UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al.,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant,

and

COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS,

Intervenor-Defendant.

Case No. 1:19-cv-614 (Lead)

MICHIGAN REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant,

and

COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS,

Intervenor-Defendant.

/

Case No. 1:19-cv-669 (Member)

HON. JANET T. NEFF

INTERVENOR-DEFENDANT VOTERS NOT POLITICIANS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION (DOCKET NO. 1:19-cv-669)

ORAL ARGUMENT REQUESTED

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INTERVENOR-DEFENDANT VOTERS NOT POLITICIANS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION (DOCKET NO. 1:19-cv-669)

ORAL ARGUMENT REQUESTED

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INTRODUCTION

As stated in their Complaint for Declaratory and Injunctive Relief, the Plaintiffs seek a declaratory ruling that they are being denied their rights of free speech and association guaranteed under the First Amendment and their right to equal protection of the law guaranteed under the Fourteenth Amendment by the constitutional qualifications and procedures for appointment to serve as a member of the new Independent Citizens Redistricting Commission created by the Michigan voters' approval of Proposal 18-2 in the last general election. In their Complaint and the Declarations accompanying their pending Motion for Preliminary Injunction, the individual Plaintiffs have expressed a desire to serve on the new Commission and represented that they would make application to do so but-for the challenged restrictions, but all of the Plaintiffs have joined together in asking this Court to enjoin Defendant Secretary of State from taking any action for implementation of the new Commission, which would render the Commission a nullity. Intervenor-Defendant Count MI Vote, d/b/a Voters Not Politicians ("Voters Not Politicians" or "VNP") was the sponsor of Proposal 18-2 and is therefore intensely interested in defending the new Independent Citizens Redistricting Commission against the constitutional challenges presented in Plaintiffs' Complaint.

VNP's proposal was presented by an initiative petition for amendment of the Michigan Constitution pursuant to Mich. Const. Article XII, § 2. As approved by 61% of the voters in November, it has amended Sections 1 through 6 of Article IV, pertaining to the legislative branch, and corresponding sections of Articles V and VI, pertaining to the executive and judicial branches. The purpose of the now adopted amendment[1] was to create an Independent Citizens

[1] Plaintiffs have persisted in mischaracterizing the challenged constitutional provisions as the "VNP proposal." The provisions were of course no longer a "proposal" after approval by the voters.

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Redistricting Commission (the "Commission") for state legislative and congressional districts as a permanent commission in the legislative branch – a commission which will now have exclusive authority to develop and establish redistricting plans for the state House of Representatives and Senate districts and Michigan's congressional districts. As the Michigan Court of Appeals explained in its Opinion approving submission of VNP's proposal to the voters, the amendment was offered as a desired means to remedy the widely-perceived abuses associated with partisan gerrymandering of state legislative and congressional election districts by establishing new constitutionally mandated procedures designed to ensure that the redistricting process can no longer be dominated by one political party. *See, Citizens Protecting Michigan's Constitution v. Secretary of State,* 324 Mich. App. 561, 569; 922 N.W.2d 404 (2018), *aff'd,* 503 Mich. 42; 921 N.W.2d 247 (2018).

It is appropriate to note at the outset the glaring inconsistency between the individual Plaintiffs' arguments regarding the alleged constitutional deficiencies and the relief sought in this matter because that inconsistency shows Plaintiffs' lawsuit for what it really is. The individual Plaintiffs have represented to the Court that they wish to serve on the newly created Commission, but are prevented from doing so by the specified criteria which eliminate them from eligibility for service, the enforcement of which has been claimed to improperly infringe their constitutional rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. But having made those claims, ostensibly based upon the denial of their opportunity to serve on the Commission they have joined Plaintiff Michigan Republican Party ("MRP") in requesting that the operation of the new Commission be enjoined in its entirety, based upon their additional claim that the challenged restrictions are non-severable –

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an argument which is clearly contrary to the plain language of the severability clause included in the new constitutional language.

Plaintiffs' prayer for relief provides convincing proof that the individual Plaintiffs are not really motivated by a desire to serve on the Commission or aggrieved by their exclusion from eligibility for that service at all – that like Plaintiff MRP, it is instead their desire to thwart the implementation of the new Commission and prevent its use to accomplish the purpose for which it was overwhelmingly approved by the voters. This motivation is consistent with, and reasonably deduced from the affiliations and interests of the individual Plaintiffs alleged in their Complaint and the Declarations submitted in support of their Motion for Preliminary Injunction, which reveal that all of them are aligned with the Republican Party – the party whose operatives engineered the gerrymandering of Michigan's state legislative and congressional election districts in 2001 and 2011,[2] and which has a strong vested interest in preserving the unfair advantage that has been secured for its members by the gerrymandered redistricting accomplished in those years.

For the reasons discussed in greater detail *infra,* VNP contends that this Court should conclude, at the outset, that the individual Plaintiffs lack standing to assert their claims for the relief requested because their submissions have made it plain that the relief requested would not redress the injury alleged, and that their claims are, in reality, an assertion of generalized grievances shared by all who opposed the approval of Proposal 18-2.

[2] The purpose of the Republican Party and its operatives to maximize and perpetuate Republican control of the Michigan Legislature and the U.S. House of Representatives, and the actions undertaken in pursuit of that purpose, are discussed at length in the Eastern District's recent decision in *League of Women Voters v. Jocelyn Benson,* 373 F. Supp 3d 867 (E.D. Mich. 2019).

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But even if it could be assumed that any of those Plaintiffs do have genuine interests sufficient to confer standing, it is also important to recognize the limited scope of the constitutional objections raised in this matter. When the new constitutional language is viewed in its proper context, it is apparent that it does not deny or burden the right of any of the Plaintiffs to speak freely on the subject of redistricting or any other topic. Nor does it prevent any of them from freely associating or communicating with any person or entity, or from participating in the proceedings of the Commission to the same extent as any other persons or organizations. Each of the Plaintiffs will have ample opportunity to participate in the public proceedings and deliberations, to address the members of the Commission to make their wishes known, and to present any data or proposals that they might care to present. The only thing that any of the individual Plaintiffs will be prevented from doing is to sit as a member of the Commission with authority to cast a controlling vote for or against adoption of a redistricting plan.

