Nos. 19-2377 & 19-2420

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY DAUNT, *et al.*,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State, *et al.*,

Defendants-Appellees.

MICHIGAN REPUBLICAN PARTY, *et al.*,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan, Southern Division
Honorable Janet T. Neff

BRIEF OF DEFENDANT-APPELLEE COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS

Graham K. Crabtree
FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
124 W. Allegan
Suite 1000
Lansing, MI 48933
(517) 482-5800

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe St.
Suite 1925
Chicago, IL, 60603
(202) 736-2200

Paul M. Smith
Mark P. Gaber
CAMPAIGN LEGAL CENTER
1101 14th St. NW
Suite 400
Washington, DC 20005
(202) 736-2200

Counsel for Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians certifies that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in its outcome.

/s/ Paul M. Smith
Paul M. Smith

Counsel for Defendant-Appellee
COUNT MI VOTE d/b/a
Voters Not Politicians

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STATEMENT REGARDING ORAL ARGUMENT

This case involves a challenge to Michigan's sovereign authority to adopt an independent redistricting commission free of conflicts of interest. The Court has scheduled oral argument for March 17, 2020, in which Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians ("VNP") will participate.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over these appeals pursuant to 28 U.S.C. § 1292(a)(1), except it lacks jurisdiction over Appellants' claim regarding the Commission's open meetings provision, because Appellants lack standing to raise that claim. *See infra* Part I.B.5.i.

STATEMENT OF ISSUES

1. Whether, as this Court has held, Michigan's sovereign decisions regarding the structure of its government are reviewed deferentially and afforded great weight, contrary to Appellants' invocation of strict scrutiny.

2. Whether Michigan may disqualify from the Commission those with conflicts of interest without implicating the First Amendment, as the Supreme Court has held states may do.

3. Whether the Commission's disqualification rules impose no unconstitutional condition on Appellants' political activity because states may consider political activity in excluding applicants for high-level policymaking positions, and because Michigan's interest in structuring its government to avoid conflicts of interest outweighs Appellants' interest in serving as commissioners.

4. Whether the Michigan Republican Party's ("MRP's") freedom of association claim fails because commissioners are not nominees or standard-bearers of political parties.

5. Whether Michigan's choice to allocate five of the thirteen commissioner seats to applicants unaffiliated with the major political parties constitutes no discrimination based on viewpoint.

6. Whether Michigan's decision to exclude conflicted commissioners was rational, and thus does not violate the Fourteenth Amendment.

7. Whether Appellants lack standing to challenge the restriction on discussing official redistricting matters outside public Commission meetings, and in any event, whether that restriction is consistent with the First Amendment.

8. Whether the voters of Michigan intended that the amendment's provisions be severable given that they approved a clause requiring that any invalidated provision be severed and the remainder continue in effect?

9. Whether the balancing of harms and public interest disfavor entry of a preliminary injunction?

STATEMENT OF THE CASE

Fifteen individual plaintiffs, along with the Michigan Republican Party ("MRP") and affiliates, challenge the constitutionality of the Michigan Independent Citizen's Redistricting Commission ("Commission"), which has the exclusive authority to establish redistricting plans for Michigan's state legislative and congressional districts. Opinion, RE.67, PageID#929. Appellants contend that the Commission's structure and eligibility requirements, which preclude them from currently serving as commissioners, violate their rights of freedom of speech, freedom of association, and equal protection under the First and Fourteenth Amendments.

The Commission was established by constitutional amendment. On December 18, 2017, Defendant-Appellee Voters Not Politicians ("VNP"), the sponsor of the amendment, filed an initiative petition with the Secretary of State that proposed establishing a permanent commission in the legislative branch to redistrict every ten years following the census. Mich. Const. art. IV, § 6(1); Opinion, RE.67, PageID#929. On June 20, 2018, after VNP gathered over 425,000 signatures, the proposal was certified by the Board of State Canvassers and added to the November 6, 2018 general election ballot as Ballot Proposal 18-2. Opinion, RE.67, PageID#929; Motion to Intervene Brief, RE.12, PageID#175. VNP submitted the proposed amendment "to remedy the widely-perceived abuses associated with

partisan 'gerrymandering' of state legislative and congressional election districts by the establishment of new constitutionally mandated procedures designed to ensure that the redistricting process can no longer be dominated by one political party." *Citizens Protecting Michigan's Constitution v. Sec'y of State*, 922 N.W.2d 404, 410 (Mich. Ct. App. 2018), *aff'd*, 921 N.W.2d 247 (Mich. 2018).

Ballot Proposal 18-2 stated the following:

Statewide Ballot Proposal 18-2

A proposed constitutional amendment to establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives and U.S. Congress, every 10 years.

This proposed constitutional amendment would:

Create a commission of 13 registered voters randomly selected by the Secretary of State:

- 4 each who self-identify as affiliated with the 2 major political parties; and

- 5 who self-identify as unaffiliated with major political parties.

- Prohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners.
- Establish new redistricting criteria including geographically compact and contiguous districts of equal population, reflecting Michigan's diverse population and communities of interest. Districts shall not provide disproportionate advantage to political parties or candidates.
- Require an appropriation of funds for commission operations and commissioner compensation.

Should this proposal be adopted?

[ ] YES [ ] NO

Opinion, RE.67, PageID#929-930.

Over 2.5 million citizens, 61% of voters, approved Proposal 18-2 in the November 2018 general election. *Id.*; VNP Motion to Intervene Brief, RE.12, PageID#174. The amendment took effect on December 22, 2018. Mich. Const. art. XII, § 2. The Commission will consist of thirteen commissioners, each of whom will be a state officer. Opinion, RE.67, PageID#951. To qualify, one must be a registered, eligible Michigan voter and must not currently be, or have in the past six years been:

> (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;

Mich. Const. art. IV, § 6(1). In addition, one must not be a "parent, stepparent, child, stepchild, or spouse" of any of the above persons, and must not otherwise be

disqualified from holding appointed or elected office. *Id.* Commissioners may not "hold a partisan elective office at the state, county, city, village, or township level in Michigan" for five years after they are appointed. *Id.*

Defendant-Appellee Benson, Michigan's Secretary of State, is responsible for overseeing the commissioner selection process. Mich. Const. art. IV, § 6(2). The amendment established a robust process to ensure a representative set of commissioners. The Secretary is required to mail applications to ten thousand Michigan voters chosen at random. *Id.* § 6(2)(a)(i). After the application period has closed, the Secretary must randomly select 60 applicants affiliated with each of the two major parties, and 80 unaffiliated applicants, with half of each pool originating from applicants who were mailed applications at random, and half from those who applied on their own accord. *Id.* § 6(2)(d)(ii). The four leaders of the legislature then each have the opportunity to strike up to five applicants from any pool. *Id.* § 6(2)(e). Finally, the Secretary must randomly draw four applicants from each of the two major party pools, and five from the unaffiliated pool. *Id.* § 6(2)(f). Those thirteen will be the commissioners.

Secretary Benson is a non-voting member of the Commission. *Id.* § 6(4). The affirmative votes of at least seven members of the Commission, including a minimum of two self-identified Republican affiliates, two self-identified Democratic

affiliates, and two members self-identified as unaffiliated with either major party, are required to pass a redistricting plan. *Id.* § 6(14)(c).

On July 30, 2019 and August 22, 2019, respectively, the *Daunt* and *MRP* Appellants filed suit, alleging that the Commission's structure and eligibility requirements violate their First and Fourteenth Amendment rights, and requesting a preliminary injunction to prevent Secretary Benson from implementing or administering the Commission. Opinion, RE.67, PageID#936-941. On August 28 and September 6, 2019, the district court granted VNP's motion to intervene as a Defendant in the two cases. Order, RE.23, PageID#262; Order, RE.15 (*MRP* Docket), PageID#171. The cases were then consolidated.

