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-614)

ORAL ARGUMENT REQUESTED

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ORAL ARGUMENT REQUESTED

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.
Peter D. Houk (P15155)
Graham K. Crabtree (P31590)
Jonathan E. Raven (P25390)
Ryan K. Kauffman (P65357)
Attorneys for Intervenor Defendant
Count MI Vote, d/b/a Voters Not Politicians
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

and

Paul M. Smith
Mark Gaber
Campaign Legal Center
1101 14th Street N.W., Suite 400
Washington D.C. 20005

Annabelle Harless
Campaign Legal Center
73 W. Monroe Street, Suite 302
Chicago, Illinois 60603

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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 and their right to petition the government guaranteed under the First Amendment, and their right to equal protection of the law guaranteed under the Fourteenth Amendment, by the constitutional qualifications for appointment to serve as a member of the new Independent Citizens Redistricting Commission created by the voters' approval of Proposal 18-2 in the last general election. In their Complaint and the Declarations accompanying their pending Motion for Preliminary Injunction, Plaintiffs have expressed a desire to serve on the new Commission and represented that they would apply to do so but-for the challenged restrictions, yet they ask this Court to invalidate the Commission on which they purportedly wish to serve, thus rendering it 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 was to create an Independent Citizens 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 proposed constitutional amendment was offered 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. *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 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. 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 requested that the operation of the new Commission be enjoined in its entirety, based upon their additional claim that the challenged restrictions are non-severable – 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 they 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 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 Plaintiffs alleged in their Complaint and the Declarations[1] 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.[3]

This Court should conclude, at the outset, that Plaintiffs lack standing to assert their claim 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 a generalized grievance shared by all who opposed the approval of Proposal 18-2. But even if it could be assumed that any of these Plaintiffs do have a genuine interest in serving on the Commission if their constitutional challenges should be resolved in a way that would allow them to serve, it is also important to recognize the limited scope of their constitutional objections. 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

[1] It is noteworthy that those declarations, represented as having been made pursuant to 28 U.S.C. § 1746, do not include the certification under penalty of perjury that the declarations made therein are true and correct, required by that provision.

[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).

[3] It is also noteworthy that Plaintiffs are represented in this matter by Attorney Eric Doster, who also appeared as counsel for the plaintiffs in last year's action seeking to prevent the submission of VNP's proposal to the voters. *See, Citizens Protecting Michigan's Constitution v. Secretary of State, supra,* 324 Mich. App. at 564.

redistricting or any other topic. Nor does it prevent any of them from freely associating or communicating with any person or entity, or from participation in the proceedings of the Commission to the same extent that any other persons are permitted to do so. The new constitutional language requires that all meetings of the Commission and all of its records be open to the public, and that all of its deliberations are to be conducted in public. Thus, 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 these 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.

The Plaintiffs' constitutional claims should be examined with the true scope of the alleged deprivation firmly in mind. When scrutinized in that light, it is apparent that the challenged restrictions do not impose any significant limitation upon Plaintiffs' right to express themselves, to associate with whomever they please, or to participate in the redistricting processes to the same extent as any other members of the public, and that the restrictions at issue 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 protected from 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 restrictions 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, 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, where Plaintiffs' claims could have been raised last November. In light of this unexplained delay, Plaintiffs' request for preliminary injunctive relief can also be properly denied on grounds of laches and unclean hands.

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 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 for appointment 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 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 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 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 with each of the two major political parties and those who are not affiliated with either of those parties. Article IV, § 6 (2)(d) . 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 the Commissioners from the remaining candidates from 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 it 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.

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."

LEGAL ARGUMENTS

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

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 a generalized grievance shared by all who 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).

Plaintiffs cannot establish standing in this matter for two 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. 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 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, and more importantly, the prayer for relief made in Plaintiffs' Complaint and their present Motion for Preliminary Injunction has shown that 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 none of the Plaintiffs are asserting an individualized grievance – that they are instead asserting, and seeking a remedy for, a generalized grievance 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)

The remedy sought in this matter cannot be seen as a remedy for the injury alleged, and it would actually *worsen* that injury. As it stands now, Plaintiffs' disqualifying conflicts of interest might expire in time for a subsequent redistricting cycle. But the relief they request would *permanently* foreclose them from serving on the Commission. Thus, Plaintiffs have themselves proven that they 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.

1) THE PLAINTIFFS HAVE NOT SHOWN THAT THEY ARE BEING DENIED THEIR RIGHTS OF FREE SPEECH AND ASSOCIATION OR THEIR RIGHT TO PETITION THE GOVERNMENT GUARANTEED UNDER THE FIRST AMENDMENT.