And for the additional reasons discussed *infra,* it is also clear that the Republican party does not have any right to participate in the selection of commissioners beyond the specified opportunity for the legislative leaders to strike applicants from one or more of the pools of applicants. The Republican Party does not have any right protected by the First or Fourteenth Amendments to choose or have a say in choosing who may serve as a commissioner who has self-identified as being affiliated with the Republican Party as its "representative" or "standard bearer," nor does it have any right protected by those provisions to determine who may or may not be considered to be affiliated with the Party for purposes of the constitutional procedure for selection of commissioners for the new politically-neutral Commission. Nor are any of the Plaintiffs threatened with the denial of any right protected by the First or Fourteenth Amendments by the constitutionally-prescribed allocation of commissioners from the three

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pools of qualified candidates or the restrictions imposed upon the communications and activities of the commissioners, staff and consultants.

The Plaintiffs' constitutional claims should be examined with the true scope of the alleged deprivations firmly in mind. When scrutinized in that light, it is apparent that the challenged restrictions and procedures have been reasonably tailored to protect the important interests of Michigan's citizens to ensure that future redistricting decisions will be made by an independent and politically-balanced ***Citizens*** Commission that cannot be subjected to undue influence of politicians, special interests or any single political party. And again, Plaintiffs have ignored the severability clause contained within the new constitutional language which would allow a limitation of the prescribed qualifications for service in accordance with any potential finding of constitutional infirmity – a remedy which does not interest the Plaintiffs in light of their true desire to prevent any use of the new Commission.

For these reasons, it is plain that these Plaintiffs do not have a strong likelihood of success on the merits. Nor have they made any persuasive showing that they would suffer irreparable harm if their request for preliminary injunctive relief is denied, or that the interests of the public would be served by the issuance of a preliminary injunction. The new constitutional language is entitled to a presumption of constitutionality, and there is ample time and opportunity for adjudication of Plaintiffs' claims and enforcement of any relief that might be ordered in this matter. Indeed, it is difficult to imagine how a claim of irreparable harm can be made at all in this case now, when Plaintiffs' claims could have been raised last November.

There is a specific constitutionally-prescribed timeline for performance of the Secretary of State's duties regarding selection of the Commissioners, and the suspension of that performance should not be ordered without proof of a compelling justification – a showing

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which has not been made by Plaintiffs' feeble suggestion that compliance with the new constitutional mandate will cost money which would be wasted if the operation of the new Commission should ultimately be scrapped in accordance with their request. And in light of the unwarranted disruption of the constitutional process that would be brought about by the requested preliminary injunction, it is also plain that the public interest would not be served by an order granting that relief.

Plaintiffs cannot satisfy any of the criteria for issuance of a preliminary injunction in this matter. Their Motion for Preliminary Injunction should therefore be denied.

STATEMENT OF MATERIAL FACTS

Plaintiffs have correctly noted that their lawsuit presents only legal issues – questions of whether rights guaranteed to them by the First Amendment and the Equal Protection Clause of the Fourteenth Amendment are being denied by application of the constitutional qualifications and procedures for appointment of applicants to serve as members of the new Independent Citizens Redistricting Commission created by the voters' approval of Proposal 18-2 in the last general election. Because the questions are purely legal and their resolution depends upon application of the law to the new constitutional provisions alone, the pertinent facts are limited to the content of the constitutional language.

The challenged restrictions are found in Article IV, § 6 (1) of the Michigan Constitution, as amended by Proposal 18-2. The new politically-balanced Commission created by that provision will consist of 13 members, four of whom will identify with each of the two major political parties, and five of whom will identify themselves as independents. The qualifications for selection to serve as a member of the Commission were designed to ensure that the Commission members will be able to fulfil their duties without being controlled or

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improperly influenced by politicians, special interests or political parties. The new language of Article IV, § 6 (1) lists the required qualifications as follows:

> "(1) An independent citizens redistricting commission for state legislative and congressional districts (hereinafter, the "commission") is hereby established as a permanent commission in the legislative branch. The commission shall consist of 13 commissioners. The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts. Each commissioner shall:
>
> (a) Be registered and eligible to vote in the State of Michigan;
>
> (b) Not currently be or in the past 6 years have been any of the following:
>
> (i) A declared candidate for partisan federal, state, or local office;
>
> (ii) An elected official to partisan federal, state, or local office;
>
> (iii) An officer or member of the governing body of a national, state, or local political party;
>
> (iv) A paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action committee;
>
> (v) An employee of the legislature;
>
> (vi) Any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person; or
>
> (vii) An unclassified state employee who is exempt from classification in state civil service pursuant to article XI, section 5, except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state;
>
> (c) Not be a parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(b) of this section; or
>
> (d) Not be otherwise disqualified for appointed or elected office by this constitution."

Under the new provisions of Article IV, § 6 (2) , the Secretary of State is required to administer the process for selection of the Commissioners according to the timetable provided

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therein. The Secretary is required to make applications for Commissioner available to the public by January 1st of the year of the decennial census – 2020, in the first instance. Article IV, § 6 (2)(a)(i) . The Secretary is required to accept applications for Commissioner until June 1st of that year. Article IV, § 6 (2)(b). By July 1st of that year, the Secretary must eliminate incomplete applications and applications submitted by applicants who do not satisfy the required qualifications and separate the eligible candidates into separate pools for applicants identifying themselves as affiliated with each of the two major political parties and those identifying themselves as being unaffiliated with either of those parties. Article IV, § 6 (2)(d).[3] The majority and minority leaders of the state Senate and House of Representatives will each have an opportunity to strike up to five candidates from any of the pools of applicants until August 1st of that year. Article IV, § 6 (2)(e) . By September 1st of that year, the Secretary must make the final selection of Commissioners from the remaining candidates in the three pools of candidates by random selection. Article IV, § 6 (2)(f) .

The new constitutional language requires that all meetings and deliberations of the Commission be open to the public, that the Commission must receive proposed redistricting plans and supporting materials for consideration, and that all plans and other written materials submitted for its consideration will be public records. Article IV, § 6 (8) , (9) and (10) . Thus, each of the Plaintiffs will have an opportunity to participate in the public proceedings and deliberations, to address the members of the Commission to make their wishes known, and to present any data or proposals that they might care to present, to the same extent that all members of the public will be allowed to do so.

[3] The Court should note that the new constitutional provisions do not provide or allow the Secretary of State any role as an arbiter of an applicant's political credentials, as Plaintiffs have erroneously claimed on Pages 1 and 2 of their supporting brief. Page ID.44-45

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To promote and ensure the desired transparency, the new Article IV, § 6 (11) requires that all discussions and communications of redistricting matters be in writing or conducted in the course of open public meetings of the Commission:

> "The commission, its members, staff, attorneys, and consultants shall not discuss redistricting matters with members of the public outside of an open meeting of the commission, except that a commissioner may communicate about redistricting matters with members of the public to gain information relevant to the performance of his or her duties if such communication occurs (a) in writing or (b) at a previously publicly noticed forum or town hall open to the general public."