On November 25, 2019, the district court denied Appellants' motions for a preliminary injunction, concluding that they were unlikely to succeed on the merits and that the other preliminary injunction factors were not satisfied. Opinion, RE.67, PageID#926-971. The district court first considered the *Daunt* Plaintiffs' claims, starting with the allegation that the Commission impermissibly "excludes categories of individuals on a basis that infringes their First Amendment rights" by denying "both a membership benefit and a quantifiable economic benefit" in a manner that is not "adequately tailored to a sufficient government interest." *Id*. PageID#948. The court noted that "[r]edistricting 'goes to the heart of the political process' in a

constitutional democracy." *Id*. PageID#952 (citation omitted).[1] The court reasoned that the eligibility requirements for the Commission "do not impose severe burdens on Plaintiffs' First Amendment rights," as there "is no right to state office or appointment," nor are any burdens from the provisions "permanent." *Id.* PageID#953-954. In contrast, the court found that the State "has a compelling interest in deciding who will be responsible for redistricting in Michigan" and a "fundamental interest in structuring its government." *Id.* PageID#954 (citations omitted). Finding that the State's interests for the eligibility provisions were "more than sufficient," the court determined that Plaintiffs were thus "unlikely to succeed on the merits of their First Amendment claim." *Id*. PageID#955.

Similarly, the court found that the Plaintiffs were unlikely to succeed on the merits of their Equal Protection claim. *Id.* PageID#955-957. In addition to the lack of a severe burden on their First Amendment rights, the court found that "Plaintiffs do not belong to any suspect classification such as race or religion," and that "the difference in treatment between persons within and outside the[] eight enumerated categories rationally furthers a legitimate state interest in establishing a fair and impartial redistricting process." *Id.* PageID#956.

[1] In conducting this analysis, the district court applied the *Anderson-Burdick* test to Plaintiffs' claims. Opinion, RE.67, PageID#951-955. However, no matter which legal standard is applied, the Plaintiffs' claims fail. See *Infra* I.A-C.

The court then analyzed the *MRP* Plaintiffs' claims, beginning with MRP's allegation that allowing "applicants for commissioner [to] self-designate their affiliation with one of the two major political parties without any involvement or consent of that political party" violates its freedom of association. *Id.* PageID#960 (citation omitted). The court found that MRP was unlikely to succeed on the merits of this claim, explaining that "neither the Michigan constitutional amendment nor membership in the Commission defines what it means to be a Republican or a Democrat." *Id*. PageID#961-962. The court further emphasized that "because the position of redistricting commissioner is randomly drawn from pools of voters, there is no basis for the commissioners to be regarded as 'standard bearers' for the parties." *Id.* PageID#962 (emphasis in original).[2]

Next, the court analyzed the *MRP* Plaintiffs' viewpoint discrimination claim, which alleges that "applicants who affiliate with one of the two major parties, including MRP, are disfavored because only four positions are reserved to each of the pools of affiliating applicants, while five positions are reserved to the pool of unaffiliating applicants." *Id*. PageID#964. The court found this claim unlikely to

[2] The individual Plaintiffs in the MRP case also challenged the disqualification rules as a violation of their freedom of association. *Id.* PageID#962. But the district court concluded that the "State's interests in designating eligibility criteria for an effective redistricting commission are, on balance, more than sufficient to justify the challenged provisions." *Id.* PageID#963-964.

succeed on the merits, because "the allocation of seats on the Commission does not reflect the State's disapproval of a subset of speech." *Id*. PageID#966.

Finally, the court addressed Plaintiffs' argument that by restricting commissioners from discussing redistricting matters with members of the public outside of an open meeting of the Commission, the amendment unlawfully "prohibits discussion of 'an entire topic.'" *Id*. The court found it unlikely that Plaintiffs would succeed on the merits of their claim, emphasizing that "the restriction at issue applies only to official speech made by commissioners in their official capacity," and "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* PageID#967-968 (quotation marks omitted).

Analyzing the remaining factors, the Court found that there would be no irreparable injury to the Plaintiffs absent a preliminary injunction. *Id*. PageID#958, 970. Finally, the court concluded that granting a preliminary injunction would cause substantial harm to others and would not serve the public interest. *Id*. PageID#959, 971.

SUMMARY OF ARGUMENT

The district court correctly denied Appellants' motion for a preliminary injunction because neither the First nor the Fourteenth Amendment precludes Michigan voters' choice to adopt an Independent Redistricting Commission free of conflicts of interest among its commissioners.

First, this Court has articulated two standards to assess challenges to a state's decisions regarding the structure of its government. Under the "deferential approach," this Court has explained that a state's decision to establish qualification rules for its most important government officials is an exercise of its constitutional rights as a sovereign, and that decision may only be overturned if it is *plainly* unconstitutional. Alternatively, under the *Anderson-Burdick* test, a challenger's burden must overcome the state's strong interest in structuring its government. Michigan's choice to exclude commissioners with conflicts of interest satisfies either test. Appellants' invitation for this Court to disregard its precedent and instead apply strict scrutiny should be rejected.

Second, Appellants' challenge to the Commission's disqualification rules fails because the Supreme Court has held that conflict-of-interest rules, which predate the founding, do not even implicate, let alone violate, the First Amendment. The Commission lawfully disqualifies those with a conflict of interest, or the appearance

thereof, by excluding those with a direct or indirect pecuniary or professional interest in the outcome of redistricting.

Third, the Commission's disqualification rules are not an unconstitutional condition on Appellants' right to engage in political activity because an unbroken line of Supreme Court and Sixth Circuit cases holds that candidates for high-level, policymaking positions may be excluded from government service based on their political activities and views. The Commission falls squarely in that category. Moreover, even if it did not, Michigan's fundamental sovereign interest in structuring its government to avoid conflicts of interest outweighs, under the *Pickering* balancing test, Appellants' interest in serving on the Commission.

Fourth, the Commission's selection process does not violate Appellant MRP's freedom of association by not permitting MRP to select the commissioners. The Supreme Court has held that where a selection process is not intended to select a political party's nominees, it does not violate a political party's freedom of association. This is so even where the applicants self-identify with the party, and is particularly so where voters themselves enact the process and thus will not be confused into misunderstanding the commissioners' associations.

Fifth, Michigan's voters did not engage in viewpoint discrimination when they allocated eight seats split between candidates self-identified as affiliated with the two major political parties and five seats to self-identified unaffiliated voters.

People unaffiliated with the major parties are not a monolithic bloc, and so unaffiliated commissioners' "viewpoints" are not favored by having an additional seat. Moreover, the amendment prohibits political views from infecting the map-drawing process. The voters of Michigan elected—exercising their First Amendment rights—to allocate power in this manner. They did not violate the First Amendment in the process.

Sixth, Appellants lack standing to challenge the provision restricting commissioners from discussing redistricting matters outside public meetings. They are lawfully disqualified from the Commission, and so will never suffer the injury they allege. Even if they were qualified to serve, the chances of actually being selected are exceedingly remote; only actual commissioners or staff have standing. In any event, the district court correctly concluded that Michigan could restrict commissioners' discussion of official redistricting matters to public meetings, given the state's interest in transparency.

Seventh, the Commission's disqualification rules do not violate the Equal Protection Clause. They do not discriminate on the basis of any protected class, and are supported by a rational basis in ensuring that conflicts of interest and party politics do not skew district lines.

Eighth, even if a provision were invalidated, the remainder of the amendment must stand, both because the voters approved an express severability clause, and

because the voters' intent is best served by retaining the Commission. Moreover, even without the disqualification rules, the amendment is a whole and operative law, with no gaps to be filled.