It is important for the Court to note that the newly amended Article IV, § 6 also includes a severability clause which prescribes severance of any provision found to be in conflict with the U.S. Constitution or federal law, and directs that the provisions of that section be implemented to the maximum extent allowable under the U.S. Constitution and federal law:

> "(20) This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the United States constitution or federal law, the section shall be implemented to the maximum extent that the United States constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section."

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LEGAL ARGUMENTS

I. THE INDIVIDUAL PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF SHOULD BE DENIED FOR LACK OF STANDING.

The individual Plaintiffs lack standing to seek the relief requested in their Complaint and Motion for Preliminary Injunction because their submissions have made it plain that the relief requested would not redress the injury alleged, and that their claims are, in reality, an assertion of generalized grievances shared by all the individuals who were opposed the approval of Proposal 18-2.

It is well established that a federal court is not "a forum for generalized grievances." *Gill v. Whitford,* ___ U.S. ___; 138 S.Ct. 1916, 1929; 201 L.Ed.2d 313 (2018); *Warth v. Seldin,* 422 U.S. 490; 95 S.C. 2197, 2205; 45 L.Ed2d 343 (1975). Thus, a plaintiff must meet three requirements which together constitute the "irreducible constitutional minimum" for standing to satisfy the Article III "case or controversy" requirement: 1) an "injury in fact" – a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical"; 2) that the alleged injury is fairly traceable to the challenged conduct of the defendant"; and 3) that there is "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.*; *Vermont Agency of Natural Resources v. United States, ex rel. Stevens,* 529 U.S. 765; 120 S.Ct. 1858, 1861-1862; 146 L.Ed.2d 836 (2000); *Lujan v Defenders of Wildlife,* 504 U.S. 555, 560-561; 112 S.Ct. 2130, 2136; 119 L.Ed2d 351 (1992).

The individual Plaintiffs cannot establish standing in this matter for a number of reasons. First, as the Supreme Court noted in *Lujan,* "it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.'" 112 S.Ct. at 2136. These Plaintiffs have asserted in passing that they wish to serve on the new Commission, although the sincerity of that claim seems doubtful in light of the relief that they seek, which

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would prevent any implementation or use of that Commission. But if it were assumed that any of them actually desire to serve and the constitutional restrictions were limited in a way that would allow them to do so, they would then have the same minimal chance of being randomly selected that any other applicant would have. Under these circumstances, there is no basis for the Court to conclude that it would be "likely," as opposed to purely "speculative" that an inability to serve on the commission would be remedied by a favorable decision in this matter.

Second, the prayer for relief made in Plaintiffs' Complaint and their present Motion for Preliminary Injunction has shown that the individual Plaintiffs are not seeking a remedy that would allow them an opportunity to serve on the new Commission at all. It shows, instead, that Plaintiffs are seeking to prevent any implementation or use of the Commission to accomplish the purpose that the voters of Michigan intended. And this, in turn, provides irrefutable proof that their objections to the qualifications for selection to serve are generalized grievances shared by everyone who voted "no" on Proposal 18-2. As the Supreme Court held in *Vermont Agency of Natural Resources, supra,* the third requirement for Article III standing – the showing of "redressability" – requires proof of "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." 120 S.Ct. at 1861, 1862. *Accord, Davis v. Detroit Public Schools Community District,* 899 F.3d 437, 443-444 (6th Cir. 2018); *Babcock v. Michigan,* 812 F.3d 531, 539 (6th Cir. 2016). Thus, as the Supreme Court aptly noted in *Steel Co v Citizens for a Better Environment,* 523 U.S. 83, 107; 118 S.Ct. 1003, 1019; 140 L.Ed.2d 210 (1998), "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."

Finally, the other injuries that the individual Plaintiffs have allegedly suffered as individual members of the Republican Party are not particularized injuries suffered by any of

them as individuals; they are instead generalized grievances commonly shared by all of Michigan's citizens who were opposed to the approval of Proposal 18-2. To establish standing, these Plaintiffs must show that they have suffered the "invasion of a legally protected interest" that is "concrete and particularized" *i.e.,* an injury which "affects the plaintiff in a personal and individual way." *Gill v. Whitford, supra,* 138 S.Ct. at 1929, quoting *Lujan v Defenders of Wildlife,* 504 U.S. at 560. If they object to the procedures for selection of Commissioners; the allocation of commissioners between persons affiliated with the major political parties and those who are independents or unaffiliated with any party; the inability of the Republican Party to approve or select applicants of its choosing; or the restrictions imposed upon the activities of those selected to serve as commissioners, staff or consultants, their objections are no more particularized than the same or similar objections shared by any other members of the public who were opposed to approval of the proposed amendment. Thus, the individual Plaintiffs do not have standing to assert their claim for the requested relief in this matter. Because this Court is not a forum for generalized grievances, their motion should be denied, and their Complaint dismissed.

II. PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS FOR ISSUANCE OF PRELIMINARY INJUNCTIVE RELIEF.

A. THE REQUIRED CRITERIA FOR ISSUANCE OF PRELIMINARY INJUNCTIVE RELIEF.

The following factors are considered in evaluating a motion for preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the public interest would be served by issuance of a preliminary injunction; and (4) whether issuance of a preliminary injunction would cause substantial harm to others. *Summit County Democratic Central and Executive*

Committee v. Blackwell, 388 F.3d 547, 550 (6th Cir. 2004). These factors are not prerequisites that must be met but are interrelated considerations that must be balanced together. *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000). However, "'[a] finding of irreparable harm is the single most important consideration that the Court must examine when ruling upon a motion for a preliminary injunction.'" *Apex Tool Group, Inc. v. Wessels,* 119 F.Supp.3d 599, 609 (E.D. Mich 2015) (citation omitted); *See also*, *Paw Paw Wine Dist., Inc. v. Joseph E. Seagram & Sons, Inc.,* 603 F.Supp. 398, 401 (W.D. Mich. 1985). When irreparable harm is lacking, as it is in the case at bar, that one factor standing alone balances strongly against the issuance of an injunction. *See*, *Apex Tool*, 119 F.Supp.3d at 609.

B. THE PLAINTIFFS CANNOT ESTABLISH A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiff MRP and the individual Plaintiffs have brought a facial challenge to Michigan's independent citizens redistricting commission, prior to the selection of any commissioners or any work of the Commission. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449; 128 S.Ct. 1184; 170 L.Ed.2d 151 (2008), quoting *United States v. Salerno*, 481 U.S. 739, 745; 107 S.Ct. 2095; 95 L.Ed.2d 697 (1987). A facial challenge fails where the law has a "plainly legitimate sweep," *id.* (quotation marks omitted), and courts considering facial challenges "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 450, quoting *United States v. Raines*, 362 U.S. 17, 22; 80 S.Ct. 519; 4 L.Ed.2d 524 (1960). Facial challenges are "disfavored" and "run contrary to the fundamental principle of judicial restraint," thereby "short circuit[ing] the democratic process by preventing laws embodying the

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will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 450-45. The Plaintiffs have fallen far short of carrying their burden to sustain their facial challenge.

1. THE CONSTITUTIONAL PROCESS FOR SELECTION OF COMMISSIONERS DOES NOT VIOLATE PLAINTIFFS' FREEDOM OF ASSOCIATION.

THE SELECTION PROCESS DOES NOT VIOLATE MRP'S FREEDOM OF ASSOCIATION.

The commissioner selection process does not violate MRP's freedom of association. The First Amendment protects the freedom of political parties to associate with candidates and voters as part of the process of "choosing the party's nominee" for elective office. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575; 120 S.Ct. 2402; 147 L.Ed.2d 502 (2000). "Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections." *Kusper v. Pontikes*, 414 U.S. 51, 58; 94 S.Ct. 303; 38 L.Ed.2d 260 (1973). The Supreme Court has thus held that when states establish electoral processes designed to identify the nominee of a political party for an elected office, they cannot force the party to "open[ ] it up to persons wholly unaffiliated with the party" so as to create "forced association" that "chang[es] the parties' message," unless the state proves its system is narrowly tailored to advance a compelling state interest. *Jones*, 530 U.S. at 581-82.

On the other hand, the Supreme Court has held that political parties' associational rights are *not* implicated by an electoral process whose purpose is not to identify a party's "nominee." In *Washington State Grange*, *supra*, several Washington state political parties brought a facial challenge to the state's primary system, which had been adopted by voter initiative, contending that it violated their First Amendment associational rights. Under Washington's system, candidates designate their party preference on their declaration of candidacy, and "[a] political

party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference." 552 U.S. at 447. The two candidates with the highest votes in the primary—regardless of party affiliation—advance to the general election. *Id.* at 447-48.

The Court upheld Washington's system, rejecting the political parties' comparison to the California system the Court had invalidated in *Jones*. "[U]nlike the California primary, the [Washington system] does not, by its terms, choose parties' nominees. The essence of nomination—the choice of a party representative—does not occur under [Washington's law]. The law never refers to candidates as nominees of any party, nor does it treat them as such." *Id.* at 453. Instead, the law serves to "winnow the number of candidates to a final list of two for the general election," and political parties remain free to "nominate candidates by whatever mechanism they choose" and those candidates may participate in the state-run primary. *Id.* The Court likewise rejected the political parties' contention that permitting self-identification by the candidates infringed on their associational rights because voters might assume the candidates were nominees of the parties, or "at least assume that the parties associate with, or approve of, them." *Id.* at 454. This argument, the Court said, was based upon "sheer speculation." *Id.* "There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.* The Court found this "especially true . . . given that it was the voters of Washington themselves, rather than their elected representatives, who enacted [the law]." *Id.* at 455. The Court thus upheld the law as facially constitutional. *Id.* at 458-459.

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The commissioner selection process adopted by Michigan's voters does not violate MRP's associational rights. First, the cases upon which MRP relies all relate to the process for choosing a party's nominee for *elected office*. The Commission is not an elected office, but rather is a randomly drawn cross-section of citizens tasked with drawing redistricting plans in a nonpartisan manner. The selection process for Michigan's redistricting commissioners has none of the characteristics that motivated the Court's decision in *Jones*. Unlike a political party's nominee for elected office, a commissioner on Michigan's independent redistricting commission does not "determine[ ] the party's positions on the most significant public policy issues of the day" or "become[ ] the party's ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575. Nor are redistricting commissioners tasked with being "a standard bearer who best represents the party's ideologies and preferences." *Id.* Indeed, quite the contrary—the voters of Michigan determined that commissioners should be prohibited from seeking to advantage political parties in adopting redistricting plans. *See,* Mich. Const. Article IV § 6(13)(d) ("Districts shall not provide a disproportionate advantage to any political party.").

MRP points to no case in which a court has concluded that a political party's associational rights are infringed because it does not get to choose who will sit on a government commission. Such commissions—including those with partisan affiliation as a membership requirement—are commonplace in federal and state law. Indeed, the Supreme Court in *Jones*—the case upon which MRP primarily relies—recognized as much, without hint that such commissions were constitutionally infirm because their members are not chosen by political parties. *See Jones*, 530 U.S. at 585 (citing the Federal Communications Commission, Board of Directors of Corporation for Public Broadcasting, and Equal Employment Opportunity

Commission and noting that "federal statutes . . . require a declaration of party affiliation as a condition of appointment to certain offices"). If MRP's theory were correct, then a substantial number of federal and state commissions would be unconstitutional because national and state political parties are uninvolved in their membership selection. *See, e.g.*, 52 U.S.C. § 301016(a)(1) (Federal Election Commission); 15 U.S.C. § 41 (Federal Trade Commission); 28 U.S.C. § 78d (Securities Exchange Commission); 42 U.S.C. § 7171(b) (Federal Energy Regulatory Commission); 47 U.S.C. § 154(b)(5) (Federal Communications Commission); 47 U.S.C. § 396(c)(1) (Board of Directors for Corporation for Public Broadcasting); 42 U.S.C. § 2000e-4(a) (Equal Employment Opportunity Commission); S*ee also* Mich. Const. Article II § 7 (Board of Canvassers); *id.* Article II § 29 (Civil Rights Commission); *id.* Article XI § 5 (Civil Service Commission). Political parties have no First Amendment associational right to dictate the membership of government commissions.