Finally, the district court correctly concluded that the remaining factors favored denying a preliminary injunction.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quotation marks omitted). Movants must prove (1) a likelihood of success on the merits, (2) that they will suffer irreparable injury, (3) that an injunction would not substantially harm others, and (4) that the public interest favors an injunction. *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012). In constitutional challenges, the likelihood of success on the merits is usually determinative. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014). This Court's review is for abuse of discretion, and thus factual findings are subject to clear error review, while legal questions are reviewed *de novo*. *See id.*

ARGUMENT

I. The District Court Correctly Denied a Preliminary Injunction Because Appellants Are Unlikely to Succeed on the Merits.

A. Under Any Standard of Review, Michigan Is Owed Substantial Deference Regarding its Sovereign Choices to Structure its Government.

Michigan has a constitutional right as a sovereign to structure its government and establish qualifications for its high-level officers. As the Supreme Court has explained, "each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (quotation marks omitted). This "power inheres in the State by virtue of its obligation . . . to preserve the basic conception of a political community," and applies to the State's power to set qualifications for "important nonelective . . . positions." *Id.* (quotation marks omitted).

In *Citizens for Legislative Choice v. Miller*, this Court rejected a challenge to Michigan's legislative term limits. The Court explained that, "[a]s a sovereign, Michigan deserves deference in structuring its government." 144 F.3d 916, 925 (6th Cir. 1998). That is so because "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause] of the Constitution." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991)). Michigan's power to determine its governmental structure is its

most fundamental right. "Through the structure of its government, and the character of those who exercise governmental authority, a State defines itself as a sovereign." *Id.*; *see also* The Federalist No. 43, at 292 (J. Madison) (Jacob Cooke ed., 1961) ("Whenever the states may chuse to substitute other republican forms, they have a right to do so . . . .").

A state's sovereign choices regarding the qualifications for important offices must be upheld unless *plainly* in conflict with the federal Constitution. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)).

This Court has said that this standard is a "workable, deferential test for evaluating state decisions regarding their government structure," and that "in this framework, a court should uphold a qualification unless the qualification is plainly prohibited by some other provision in the Constitution." *Citizens for Legislative Choice*, 144 F.3d at 925 (internal quotation marks omitted); *Sugarman*, 413 U.S. at 648 ("[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.").

In addition to applying this test, which it called the "deferential approach," this Court also upheld Michigan's term limits under the *Anderson-Burdick* test. Under *Anderson-Burdick*, the court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Citizens for Legislative Choice*, 144 F.3d at 920 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

In this case, the district court primarily analyzed Appellants' challenge to the Commission's disqualification rules under the *Anderson-Burdick* test. Opinion, RE.67, PageID#952. In doing so, the district court acknowledged the alternative deferential approach outlined by this Court in *Citizens for Legislative Choice*, noting that its considerations underpinned the balancing of interests in its application of the *Anderson-Burdick* framework.[3]

Appellants object to the district court's reliance on *Anderson-Burdick*, contending that the test is limited to claims challenging "the actual administration of

[3] The district court mistakenly observed that neither side advocated adoption of the deferential approach in this case. Opinion, RE.67 PageID#952 at n.3. In its briefing below, VNP contended that the deferential approach set forth by this Court in *Citizens for Legislative Choice* governed this case. Brief, RE.32, PageID#359-360. Although VNP believes the deferential approach this Court outlined in *Citizens for Legislative Choice* is the most appropriate test for this case, the result—upholding the Commission—is the same whether the deferential approach or the *Anderson-Burdick* test is applied.

conducting elections." Daunt Br. at 17; MRP Br. at 3. The *Anderson-Burdick* test is inapplicable, they say, because it is necessitated by the "tension" between the "competing interests" of the fundamental right to vote, on the one hand, and the government's need to "'play an active role in structuring elections' to ensure fairness and honesty and avoid chaos during democratic processes." Daunt Br. at 18, 23 (quoting *Burdick v. Takushi*, 504 U.S. 428, 422 (1992)). Because of "the state's heightened interests in administering elections," Daunt Br. at 19, Appellants approve of the use of a balancing test for challenges to election laws, but contend that traditional strict scrutiny applies to their challenge to the Commission's disqualification rules, *id.* at 24; MRP Br. at 3-4. They are wrong.[4]

Although this case involves state interests that differ from the typical *Anderson-Burdick* analysis of election regulations, that difference warrants *more* deference to the state, not less. In introducing the "deferential approach," this Court

[4] MRP is a state affiliate of the Republican National Committee ("RNC"), which recently filed an amicus brief in the Supreme Court that is irreconcilable with the arguments MRP makes here. *See* Br. of Amicus Curiae RNC at 2, *Carney v. Adams*, No. 19-309 (Jan. 28, 2020), https://www.supremecourt.gov/DocketPDF/19/19-309/130183/20200128141442172_19-309%20tsac%20Republican%20National%20Committee.pdf at 2 ("Delaware's choices in structuring its own constitutional offices merit the highest deference."); *id.* at 5 ("Delaware's interest in controlling its own judicial-appointment process is of the highest magnitude. Control of this process is among the most 'fundamental' and inalienable elements of sovereignty . . . [at the] very peak of internal state concern."); *id.* (rejecting strict scrutiny as the appropriate framework for challenge to Delaware's choice in requiring partisan balance in judicial appointments).

in *Citizens for Legislative Choice* observed that the *Anderson-Burdick* test typically applies to challenges to "regulatory procedures relating to the election process." 141 F.3d at 924. But term limits, this Court explained, "implicate a different, and in some respects a far more important interest: the State's power to prescribe qualifications for its officeholders." *Id*. Exercising that power, "the State of Michigan, and the voters of Michigan, chose a citizen legislature over a professional legislature. They chose a different type of polity based on a different type of representative." *Id.* Michigan's decision deserved deference, this Court concluded, because it struck at the core of its sovereign authority under the Constitution to structure itself. *Id.* at 925.

The same is true here. Even if this Court agrees with Appellants that the *Anderson-Burdick* test is best confined to challenges to election regulations,[5] the result is not strict scrutiny, as Appellants contend, but rather an even *more* deferential

[5] Appellants overstate their argument. This Court applied the *Anderson-Burdick* framework in *Citizens for Legislative Choice* despite acknowledging the departure from its usual context. 144 F.3d at 924. Moreover, Appellants' reliance on *Moncier v. Haslam*, 570 Fed. App'x 553 (6th Cir. 2014), is especially peculiar. In that case, this Court rejected the *Anderson-Burdick* test for a challenge to Tennessee's appointed judge system because the test was not deferential *enough*. *Id.* at 559 (noting that neither *Anderson* nor *Burdick* involved the state's power to "organize their governments in a particular manner"). And the RNC is simultaneously advocating for the Supreme Court to apply the *Anderson-Burdick* test to uphold Delaware's system of partisan balance in judicial appointments—a context that has nothing to do with election administration, in complete contradiction to what the Appellants—one of whom is a subsidiary affiliate of the RNC—contend here. RNC Br., *supra* n.4 at 6-7.

test—"the deferential approach"—aimed at protecting "the State's power to prescribe qualifications for its officeholders," *id.* at 924, precisely the state interest at stake here. Appellants are therefore wrong to contend that this case does not involve a "competing interest," *Daunt* Br. at 23, warranting a balancing test. And that balancing test, just as it did for Michigan's term limits, compels the rejection of Appellants' claims.[6]

B. The Commission's Disqualification Rules and Structure Do Not Violate the First Amendment.

Michigan's decisions regarding the Commission's disqualification rules and its structure do not violate the First Amendment. Appellants raise a host of First Amendment arguments seeking to overturn Michigan's sovereign choices about the structure of the Commission. None has merit.