Moreover, like the primary election process in *Washington State Grange*, the commission selection process challenged in this case does not "choose parties' nominees. . . . The law never refers to the [prospective commissioners] as nominees of any party, nor does it treat them as such." 552 U.S. at 453. In fact, the commissioners of the new Redistricting Commission are clearly intended ***not*** to be nominees of political parties, and they are not tasked with representing the interests of political parties. *See, e.g.*, Mich. Const. Article IV § 6 (1) (characterizing the commission as an "independent citizens redistricting commission"); *id.* § 6 (1)(b) (excluding from commission membership various leaders of political parties and partisan officeholders, candidates, and close associates); *id.* § 6(13)(d) (prohibiting the Commission from drawing maps to disproportionately favor a political party). The fact that the selection procedure allocates a certain number of seats to commissioners who self-identify as affiliated

(or unaffiliated) with the two major political parties does not transform the commissioners into "nominees" of those parties, rather it serves to ensure that the commission's decisions reflect some level of bipartisan or cross-partisan consensus. *See, e.g.*, *id.* § 6(14)(c) (requiring a final redistricting plan to have majority support, including at least two commissioners self-affiliated with each of the two major political parties and two unaffiliated commissioners). Nor does the grant of preemptive strikes to legislative leaders injure MRP's associational rights. The commissioners are not nominees of the political parties, and thus the political parties have no First Amendment right to control the selection process of commissioners. If MRP has no First Amendment right to select commissioners, it likewise has no First Amendment right to prevent the striking of prospective commissioners from the pools of applicants.[4]

In addition, the fact that prospective commissioners self-designate their party affiliation (or non-affiliation) does not implicate MRP's associational rights. As the Court held in *Washington State Grange*, a political party has no associational injury from a candidate's self-designation of affiliation so long as the candidates are not deemed "nominees" of the party. 552 U.S. at 453. Such is the case here. And MRP does not even contend, as the plaintiffs unsuccessfully did in *Washington State Grange*, that there is a risk that the public will confuse the commissioners to be nominees or representatives of the Republican Party. (Plaintiff's Brief in Support of Motion for Preliminary Injunction, PageID. 60-61) Instead, MRP merely contends that it will be difficult for MRP's "affiliated legislative leaders"—who each have the

[4] In any event, if a Democratic legislative leader strikes a Republican commissioner applicant, MRP's freedom of association will not be injured. Republican legislators have the same opportunity to strike applicants self-affiliated with the Democratic Party and/or applicants self-identified as unaffiliated, and MRP can continue to associate with stricken applicants, and *vice versa*. There is no First Amendment interest implicated; MRP has no First Amendment right to have its preferred applicants on the Commission, or to avoid the removal of its preferred applicants.

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ability to strike up to five commissioner candidates—to know which self-identified Republicans among the prospective commissioners are "bona fide affiliates of MRP." *Id.,* PageID. 60. That is so, MRP says, because the party is not involved in their selection and Michigan lacks voter registration by political party, which it calls a "preexisting validator of intent." *Id.* But MRP has no constitutional right to have "bona fide affiliates" as commissioners, and it has no associational right to preclude the service of commissioners who self-designate their party affiliations.[5] *See Washington State Grange*, 552 U.S. at 453-455. The entire purpose of the voters' enactment of the commission was to *limit* the ability of those with conflicts of interest—including political parties—to control the outcome of redistricting.

At bottom, MRP has no "forced association" claim—the commissioner selection process does not require any association at all between commissioner applicants and MRP as an organization. MRP's image, membership, or policy views are not compromised by the commissioner selection process, and MRP is no more required to associate with the commissioners than were the political parties in *Washington State Grange* required to associate with the self-affiliating candidates. Instead, MRP's actual objection is that it—and its "affiliated legislative leaders," *id.,* PageID 60 —were stripped of power over redistricting by the voters. But MRP has no First Amendment right to control redistricting, or to engage in partisan gerrymandering. As a result, its attempt to shoehorn its objection to losing control over redistricting into a First Amendment claim fails.[6]

[5] MRP suggests that the risks it identifies would be minimized if Michigan voters declared their party affiliations when they registered to vote. But that too is a system of self-declaration.

[6] Even if MRP had articulated some cognizable associational injury, whether that injury would actually come to pass following the selection of commissioners is entirely speculative at this point. It is yet unknown who will be chosen as commissioners. MRP can certainly encourage its favored members to apply for commissioner seats, increasing the odds it will avoid the outcomes it warns of in its motion. *See, Washington State Grange*, *supra,* 552 U.S. at 449 ("[A]

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THE COMMISSION'S QUALIFICATION REQUIREMENTS DO NOT VIOLATE THE INDIVIDUAL PLAINTIFFS' FREEDOM OF ASSOCIATION OR DENY THEM EQUAL PROTECTION.

The Commission's qualification requirements do not violate the individual Plaintiffs' First Amendment freedom of association or the Fourteenth Amendment's Equal Protection Clause. The individual Plaintiffs' argument regarding the Commission's qualification requirements mostly repeat the arguments raised by the individual Plaintiffs in the *Daunt* action (No. 1:19-cv-614). As previously discussed, the individual Plaintiffs lack standing to raise generalized grievances and claims of speculative injuries that could not be redressed by the relief they seek. But even if they had standing, their challenges to the qualification requirements fail on the merits. Rather than burden the Court with a repetition of its arguments addressing the merits of these claims, VNP shall incorporate here its briefing in support of its Motion to Dismiss in the *Daunt* Plaintiffs' case with respect to the Commission's qualification requirements.[7]

The individual Plaintiffs in this case have raised an additional argument not emphasized by the *Daunt* Plaintiffs—they contend that that courts have only upheld limitations on political activities of government officials "during their current term of office" and that here there is a "total bar to service on the commission based on past political activity," (Plaintiff's Brief in Support of Motion for Preliminary Injunction, PageID. 63-64 – emphasis omitted). They are

plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exist under which the Act would be valid.'" (quoting *United States v. Salerno*, *supra,* 481 U.S. 739, 745 (1987) (second bracket in original)). The Court cannot "speculate about 'hypothetical' or 'imaginary' cases," *id.* at 450 (quoting *United States v. Raines*, *supra,* 362 U.S. 17, 22 (1960).

[7] The individual Plaintiffs' equal protection arguments in opposition to the membership qualifications fail for the same reasons their First Amendment arguments do, as explained in VNP's briefing regarding the *Daunt* Plaintiffs' First Amendment claims.

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mistaken. The Supreme Court has expressly held that states may guard against conflicts of interest in legislative decision-making based upon conduct that predates the term of office. *See, Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117; 131 S.Ct. 2343; 180 L.Ed.2d 150 (2011). And the Sixth Circuit has upheld a lifetime ban on future legislative service based upon prior legislative service. *See, Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998). In any event, the individual Plaintiffs are wrong to contend that they face a "total bar to service on the commission." PageID. 64 (emphasis omitted). Instead, their conflicts of interest only preclude their service for a period of six years after the relevant activity ends. *See* Mich. Const. Article IV § 6(1)(b) .

In *Clements v. Fashing*, 457 U.S. 957, 967; 102 S.Ct. 2836; 73 L.Ed.2d 508 (1982), the Supreme Court explained that "[a] 'waiting period' is hardly a significant barrier to candidacy" and that it had previously "upheld a 7-year durational residency requirement for candidacy." *Id.* (citing *Chimenko v. Stark*, 414 U.S. 802; 94 S.Ct. 125; 38 L.Ed.2d 39 (1973), *summarily aff'g* 353 F. Supp. 1211 (D.N.H. 1973). The Court concluded that such a waiting period need only "rest on a rational basis." *Id.*; *See also* 18 U.S.C. § 207(e) (establishing two-year ban on former members of Congress seeking to influence Congress). Just such a basis exists here—Michigan has a rational basis in ensuring that a prospective commissioner's conflicts of interest have truly ended—and are unlikely to begin anew—prior to entrusting them with the power to shape district lines. The individual Plaintiffs' challenge to the Commission's qualifications requirements is without merit.

2. THE NEW CONSTITUTIONAL PROVISIONS GOVERNING THE COMPOSITION OF THE COMMISSION AND REGULATING ITS ACTIVITIES DO NOT VIOLATE THE PLAINTIFFS' FREEDOM OF SPEECH OR DENY THEM EQUAL PROTECTION.

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The new constitutional provisions governing the composition of the Commission and regulating its activities do not violate the Plaintiffs' right to freedom of speech or deny them equal protection. They first contend that the Commission constitutes viewpoint discrimination and violates the Equal Protection Clause of the Fourteenth Amendment because it reserves four seats for each of the two major parties and five seats for those unaffiliated with the major parties. They also contend that the provision restricting commissioners from discussing redistricting matters outside of open meetings is an unlawful content-based speech restriction. As previously discussed, the individual Plaintiffs lack standing to raise either challenge, and both arguments are wrong on the merits.

THE COMMISSION'S ALLOCATION OF SEATS DOES NOT CONSTITUTE VIEWPOINT DISCRIMINATION OR DENY PLAINTIFFS EQUAL PROTECTION.

The Commission's allocation of seats does not constitute viewpoint discrimination in violation of the First Amendment or violate the Equal Protection Clause. The Supreme Court has held that partisan affiliation may be considered as a requirement for government employment when it "is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518; 100 S.Ct. 1287; 63 L.Ed.2d 574 (1980). The Sixth Circuit has explained that such is the case for, *inter alia*, "positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies." *Sowards v. Loudon Cnty., Tenn.*, 203 F.3d 426, 436 (6th Cir. 2000). Partisan views and affiliations may be considered as a qualification for such positions "without violating the First Amendment." *Id.*

The Commission falls within the category of bodies for which political affiliation may be considered without violating the First Amendment, as the Sixth Circuit has explained. Nor

is it remarkable, contrary to the Plaintiffs' contention, that applicants are required "to attest under oath either that they affiliate with one of the two major political parties and, if so, to identify the party with which they affiliate, or that they do not affiliate with either major party." PageID.66. As the Supreme Court has explained, this is common for these types of bodies and does not implicate any First Amendment rights. *See, Jones*, 530 U.S. at 585 ("If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices.").

The Plaintiffs are also wrong to contend that it violates the First Amendment and the Equal Protection Clause to allocate four seats to each of the major political parties and five to those unaffiliated with the parties. They complain that by doing so, the Commission structure "seeks to suppress speech and expression motivated by Republican ideologies and perspectives, while enhancing the perspectives of commissioners who are unaffiliated with either major party by allocating more seats to that pool of applicants." PageID. 66: *Id.,* PageID.71-72 (rephrasing objection in equal protection terms). This contention is without merit.

First, the premise of the argument is mistaken. Plaintiffs speculate that the five unaffiliated commissioners will constitute a monolithic bloc, such that their shared viewpoints will constitute a plurality view, outnumbering by one seat the commissioners affiliated with each of the two major parties. But it is more likely—perhaps substantially so—that those seats will be filled by people affiliated with various minor parties and some who are truly independent. And those five commissioners may likely have little in common with one another, and some may likely find themselves most closely aligned with the major party commissioners. Plaintiffs cannot sustain a facial constitutional challenge to the Commission's allocation of seats based upon their "speculat[ion] about hypothetical or imaginary cases." *Washington State*

Grange, 552 U.S. at 450 (internal quotation marks omitted). Moreover, no political party has a majority of the seats on the Commission, and the Commission is structured to ensure that redistricting plans attract substantial support from members across the various parties. *See* Mich. Const. Article IV § 6 (14)(c)(3). Plaintiffs' contention that the Commission's structure suppresses Republican views while enhancing the views of those unaffiliated with the parties is thus factually inaccurate.

Second, the Plaintiffs misconceive the role of Commissioners. They are not tasked with engaging in "speech and expression" to advance certain "ideologies and perspectives." PageID. 66. Indeed, they are legally obligated *not* to draw districts to favor ideologies and perspectives—that is the very ill the Commission was designed to eliminate. *See* Mich. Const. Article IV § 6 (13)(d) (noting that adopted plans "shall not provide a disproportionate advantage to any political party" and must instead adhere to "accepted measures of partisan fairness"). In any event, the Supreme Court has explained that the allocation of legislative power, and the act of voting by legislators, does not constitute speech protected by the First Amendment. "[A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Carrigan*, 564 U.S. at 126; *id.* at 127 ("[A] legislator has no right to use official powers for expressive purposes.").[8] No First Amendment interests are implicated by the allocation of seats on a commission designed to draw from multiple political affiliations and ensure that no one

[8] The Commission is "a permanent commission in the legislative branch." Mich. Const. Article IV § 6(1).

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affiliation dominates. Nor is there any basis to conclude that such a system violates the Equal Protection Clause.

Third, the Supreme Court has twice summarily affirmed decisions upholding laws reserving seats on governmental bodies for members of certain political parties in order to ensure broader representation of views. In *Hechinger v. Martin*, 411 F. Supp. 650, 652 (D.D.C. 1976), a three-judge district court upheld a law passed by Congress requiring that not all members of the Washington, DC city council be of the same political party. The court noted that associational freedoms were not absolute, and that Congress's "interests in facilitating some representation of political minorities on the City Council of the nation's capital is a valid one." *Id.* The Supreme Court summarily affirmed. *See Hechinger v. Martin*, 429 U.S. 1030; 97 S.Ct. 721; 50 L.Ed.2d 742 (1977). Likewise, in *LoFrisco v. Schaffer*, 341 F. Supp. 743 (D. Conn. 1972), a three-judge court upheld a Connecticut statute designed to ensure minority representation that limited the number of school board positions to which a political party could nominate candidates and limited the number of candidates each voter could choose on his ballot. *Id.* at 745. The court concluded that the statute was supported by a legitimate state interest, and the Supreme Court summarily affirmed. *See LoFrisco v. Schaffer*, 409 U.S. 972; 93 S.Ct. 313; 34 L.Ed.2d 236 (1972). Similarly here, Michigan has a legitimate interest in ensuring that neither major political party controls a majority of seats on the Commission, and that a range of unaffiliated voters have an opportunity to participate in the decision-making process. Indeed, there is considerably less impact on First Amendment interests here, because the Commission is an unelected body with a narrow subject matter jurisdiction.