1. Michigan's Decision to Disqualify Those with Conflicts of Interest, or the Appearance Thereof, Does Not Implicate, Let Alone Violate, the First Amendment.

Michigan's decision to disqualify those with conflicts of interest, or the appearance thereof, from service on the Commission does not implicate, let alone

[6] Appellants contend that *Citizens for Legislative Choice* is "inapposite" because the plaintiffs in that case "were essentially arguing for a right to *vote* for a specific candidate or class of candidates." Daunt Br. at 23-24 (emphasis in original). Appellants offer no explanation for how a case that turned on "the State's power to prescribe qualifications for its officeholders," *Citizens for Legislative Choice*, 144 F.3d at 924, could possibly be "inapposite" to their challenge to Michigan's power to prescribe qualifications for the Commission.

"plainly" violate, the First Amendment. In *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), the Supreme Court rejected a First Amendment challenge to Nevada's law requiring legislators to recuse themselves from voting on, or advocating for passage or defeat of, matters as to which they had a conflict of interest. That law included conflicts arising from a "'commitment to a person' who is a member of the officer's household; is related by blood, adoption, or marriage to the officer; employs the officer or is a member of his household; [ ] has a substantial and continuing business relationship with the officer," or any "'substantially similar'" relationship. *Id.* at 119 (quoting Nev. Rev. Stat. § 281A.420(2) & (8)(a)-(d)).

The Court held that the law did not implicate the First Amendment rights of legislators to vote on legislation, reasoning that conflict-of-interest prohibitions had a long history: "[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional." *Id.* at 122 (quotation marks omitted). Just as libel and defamation laws do not violate the First Amendment, the Court explained, neither do "legislative recusal rules." *Id.*

For support, the Court cited "[e]arly congressional enactments," which it noted "'provid[e] contemporaneous and weighty evidence of the Constitution's meaning.'" *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)). Both the United States House and Senate adopted recusal rules within fifteen years of the

Founding. The House's rule provided that "[n]o member shall vote on any question, in the event of which he is immediately and particularly interested." *Id.* at 122-23 (quoting 1 Annals of Cong. 99 (1789)). The Court explained that "[m]embers of the House would have been subject to this recusal rule when they voted to submit the First Amendment for ratification; their failure to note any inconsistency between the two suggests that there was none." *Id.* at 123.

Likewise, as President of the Senate, Thomas Jefferson adopted a rule requiring that

> [w]here the private interests of a member are concerned in a bill or question, he is to withdraw. . . . In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to.

Id. (quoting A Manual of Parliamentary Practice of the Use of the Senate of the United States 31 (1801)).

The Court further noted that "[f]ederal conflict of interest rules applicable to judges also date back to the founding," *id.*, and that "[a] number of States, by common-law rule, have long required recusal of public officials with a conflict," *id.* at 124; *see id.* (citing *In re Nashua*, 12 N.H. 425, 430 (1841) ("If one of the commissioners be interested, he shall not serve"); *Commissioners' Court v. Tarver*, 25 Ala. 480, 481 (1854) ("If any member . . . has a peculiar, personal interest, such member would be disqualified"); *Stubbs v. Fla. State Finance Co.*, 118 Fla. 450, 451

(1935) ("[A] public official cannot legally participate in his official capacity in the decision of a question in which he is personally and adversely interested.")).

Moreover, the Court explained that voting by a governmental body does not constitute protected speech under 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." *Id.* at 125-26; *id.* at 127 ("[A] legislator has no right to use official powers for expressive purposes.").

In this case, Michigan exercised its sovereign authority to exclude from the Commission those citizens most likely to have a conflict of interest, or the appearance thereof, in choosing district boundaries for the state legislature and Congress. The Supreme Court has acknowledged the importance of that goal: "[i]ndependent redistricting commissions . . . have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting.] They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2676 (2015) (brackets in original).

The Commission's disqualification rules lawfully exclude those with conflicts of interest, or the appearance thereof. The categories of excluded persons under the

provision are those whose political careers (and thus paychecks or potential paychecks) are affected by the drawing of lines (*i.e.*, candidates for partisan office or partisan officeholders); those with a substantial interest in the lines being drawn to advantage particular candidates or who are themselves likely future candidates (*i.e.*, officers or members of governing bodies of political parties); those whose employment may depend upon the lines being drawn to favor or disfavor particular candidates (*i.e.*, paid consultants or employees of candidates or elected officials, employees of the legislature, lobbyists, or employees of lobbyists); and those who are financially supported by people with a political or pecuniary interest in how the lines get drawn (*i.e.*, family members of the above categories of people).

The characteristics identified by Michigan voters as disqualifying a person from voting membership on the Commission are the same types of characteristics that the Supreme Court held Nevada could rely upon to disqualify government officials from voting on certain matters. *See Carrigan*, 564 U.S. at 119-20. And the categories of disqualified persons are viewpoint-neutral and apply regardless of party. *See id.* at 125.

It does not matter that *Carrigan* involved recusals from particular matters as opposed to disqualification from serving altogether. Unlike most governmental bodies—such as the city council at issue in *Carrigan*—the Commission has only a single matter before it—redistricting. There would be no purpose in permitting

someone to be a commissioner but requiring their recusal from voting on the maps; indeed, doing so would risk the Commission being unable to adopt new maps.

Because a state may disqualify from government service those with conflicts of interest, or the appearance thereof, without *implicating* the First Amendment—let alone "*plainly*" violating it, *Citizens for Legislative Choice*, 144 F.3d at 925 (emphasis added)—Michigan voters did not place any unconstitutional condition on Appellants' rights to engage in political activity by disqualifying them from Commission membership.

2. The Commission's Disqualification Rules Are Not an Unconstitutional Condition on Appellants' Political Activity.

Even if Appellants' First Amendment claims were not foreclosed by *Carrigan* and *Citizens for Legislative Choice*, they nonetheless fail based upon the precedent Appellants themselves cite. Appellants rely on two lines of precedent about government employee speech: (1) patronage cases invalidating partisan-based personnel decisions for low-level, nonpolicymaking positions, and (2) cases involving other speech-related conditions on government employment. Neither set of cases supports Appellants' claims.[7]

[7] Contrary to MRP, the RNC takes the view that the Supreme Court's "political-patronage precedents . . . cannot plausibly apply" to states' choices for qualification of their important officers. RNC Br., *supra* n.4, at 2.

i. Commissioners Are High-Level Policymakers Whose Prior Partisan Activities May Permissibly Be Disqualifying.

Commissioners are high-level policymakers and therefore candidates for these positions may lawfully be disqualified based upon their prior partisan activities. Appellants misapply the Supreme Court's partisan patronage cases. *See* Daunt Br. at 25-29; MRP Br. at 18-19. In *Elrod v. Burns*, a plurality of the Supreme Court held that the First Amendment prohibits the practice of patronage dismissals—*i.e.*, firing government employees because they do not support the party in power—for "nonpolicymaking individuals [with] limited responsibility." 427 U.S. 347, 367 (1976). The Court noted that it faced conflicting First Amendment interests: the right of political parties to advance their interests versus the right of individual employees to associate freely. *Id.* at 371-72. "The illuminating source to which we turn in performing the task is the system of government the First Amendment was intended [to] protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern." *Id.* at 372.

The Court struck a balance by concluding that the First Amendment did *not* preclude patronage dismissals for "policymaking positions," in part to ensure that the "policies presumably sanctioned by the electorate" would not be undercut by

employees opposed to those policies. *Id.* at 367-72 ("There is . . . a need to insure that policies which the electorate has sanctioned are effectively implemented.").

The Court refined that exception in *Branti v. Finkel*, holding that "the ultimate inquiry is not whether the label 'policymaker' . . . fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. 507, 518 (1980). Later, in *Rutan v. Republican Party of Illinois*, the Court explained that "[a] government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." 497 U.S. 62, 74 (1990).

This Court has likewise addressed this issue, concluding that a state may make personnel decisions based on political views when, *inter alia*, the position has "discretionary authority [in] . . . carrying out . . . [a] policy of political concern" or is "part of a group of positions filled by balancing out political party representation." *Sowards v. Loudon Cty., Tenn.*, 203 F.3d 426, 435-36 (6th Cir. 2000).

The members of the Commission are high-level policymakers. The amendment provides that "the powers granted to the commission are legislative functions not subject to the control or approval of the legislature, and are exclusively reserved to the commission." Mich. Const. art. IV § 6. Each commissioner is

empowered to create a proposed map for each type of district, *id.* § 6(14)(c)(i), and the commissioners have the power to rank their choices among the proposed plans in order to vote on the final plan, *id.* § 6(14)(c)(ii) & (iii). The Commission "shall elect its own chairperson," has "the sole power to make its own rules of procedure," and "may hire staff and consultants . . . including legal representation." *Id.* § 6(4).

In this case, the *absence* of connections to partisan political powerbrokers is key to the "effective performance of the public office involved." *Branti*, 445 U.S. at 518. If the First Amendment permits the government to prefer one partisan affiliation over another in hiring high-level policymakers, *see, e.g.*, *Branti*, 445 U.S. at 518, it permits the government to prefer candidates who have avoided partisan politics altogether—equally disqualifying people regardless of their political viewpoints.

ii. Michigan's Interest in Disqualifying Conflicted Commissioners Far Outweighs Any Condition on Appellants' Political Activity.

Even if Appellants' First Amendment claims were not foreclosed by the *Elrod/Branti* exception for policymaking positions, they would likewise fail because Michigan's interest in structuring its government to avoid conflicts of interest far outweighs Appellants' interest in serving on the Commission. In addition to the patronage cases, Appellants rely upon other government employment cases for the proposition that "even though a person has no 'right' to a valuable governmental benefit . . . [the government] may not deny a benefit to a person on a basis that

infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see* Daunt Br. at 28-29; MRP Br. at 18-19.

The Daunt Appellants rely in particular upon *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014), a case they contend "is remarkably akin to the present case," Daunt Br. at 27. In *Autor*, a group of federally registered lobbyists challenged a ban on lobbyists serving on federal advisory committees. 740 F.3d at 177. The district court dismissed their First Amendment claim, but the D.C. Circuit reversed, concluding that they had stated a potential First Amendment claim because advisory committee membership was conditioned on foregoing the right to petition the government as lobbyists. *Id.* at 183.

The Daunt Appellants contend this case is nearly identical to *Autor*, but omit from their brief the actual resolution of *Autor*. The D.C. Circuit did not, after concluding the First Amendment claim was viable, apply strict scrutiny and undertake an analysis of whether the lobbyist ban was "narrowly tailored," "over- or under-inclusive," or the "least restrictive means among available, effective alternatives," Daunt Br. at 30, as the Appellants contend this Court should do, *see* Daunt Br. at 30-39; MRP Br. at 13-22.[8] Instead, the court noted that "[t]he Supreme

[8] For that reason, Appellants' lengthy dissection of each aspect of the Commission's disqualification rules is misplaced. This Court's task is not to look under every stone and decide how Michigan should have tinkered with the Commission's structure;

Court has long sanctioned government burdens on public employees' exercise of constitutional rights that would be plainly unconstitutional if applied to the public at large." *Autor*, 740 F.3d at 183 (internal quotation marks omitted). The court explained that "although [advisory committee] service differs from public employment, the government's interest in selecting its advisors . . . implicates similar considerations that we believe may justify similar restrictions on individual rights." *Id.* at 183-84 (citation omitted). Citing *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court concluded that the district court on remand would have to undertake a *Pickering* balancing analysis that weighs "the interest of the [individual] . . . and the interest of the State" to determine whether the government's interest in banning lobbyists was sufficient to outweigh the burden imposed on their speech rights. *Id.* at 184 (quoting *Pickering*, 391 U.S. at 568) (bracket in original).

The *Pickering* balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). Because interference with a public employer's work can detract from the function of a public employer, "avoiding such interference can be a strong state interest." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). "[E]ven termination because of protected speech may be justified when

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rather, this Court's task is to defer to Michigan's choice so long as there are no *plain* constitutional violations.

legitimate countervailing government interests are sufficiently strong. . . . [T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated . . . to a significant one when it acts as employer." *Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 675-76 (1996) (internal quotation marks omitted).

Michigan's interest in enforcing the Commission's disqualification rules outweighs Appellants' purported interest in serving as commissioners. To the extent conflict-of-interest laws could even implicate the First Amendment, Michigan's interest in having commissioners who lack conflicts, or the appearance thereof, justifies the disqualification rules. As this Court has recognized, Michigan has strong interests in preserving its democratic system of government, including "foster[ing] electoral competition, . . . reducing the advantages of incumbency and encouraging new candidates, . . . dislodging entrenched leaders, curbing special interest groups, and decreasing political careerism." *Citizens for Legislative Choice*, 144 F.3d at 923.

Michigan also has an interest in generally avoiding the influence of partisan politics and corruption, or the appearance thereof, on the Commission. For example, the Supreme Court has upheld the Hatch Act's limitations on political activity, endorsing its "major thesis" that "it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets."

U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 565 (1973). This was so, the Court reasoned, because "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* Likewise, the Court concluded that the Hatch Act furthered the critical purpose of ensuring that "[g]overnment employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *Id.* at 566.

This Court has likewise upheld the application of the Hatch Act to state employees whose agencies receive federal funds, *see Molina-Crespo v. U.S. Merit Sys. Protection Bd.*, 547 F.3d 651, 658 (6th Cir. 2008), and the termination of a public employee "because of the fact of that employee's candidacy," *Murphy v. Cockrell*, 505 F.3d 446, 450 (6th Cir. 2007). As this Court has noted, these prohibitions protect against corruption and its appearance, which would otherwise be present if state employees were conflicted by partisan political activities. *See Molina-Crespo*, 547 F.3d at 665 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) ("Preserving the integrity of the electoral process, preventing corruption, and [sustaining] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests

of the highest importance.")).[9] The same interests that permit the Hatch Act likewise support the disqualification rules.

Moreover, even if Appellants' claims were subjected to the *Pickering* balancing test, that balancing must occur within the framework of the deferential approach this Court outlined in *Citizens for Legislative Choice*. Only "plain[]" violations of the First Amendment suffice to warrant disturbing Michigan's sovereign right to structure its government. 144 F.3d at 925. Here, Michigan's interests plainly outweigh those of Appellants.

3. The Commission Does Not Burden MRP's Freedom of Association.

The Commission does not burden 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 (2000). "Under our political system, a basic function of a political party is to select the candidates for public

[9] The MRP Appellants contend that these cases only permit restrictions during the official's current term. MRP Br. at 15-16. The Court did not make that distinction in upholding these limitations. Moreover, courts approve disqualification based on *prior* political activity, *see Branti*, 445 U.S. at 518; *Sowards*, 203 F.3d at 436, and other durational limitations to political activity, *see, e.g.*, *Clements v. Fashing*, 457 U.S. 957, 967-68 (1982) (explaining that a "'waiting period' is hardly a significant barrier to candidacy," noting that the Court had "upheld a 7-year durational residency requirement for candidacy," and holding that waiting period must only satisfy rational basis review); *see also* 18 U.S.C. § 207(e) (establishing waiting periods for former members of Congress to seek to influence Congress).

office to be offered to the voters at general elections." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). The Supreme Court has thus held that when states establish an electoral process 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.