Fourth, the voters of Michigan—by a supermajority vote—*chose* to allocate four commissioner seats to each of the major parties and five commissioner seats to those

unaffiliated with those parties. Voters choose how to allocate power among those affiliated with political parties in every partisan election that is held. It cannot possibly be the case that the voters violated the First Amendment or Equal Protection Clause by voting on how to allocate power on the Commission. The entire point of an election is for voters to choose among political viewpoints and decide how to allocate power. If the voters of Michigan violated the First Amendment and Equal Protection Clause by deciding that there should be four Republican-affiliated commissioners, four Democratic-affiliated commissioners, and five unaffiliated commissioners, then they also engage in viewpoint discrimination in violation of the First Amendment, and discriminate in violation of the Equal Protection Clause, every time they choose among partisan candidates for Governor, Congress, and the legislature. So too would it violate the First Amendment and Equal Protection Clause for the majority party in the legislature to allocate to itself a majority of the seats on legislative committees. And it would likewise violate the First Amendment and Equal Protection Clause for Congress and the state legislature to adopt commission structures—common in federal and state law—where one political party can hold a majority of the commission seats. The Federal Trade Commission, Securities Exchange Commission, and Federal Energy Regulatory Commission are all structured to permit three of five commissioners to be of the same political party. *See* 15 U.S.C. § 41; 28 U.S.C. § 78d; 42 U.S.C. § 7171(b). If the Court adopted Plaintiffs' view of the law, all of these commissions would likewise constitute unlawful viewpoint discrimination in violation of the First Amendment and unlawful discrimination in violation of the Equal Protection Clause. Voters do not violate the First Amendment or Equal Protection Clause when they

choose how to allocate political power among partisan viewpoints—they *exercise* their First and Fourteenth Amendment rights by doing so.[9]

THE REQUIREMENT THAT REDISTRICTING DISCUSSIONS OCCUR IN PUBLIC MEETINGS DOES NOT VIOLATE THE FIRST AMENDMENT.

The restriction on commissioners' discussion of redistricting outside of public Commission meetings does not violate the First Amendment. In *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012), the Fifth Circuit considered a First Amendment challenge by officeholders to Texas's Open Meetings Act, which made it a crime for officeholders constituting a quorum to discuss "public business or public policy over which the governmental body has supervision or control" outside of a public meeting. *Id.* at 458. The court rejected the plaintiffs' challenge.

The court noted that "[a] regulation is not content-based [ ] merely because the applicability of the regulation depends on the content of the speech. A statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech." *Id.* at 459, citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-

[9] Because plaintiffs have no First Amendment or equal protection interest that is harmed by the allocation of Commission seats, the Court need not address the strength of Michigan's interest in the voters' choice for how to allocate the seats. But Michigan nonetheless has a compelling, and certainly a rational, basis in choosing to structure its Commission to ensure that no one political party controls a majority or plurality of seats, to include voters affiliated with minor parties or no parties, and to require that a final map have support from commissioners associated with all three groups. This structure helps to prevent partisan gerrymandering, which the Supreme Court has emphasized is "[incompatible] with democratic principles." *Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2663; 192 L.Ed.2d 704 (2015).

It is remarkable that plaintiffs contend that it would be "less restrictive" and constitutionally appropriate to *exclude* altogether commissioners unaffiliated with the major political parties, and instead give equal numbers of seats to Democrats and Republicans. PageID.72 The fact that Plaintiffs think the Constitution requires the two major political parties to control redistricting, to the exclusion of unaffiliated voters, underscores the wisdom of the voters' choice in removing politicians from this process.

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48; 106 S.Ct. 925; 89 L.Ed.2d 29 (1986). *See also, Ward v. Rock Against Racism*, 491 U.S. 781, 791; 109 S.Ct. 2746; 105 L.Ed.2d 661(1989) (noting that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . The government's purpose is the controlling consideration" and that a regulation is content neutral if it serves purposes "unrelated to the content of the expression."). The court concluded that Texas's law was content-neutral—even though on its face it was limited to discussions of matters of public concern within the body's jurisdiction—because it furthered the purpose of transparency. "Transparency is furthered by allowing the public to have access to government decisionmaking. . . . The private speech itself makes the government less transparent regardless of its message." *Id.* at 461-462. The court thus held that the law was a "content-neutral time, place, or manner restriction [that] should be subjected to intermediate scrutiny." *Id.* at 462.

Relying upon the Supreme Court's precedent upholding disclosure requirements in the campaign finance context, the court observed that "[f]or First Amendment purposes, the requirement to make information public is treated more leniently than are other speech regulations." *Id.* at 463. The court reasoned that Texas's law served the purposes of "increasing transparency, fostering trust in government, and ensuring that all members of a governing body may take part in the discussion of public business," and concluded that with respect to those goals, the law—and its criminal penalties—were "not overbroad." *Id.* at 464. Moreover, the court noted that the First Amendment has been interpreted to require public access to criminal proceedings: "It makes little sense for the First Amendment to require states to open their

criminal proceedings while prohibiting them from doing so with their policymaking proceedings." *Id.* at 465.

Contrary to the Plaintiffs' contention, PageID.68, the restriction on commissioners and their staff, attorneys, and consultants discussing redistricting matters outside of open meetings of the Commission is not a content-based regulation subject to strict scrutiny. As the Supreme Court has directed, *see Ward*, 491 U.S. at 792, whether a regulation is content-based turns on the government's purpose in enacting the restriction. Here, the voters of Michigan did not choose to prohibit private discussions of redistricting matters by the Commission because they disfavor redistricting discussions, but rather to "increas[e] transparency, foster[ ] trust in government, and ensur[e] that all members of a governing body may take part in the discussion of public business." *Asgeirsson*, 696 F.3d at 464. "Redistricting" topics are specified because that is the only matter within the Commission's jurisdiction; it thus serves to narrowly tailor the restriction. Because the restriction is justified without regard to the content of the speech, it is a content-neutral time, place, and manner restriction subject only to intermediate scrutiny, just as was the case with respect to the Texas law at issue in *Asgeirsson*.