At the same time, the Supreme Court has made clear that the violation of associational rights identified in *Jones* does not extend beyond electoral processes whose purpose is to identify a party's "nominee." In *Washington State Grange v. Washington State Republican Party*, Washington had adopted by voter initiative a state primary system in which 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. 442, 447 (2008). The two candidates with the highest votes in the primary—regardless of party affiliation—advance to the general election. *Id.* at 447-48. Several Washington state political parties brought a facial challenge to this system, contending that it violated their First Amendment associational rights. *Id* at 449.

The Court upheld Washington's system, rejecting the political parties' comparison to the California system 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 the candidates as nominees of any party, nor does it treat them as such." *Id.* at 453. Instead, 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, and approve of, them." *Id.* at 454. This argument, the Court said, was based on "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.

Michigan's commissioner selection process does not violate MRP's associational rights. Like the primary election process upheld in *Washington State Grange*, the commissioner 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 are deliberately 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. art. IV, § 6(1) (characterizing the Commission as an "independent citizens redistricting commission"); *id.* § 6(1)(b) (excluding from commission membership 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). As in *Washington State Grange*, here "[t]here is simply no basis to presume that a well-informed electorate will interpret a [commissioner's] party-preference designation to mean that the [commissioner] is the party's chosen nominee or representative or that the party associates with or approves of the [commissioner]." 552 U.S. at 454.

Likewise, MRP's contention that the public will perceive the self-affiliated commissioners as its standard-bearers because the Commission meetings are public, MRP Br. at 9, is misplaced. As in *Washington State Grange*, the voters of Michigan are the ones who chose to remove the major political parties themselves from the

process, and to require that process to be public. Having done so, it makes no sense to contend the voters will now be confused by what they did and believe that MRP nominated the Republican-affiliated commissioners.[10]

MRP identifies no case in which a court has concluded that a political party's associational rights are infringed because it does not get to select government commissioners. 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 this, 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 various federal commissions 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 many 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. § 30106(a)(1) (Federal Election Commission); 15 U.S.C. § 41 (Federal Trade Commission); 15 U.S.C. § 78d (Securities and Exchange Commission); 42 U.S.C. § 7171(b) (Federal Energy Regulatory Commission); 47 U.S.C. § 154(b)(5) (Federal Communications

[10] MRP is also wrong to suggest that the commissioners will "self-designate an affiliation with MRP." MRP Br. at 7. Their designation is as Republicans, not as members of the official party apparatus.

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); *see also* Mich. Const. art. II, § 7 (Board of Canvassers); *id.* art. II, § 29 (Civil Rights Commission); *id.* art. XI, § 5 (Civil Service Commission). Political parties have no First Amendment associational right to dictate the membership of government commissions.[11]

Moreover, 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. It rather serves to ensure that the Commission's decisions reflect some level of bipartisan or cross-partisan support. *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 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

[11] Indeed, all of the cases cited by MRP involve elected positions. Unlike a political party's nominee for elected office, a commissioner on Michigan's 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 "standard bearer[s] who best represents the party's ideologies and preferences." *Id.* Rather, the voters of Michigan prohibited commissioners from seeking to advantage political parties in adopting redistricting plans. *See* Mich. Const. art. IV, § 6(13)(d).

thus the political parties have no First Amendment right to control their selection. 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.[12]

MRP also complains that Michigan lacks party voter registration, MRP Br. at 9, and thus there will be a "tainted, unverified Republican pool who do not share the common political beliefs of MRP," leaving MRP with "no reliable means to determine an applicant's true political affiliation," *id.* at 11. But MRP has no constitutional right to have what it considers "*bona fide*," party loyalists as commissioners, *id.*, and it has no associational right to preclude the service of commissioners who self-designate their party affiliations. *See Washington State Grange*, 552 U.S. at 453-55. The voters' purpose 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 freedom of association claim—the commissioner selection process does not require any association between commissioner applicants and MRP as an organization. MRP's image, membership, or policy views are not

[12] 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 as Democrats and/or applicants self-identified as unaffiliated, and MRP can continue to associate with stricken applicants, and *vice versa*.

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. MRP's attempt to shoehorn its objection to losing control over redistricting into a First Amendment claim fails.[13]

4. The Commission Does Not Discriminate Based on Viewpoint.

The district court correctly rejected Appellants' arguments that the Commission structure "discriminates against Republican applicants based on their sworn party affiliation—*i.e.*, based on their viewpoint," MRP Br. at 25, by the allocation of four seats to each of the major political parties and five to those unaffiliated with either of those parties.

First, the premise of the argument is mistaken. Appellants speculate that the five unaffiliated commissioners will constitute a monolithic bloc—that their shared viewpoints will constitute a plurality view, outnumbering by one seat the commissioners affiliated with each of the two major parties. MRP Br. at 22-27. 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. Those five

[13] Even if MRP had articulated an associational injury, whether that injury would materialize following the selection of commissioners is speculative. Courts cannot "speculate about hypothetical or imaginary cases." *Washington State Grange*, 552 U.S. at 450 (internal quotation marks omitted).

commissioners may likely have little in common with one another, and some may find themselves most closely aligned with the major party commissioners. Appellants 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 political spectrum. *See* Mich. Const. art. IV, § 6(14)(c). The Commission does not suppress the views of major parties.

Second, Appellants misconceive the role of commissioners. They are not tasked with engaging in "speech and expression," MRP Br. at 26, to advance certain "ideologies and viewpoints," *id.* at 25. Indeed, they are obligated *not* to draw districts to favor ideologies and perspectives. *See* Mich. Const. art. IV, § 6(13)(d) (noting that adopted plans "shall not provide a disproportionate advantage to any political party"). 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 125-26; *id.* at 127 ("[A] legislator has no right to use official powers for expressive purposes."). The Commission's seats were allocated by voters to ensure no one party had control, and to limit the ability of partisan politicians to skew the map-drawing. The allocating of these positions on the Commission, like the allocating of legislative voting power, does not implicate speech rights.[14]

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*, the Court summarily affirmed the decision of a three-judge district court upholding the statute requiring that not all members of the Washington, DC city council be of the same political party. 411 F. Supp. 650, 652 (D.D.C. 1976) (three-judge court), *aff'd mem.,* 429 U.S. 1030 (1977). The lower 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.*; *see also LoFrisco v. Schaffer*, 341 F. Supp. 743 (D. Conn. 1972) (three-judge court) (upholding minority representation allotment for Connecticut school boards), *aff'd*, 409 U.S. 972 (1972). Similarly here, Michigan has a legitimate interest in ensuring

[14] The MRP Appellants contend that speech rights are implicated "if not through the act of voting, then through other speech that necessarily attends service as a commissioner." MRP Br. at 26. But they offer no explanation of how the presence of five unaffiliated commissioners infringes the ability of the four Republican commissioners to speak up at Commission meetings.

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.

Fourth, voters have a right to allocate power among those affiliated with political parties, and do so in every partisan election. Here the voters of Michigan—by a supermajority vote—did exactly that, choosing to allocate four commissioner seats to voters who identify with each of the major parties and five commissioner seats to voters who identify as unaffiliated with those parties. The entire point of an election is for voters to choose among political viewpoints and decide how to allocate power, and doing so in this context no more constituted viewpoint discrimination than every time voters choose among partisan candidates for Governor, Congress, and the legislature. 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.

Moreover, Appellants' logic would invalidate action by the majority party in the legislature to allocate to itself a majority of the seats on legislative committees, or 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.[15] 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; 15 U.S.C. § 78d; 42 U.S.C. § 7171(b).[16]

5. The Court Should Reject the Challenge to the Requirement that Commission Staff Only Discuss Redistricting at Public Meetings.

i. Appellants Lack Standing to Challenge this Provision.

While the court below did not rule on this argument, Opinion, RE.67, PageID#967, Appellants lack standing to challenge the provision limiting discussions of redistricting matters to public meetings. To have standing, plaintiffs must show: (1) that they "have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent,

[15] The MRP Appellants contend that these bodies are different because they *permit*, rather than *guarantee*, an uneven number of Republicans or Democrats. MRP Br. at 39-41. But they offer no explanation for why that matters to the constitutional analysis.

[16] Even if MRP's constitutional rights were implicated by the allocation of seats, Michigan has a compelling, and certainly a rational, basis for 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. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658 (quotation marks omitted) (bracket in original). The Constitution does not require the exclusion of unaffiliated voters from the process, as MRP seemingly contends. *See* MRP Br. at 26-27.

not conjectural or hypothetical," (2) that the injury is "trace[able] to the challenged action of the defendant," and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (internal quotation marks and citations omitted) (bracket in original).

Appellants lack standing to challenge the restriction on discussing redistricting matters except in a public meeting. First, they will not suffer an injury from that limitation because they are lawfully disqualified from serving on the Commission. Second, even if they were not disqualified, it is speculative that they would ever be randomly drawn from the large pool of applicants. Because the chance of any person being selected is so remote, only those persons who are *actually* selected for the Commission have standing to raise this challenge.

ii. The Public Meeting Restriction Does Not Violate the First Amendment.

In any event, the restriction on discussing redistricting matters outside public meetings does not violate the First Amendment. The district court correctly ruled that the restriction "applies only to official speech made by commissioners in their official capacity," and that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer

control over what the employer itself has commissioned or created." Opinion, RE.67, PageID#967-68 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

Appellants acknowledge that the district court's construction "may lessen the burden imposed," but contend that the district court's limiting interpretation is not supported by the plain text of the amendment because it does not contain the word "official." MRP Br. at 28. But the amendment details how the commissioners can discuss redistricting outside an official meeting "to gain information relevant to the *performance of his or her duties*" if it is done in writing or at a public forum, Mich. Const. art. IV, § 6(11) (emphasis added), thus suggesting the provision's scope is limited to official duties. Likewise, the phrase "redistricting matters" does not need the word "official" to be so construed. The whole thrust of the amendment is about the official drawing of lines, not commissioners' or staff members' private activities or discussions. There is therefore no reason to read the restriction in the broad manner presumed by Appellants. *See Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) (noting that courts should "construe [laws] to avoid constitutional difficulty when fairly possible" (internal quotation marks omitted)).

Moreover, similar open meeting laws have been upheld as reasonable time, place, and manner restrictions. *See Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012) (upholding Texas's open meetings law as content-neutral because it was justified without regard to the content of speech and furthered the important state

interest in transparency in decisionmaking). It does not matter that here, only redistricting matters are restricted—those are the *only* matters of official business for the Commission, and so a broader wording would make no sense.

C. The Commission's Disqualification Rules Do Not Violate the Equal Protection Clause.

The Commission's disqualification rules likewise do not violate the Equal Protection Clause. To withstand a challenge under the Equal Protection Clause, "statutes that do not interfere with fundamental rights or single out suspect classifications must bear only a rational relationship to a legitimate state interest." *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 574 (6th Cir. 2002).

In this case, the Commission's disqualification rules do not target any suspect class or interfere with any fundamental rights, including those guaranteed by the First Amendment. Appellants base their equal protection claim on the "over- and under-inclusive[ness]" of the Commission's disqualification rules. Daunt Br. at 29, 39-41; *see* MRP Br. at 31-42. In doing so, they essentially bootstrap their First Amendment claim, contending that statutes affecting First Amendment interests must "be narrowly tailored to their legitimate objectives." Daunt Br. at 39 (quotation marks omitted). But there is no First Amendment right to be appointed to the Commission, and states do not implicate the First Amendment by disqualifying members of a policy-making body based on anticipated conflicts of interest, even when those conflicts arise from political activities. *See Carrigan*, 564 U.S. at 124;

Branti, 445 U.S. at 518; *supra* Part I.B.1. Because the disqualification rules do not burden a fundamental right or a suspect class, rational basis review applies.

The Supreme Court and the Sixth Circuit have rejected under-inclusiveness arguments like those raised by the Appellants so long as the distinction between classes is not "the result of invidious discrimination." *Richland*, 278 F.3d at 576 (citing *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955), for the proposition that legislatures may properly "take one step at a time" in making reform); *see also Clements v. Fashing*, 457 U.S. 957, 971 (1982) ("A [law] is not devoid of a rational [basis] simply because it happens to be incomplete.").

The disqualification rules have a rational basis. Michigan voters have adopted a sensible system to identify and disqualify those with a direct or indirect political or financial interest in the outcome of redistricting. For example, employees of elected officials are disqualified because they have a direct pecuniary interest in their boss's reelection prospects, whereas volunteers do not. Candidates and elected officials to partisan offices stand to gain politically from new maps, whereas candidates to statewide nonpartisan offices do not. Family members likewise have a conflict, or at least the appearance of one. *Cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (noting that the government's interest in preventing the "appearance of corruption" is "[o]f almost equal concern as the danger of actual quid pro quo arrangements" and sufficient to withstand heightened scrutiny, let alone rational basis).

Moreover, Appellants offer nothing to suggest that the people of Michigan were motivated by "invidious" discriminatory intent. *Richland*, 278 F.3d at 576. The Commission's disqualification rules do not violate the Equal Protection Clause.

D. Any Constitutionally Infirm Aspects of the Commission Are Severable.

Even if any aspect of the Commission were constitutionally infirm, it would be severable from the remaining provisions. The Daunt Appellants' contention otherwise is incorrect.

The Michigan Supreme Court "has long recognized that '[i]t is the law of this State that if invalid and unconstitutional language can be deleted from a[ ] [law] and still leave it complete and operative then such remainder of the [law] be permitted to stand.'" *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 806 N.W.2d 683, 713 (Mich. 2011) (quoting *Eastwood Park Amusement Co. v. East Detroit Mayor*, 38 N.W.2d 77, 81 (Mich. 1949)); *see also People v. McMurchy*, 228 N.W. 723, 727-28 (Mich. 1930) ("The constitutionality of a law that is complete in itself, without certain provisions that may be omitted, will remain constitutional if such objectionable parts are omitted."). Under this reasoning, severability follows even where a provision does not include a severability clause. "[U]nconstitutional provisions may be severed even absent a severability clause if, among other conditions, 'it is clear from the [law] itself that it was the intent of the [voters] to enact these provisions irrespective of the others.'" *Constitutionality of*

2011 PA 38, 806 N.W.2d at 713 (quoting *Eastwood Park*, 38 N.W.2d at 82. And where a law *contains* a severability clause, it is clear that in Michigan, as in most places, the remainder of it should be upheld. *See Civil Service Comm'n of Mich. v. Auditor Gen.*, 5 N.W.2d 536, 541 (Mich. 1942) ("As the act specifically contains a 'severability clause,' the remainder of the law is valid.").[17]

> In this case, the voters adopted a severability clause:
>
> > 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.

Mich. Const. art. IV, § 6(20). The Daunt Appellants contend that "[n]otwithstanding this clause, this Court must still determine whether the offending provisions of a law may be severed or if doing so would upset the will of the enactors," Daunt Br. at 42, and further argue that where a ballot initiative is concerned, the absence of a record as to enactors' intent weighs strongly on the side of non-severability. *See id.* at 43. Not so.