> As a time, place, and manner regulation, the restriction in this case
>
> "must be narrowly tailored to serve the government's legitimate, content-neutral interests but [ ] it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Ward, 491 U.S. at 798-99 (internal quotation marks and footnote omitted) (alteration in original). The restriction on discussing redistricting matters outside open meetings of the Commission plainly promotes a substantial government interest—it furthers transparency and ensures that line drawing decisions are not made for improper, corrupt, or discriminatory

purposes; promotes public confidence in the process that determines the very structure of the electoral process, and ensures that all commissioners are involved in the decision-making.

These goals would be achieved less effectively absent the restriction. For example, Plaintiffs suggest that it would suffice if the final decisions were required to be made in public, and if the commission staff were excluded from the requirement. But redistricting is a complex process, with decisions about whether to include or exclude particular precincts or census blocks frequently made by staff members who are expert in the demographic and technical aspects of drawing district lines. The decision by staff members of where to place those lines in each commissioner's draft map are of incredible public interest, and the exclusion of staff members—or draft stages of the line drawing—from the regulation would frustrate Michigan's interest in ensuring that lawful, nondiscriminatory, and fair maps are proposed and that those maps are not based upon any improper motivations that could more easily take hold in private. The restriction easily satisfies intermediate scrutiny.

C. THE PLAINTIFFS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

Plaintiffs have failed to make the necessary showing of irreparable harm. Their constitutional rights will not be violated by the creation of the Independent Citizens Redistricting Commission. Their constitutional challenges are meritless, as previously discussed, and in any event, this Court has ample time to resolve the constitutional claims made in this matter long before the Independent Citizens Redistricting Commission is ever finalized.

In relevant part, Mich. Const., Article IV, §6 (2)(a)(i) provides that the Secretary of State shall make "applications for commissioner available to the general public not later than January 1 of the year of the federal decennial census." Thus, no citizen will have the ability to

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even apply for the Independent Citizens Redistricting Commission until January 1, 2020. Moreover, citizens will thereafter have until June 1, 2020, to complete and submit their applications before the Secretary of State creates the pools of eligible applicants. Mich. Const., Article IV, § 6(2)(c) and (d). The Commission's membership will not be finalized until September 1, 2020, when the members of the Commission are randomly selected from the pools of remaining applicants. *Id*., §6 (2)(f).

In other words, there is no exigency. This Court could take a full year to decide the merits of Plaintiffs' claims and still reach a decision before the Independent Citizens Redistricting Commission is established. The earliest date that Plaintiffs' rights could be impacted, if at all, is June 1, 2020, the date after which the Secretary of State will no longer accept applications. Accordingly, the Court has more than enough time to consider and decide the merits of Plaintiffs' claims. This is not a case that requires discovery or protracted litigation; it presents only questions of law, and the Court's expedited briefing schedule will assure a prompt disposition. Simply put, there is no reason to grant a preliminary injunction pending a final resolution on the merits when the merits are so easily resolved before the alleged irreparable harm could ever arise.

Plaintiffs cannot persuasively contend that they are suffering irreparable harm merely because the Secretary of State is taking the steps necessary to meet its obligation of disseminating applications to the public on or before January 1, 2020, as required by the new constitutional provisions. If the unlikely event that the Plaintiffs should eventually succeed on the merits, the Court can easily order the Secretary of State to suspend her actions to establish the Commission, or to take other appropriate action in accordance with the Court's rulings, at that time. There is no valid reason to short-circuit the process now. *See, Sampson v. Murray*,

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415 U.S. 61, 90; 94 S.Ct. 937, 953; 39 L.Ed.2d 156 (1974) (holding that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") (citation omitted); *NDSL, Inc. v. Patnoude*, 914 F.Supp.2d 885, 899 (W.D. Mich. 2012) (same).

This point is further highlighted by Plaintiffs' inexplicable decision to wait so long after the passage of Proposal 18-2 to bring the present lawsuit. Had a risk of irreparable harm truly existed because the voters approved of the creation of an Independent Citizens Redistricting Commission, Plaintiffs undoubtedly would have brought this lawsuit, and sought preliminary injunctive relief, months ago. Had Plaintiffs done so, however, the Court would have had even more time to decide the merits. Consequently, Plaintiffs made the deliberate choice to wait to bring suit with the hope that they could somehow manufacture their own "emergency" – a tactic which clearly suggests both laches and unclean hands. Because the Plaintiffs have not proceeded with any sense of urgency, the Court should have no compunction to take whatever time is required to decide the case on the merits.

D. ISSUANCE OF THE REQUESTED PRELIMINARY INJUNCTIVE RELIEF WOULD CAUSE SUBSTANTIAL HARM TO THE RIGHTS THAT MICHIGAN'S CITIZENS HAVE RESERVED FOR THEMSELVES BY THEIR OVERWHELMING APPROVAL OF THE CHALLENGED CONSTITUTIONAL PROVISIONS, AND THUS, THE PUBLIC INTEREST WOULD BE ILL SERVED BY AN ORDER GRANTING THE RELIEF REQUESTED.

The public has a strong interest in the smooth and effective administration of the law. *Northeast Ohio Coalition for Homeless and Service Employees Intern. Union, Local* 1199 *v. Blackwell*, 467 F.3d 999, 1011 (6th Cir. 2006). The public's interest in the proper implementation of the challenged constitutional procedure is especially strong because the adoption of that procedure was accomplished by the clearly expressed will of the people, as

manifested by the 61% vote in favor of Proposal 18-2. The preliminary injunction requested by Plaintiffs would interfere with this important public interest because it would prevent the Secretary of State from continuing with her obligations to make applications for commissioner available to the public in the time required by Mich. Const., Article IV, § 6 (2)(a)(i).

And as previously discussed, the Plaintiffs will not suffer any type of cognizable injury if the Secretary of State continues her preparations while this Court considers and adjudicates the merits of the claims raised in this case. But if the requested preliminary injunction is issued, the public will be denied the smooth and effective implementation of the new constitutional procedure during the pendency of this matter, and the resulting delay may prevent the Secretary of State from fulfilling her obligations in accordance with the constitutionally-prescribed timeline if the Court eventually rejects Plaintiffs' challenges. The public interest would therefore be harmed rather than served by issuance of the requested preliminary injunction.

RELIEF REQUESTED

WHEREFORE, Intervenor-Defendant Count MI Vote, d/b/a Voters Not Politicians, respectfully requests that Plaintiffs' Motion for Preliminary Injunction be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document was prepared using Microsoft Word. The word count for Intervenor-Defendant's Brief in Opposition to Motion for Preliminary Injunction as provided by that software is 10,240 words which is less than the 10,800-word limit for a brief filed in support of a dispositive motion.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

Respectfully submitted,

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