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[17] A similar standard is applied under federal law. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) ("Unless it is evident that the [enacting body] would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law" (quoting *Buckley v. Valeo*, 424 U.S. at 108)); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("This Court has held that the inclusion of such a clause creates a presumption that [the enacting body] did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.").

The cases cited by the Daunt Appellants do not support their contention, because with one exception,[18] they all involve the standard applied in the *absence* of a severability clause. *See Constitutionality of 2011 PA 38*, 806 N.W.2d at 713 (discussing standard to apply "absent a severability clause"); *McMurchy*, 228 N.W. at 727-28 (same); Mich. Att'y Gen. Op. 7309 at 19-21 (2019) (applying general statutory severability provision in absence of specific provision contained in statute at issue); *In re Apportionment of State Legislature-1982*, 321 N.W.2d 565 (Mich. 1982) (discussing severability of state constitutional provisions without mention of a severability clause); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 739-741 (1964) (reviewing amendment with no severability clause, and concluding that "there is no indication that the apportionment of the two houses of the Colorado General Assembly, pursuant to the 1962 constitutional amendment, is severable"); *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 191 (stating that "President Taylor intended [his] 1850 [executive] order to stand or fall as a whole").

[18] The exception is *Randall v. Sorrell*, 548 U.S. 230 (2006), but that case is inapposite. In *Sorrell*, the Court stated: "To sever provisions to avoid constitutional objection here would require us to write words into the statute (inflation indexing), or to leave gaping loopholes (no limits on party contributions), or to foresee which of the many different possible ways the legislature might respond to the constitutional objections we have found." *Id*. at 262. As explained further below, that would not be the case here, as the remaining amendment is fully operative without the disqualification provisions.

The Daunt Appellants thus provide no support for their contention that this Court should look beyond the plain text of the severability clause the voters enacted. Rather, the Michigan Supreme Court has made clear that such clauses govern: "As the [Amendment] specifically contains a 'severability clause,' the remainder of the law is valid." *Civil Service Comm'n*, 5 N.W.2d at 541.

Even if it were appropriate to look beyond the severability clause, it is clear the voters would have intended the remainder of the amendment to continue to operate. The primary intent of the amendment—to establish an independent redistricting commission that would create a "fair, impartial, and transparent process" for redistricting[19]—can still be advanced without the disqualification provisions. The summary of the amendment, in bold lettering at the top of the ballot proposal, states "**A proposed constitutional amendment to establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives and U.S Congress, every 10 years**" (emphasis in original).[20] The amendment contains twenty-two paragraphs regulating the Commission—including creating a large, representative

[19] Voters Not Politicians, *We Ended Gerrymandering in Michigan*, https://votersnotpoliticians.com/redistricting.

[20] Michigan Senate Fiscal Agency, *November 2018 Ballot Proposal 18-2*, https://www.senate.michigan.gov/SFA/Publications/BallotProps/Proposal18-2.pdf (last viewed Feb. 3, 2020).

pool of candidates and random selection of commissioners, including transparency measures, establishing redistricting criteria, prohibiting partisan gerrymandering, and establishing rules that ensure a range of support across the political spectrum. Mich. Const. art. IV, §§ 6(2)-(22). All of these provisions can continue to operate if the single subsection dealing with the disqualification rules were invalidated. To throw out the whole amendment based on that single invalidation would disregard the *entire purpose* behind the voters' passage of the amendment.

The Daunt Appellants' contention that voters would have preferred the status quo over a Commission without disqualification rules thus makes no sense.[21] Daunt Br. at 47. If the entire Commission is invalidated, the redistricting process will be *guaranteed* to be in the hands of the very people Michigan's voters sought to disqualify from drawing district lines—the legislature. And the legislature will not be constrained by any of the lawful criteria voters adopted. On the other hand, even if otherwise disqualified persons became commissioners, the other protections adopted by the voters, such as the redistricting criteria, would vindicate the voter's redesign of the redistricting process to "ensure that [it] can no longer be dominated

[21] *See, e.g., Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) ("[N]othing in the . . . text or historical context makes it 'evident' that [the enacting body], faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will").

by one political party." *Citizens Protecting Michigan's Constitution v. Sec'y of State*, 922 N.W.2d at 410.

Moreover, the amendment is "complete and operative" without the eligibility provisions. *Constitutionality of 2011 PA 38*, 806 N.W.2d at 713. If the eligibility provisions were excised, unlike the statute in question in *Sorrell*, there would be no gaps to fill in the law, no loopholes, and no guessing as to how the amendment would operate.

Finally, Appellants also rely upon *In re Apportionment of State Legislature-1982*, which addressed the Redistricting Commission created by the Michigan Constitution of 1963 as originally approved, but that case is also inapposite. In that case, the Michigan Supreme Court concluded that the constitutional redistricting criteria adopted by the voters were unlawful, and held that the provisions at issue could not be severed because:

> [w]hen the weighted land area/population apportionment formulae fell, all the apportionment rules fell because they are inextricably related. The commission cannot survive without apportionment rules. . . . The notion that the people of this state confided to an apportionment commission without apportionment rules absolute discretion to reapportion the Legislature and thereby reallocate political power in this state limited only by human ingenuity and by no federal constitutional standard that a computer cannot circumvent is unthinkable.

In re Apportionment of State Legislature-1982, 321 N.W.2d at 582.

The Commission's essential "apportionment rules" have not been challenged here and remain in place as a check on the "discretion [of commissioners] to reapportion the Legislature and thereby reallocate political power," no matter which applicants are selected as commissioners. *Id*. Further, as explained above, the disqualification provisions are in no way "inextricably related" to any other provision of the amendment. *Id.*

II. The District Court Correctly Concluded that the Remaining Preliminary Injunction Factors Favor Denial of the Requested Injunction.

The district court correctly concluded that the remaining factors disfavor granting an injunction. *See Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014) (noting that, in cases raising constitutional challenges, "the likelihood of success on the merits often will be the determinative factor." (quotation marks omitted)). Because applications are not due until June 2020, there will be no irreparable injury pending final resolution of Appellants' claims. Mich. Const. art. IV, § 6(2)(c) & (d).

Likewise, the district court correctly concluded that the public interest is best served by respecting the voters' choices while the case progresses. Opinion, RE.67, PageID#970-71.

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The Supreme Court specifically highlighted, as a solution to partisan gerrymandering, the fact that "in November 2018, voters in . . . Michigan approved

constitutional amendments creating multimember [independent redistricting] commissions." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). This Court should reject Appellants' effort to overturn the voters and return to unconstrained gerrymandering.

CONCLUSION

For the foregoing reason, the district court's order should be affirmed.

February 3, 2020

Respectfully submitted,

Graham K. Crabtree
FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
124 W. Allegan, Suite 1000
Lansing, MI 48933
(517) 482-5800

/s/ Paul M. Smith
Paul M. Smith
Mark P. Gaber
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
(202) 736-2200

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe Street, Suite 1925
Chicago, IL 60603
(202) 736-2200

Counsel for Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 23(a)(7)(B) and 6th Cir. R. 32(b) because it contains 12,974 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Paul M. Smith
Paul M. Smith

Counsel for Defendant-Appellee
COUNT MI VOTE d/b/a Voters Not Politicians

CERTIFICATE OF SERVICE

I certify that on February 3, 2020, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in this case are represented by lead counsel who are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Paul M. Smith
Paul M. Smith

Counsel for Defendant-Appellee
COUNT MI VOTE d/b/a Voters
Not Politicians

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