MICHIGAN HAS A CONSTITUTIONAL RIGHT TO STRUCTURE ITS GOVERNMENT, AND THE COMMISSION'S MEMBERSHIP QUALIFICATIONS WERE PROPERLY APPROVED BY ITS CITIZENS IN ACCORDANCE WITH THAT RIGHT.

Michigan has a constitutional right to structure its government, including the membership qualifications of the Commission tasked with drawing the districts from which its citizens elect their representatives. Its chosen membership qualifications—which exclude only those citizens with conflicts of interest, or the appearance of such conflicts—are in accord with the historical power of states to exclude conflicted governmental decisionmakers, and does not implicate, let alone violate, the First or Fourteenth Amendments. Plaintiffs' motion for a preliminary injunction should be denied.

In *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 925 (6th Cir. 1998), the Sixth Circuit affirmed the district court's rejection of First and Fourteenth Amendment challenges to the state constitutional amendment imposing term limits for state legislators approved by Michigan's voters in 1992. In so ruling, the Court explained that, "[a]s a sovereign, Michigan deserves deference in structuring its government." 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; 111 S.Ct. 2395; 115 L.Ed2d 410 (1991). Michigan's power to determine its own 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.*

A state's sovereign choices regarding the qualifications for important government 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*, *supra,* 501 U.S. at 460, quoting *Taylor v. Beckham*, 178 U.S. 548, 570-571; 20 S.Ct 890; 44 L.Ed 1187 (1900).

In *Citizens for Legislative Choice*, the Sixth Circuit explained that this standard is a "workable, deferential test for evaluating state decisions regarding their government structure," and that "under this framework, a court should uphold a qualification "unless the qualification is plainly prohibited by some other provision in the Constitution." 144 F.3d at 916. As the Sixth Circuit explained, this deferential standard accords with the Supreme Court's jurisprudence, including the Court's decision dismissing for "want of a substantial federal question" an appeal challenging West Virginia's gubernatorial term limits on First and Fourteenth Amendment grounds. *Id.*, citing *Moore v. McCartney*, 425 U.S. 946; 96 S.Ct. 1656 (1976) (Mem.). It is also consistent with cases invalidating qualifications based on invidious grounds, such as religious discrimination, *see McDaniel v. Paty*, 435 U.S. 618; 98 S.Ct.1322; 55 L.Ed.2d 593 (1978), or viewpoint discrimination, *see Bond v. Floyd*, 385 U.S. 116; 87 S.Ct 339; 17 L.Ed.2d 235 (1966). This standard requires the rejection of Plaintiffs' claims in this case.

PLAINTIFFS HAVE NO FIRST AMENDMENT INTEREST IN MEMBERSHIP ON THE COMMISSION.

Plaintiffs have no First Amendment right to qualify for Commission membership. State laws that disqualify those with conflicts of interest, or the appearance thereof, from participating in governmental decision making do not implicate the First Amendment. In *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117; 131 S.Ct. 2343; 180 L.Ed.2d 150 (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 with which they had a conflict of interest. Among the conflicts identified by the Nevada law were matters "'with respect to which the independence of judgment of a reasonable person . . . would be materially affected by' . . . 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.,* 564 U.S. 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 the strong presumption that the prohibition is constitutional." *Id.,* 564 U.S. at 122, quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 785; 122 S.Ct. 2528; 153 L.Ed.2d 694 (2002). 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; 117 S.Ct. 2365; 138 L.Ed.2d 914 (1997).

Both the House and Senate adopted recusal rules within fifteen years of the founding; the House's rule, adopted "within a week of that chamber's first achieving a quorum," provided that "[n]o member shall vote on any question, in event of which he is immediately and particularly interested." *Id.,* 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 there was none." *Id.,* 564 U.S. 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 case, 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 likewise noted that "[f]ederal conflict of interest rules applicable to judges 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.,* 564 U.S. at 124, 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"); and *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."). These historic laws accord with modern laws: "[t]oday, virtually every State has enacted some type of recusal

law, many of which . . . require public officials to abstain from voting on all matters presenting a conflict of interest." *Id.* 564 U.S. at 125.

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 126. "[A] legislator has no right to use official powers for expressive purposes." *Id.,* at 127.

In this case, Michigan's voters, by a supermajority vote, exercised their sovereign authority to exclude from the Commission those citizens most likely to have a conflict of interest, or the appearance thereof,[4] 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; 192 L.Ed.2d 2652 (2015) (brackets in original). The categories of excluded persons 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

[4] *Cf. Buckley v. Valeo*, 424 U.S. 1, 26; 96 S.Ct. 612; 46 L.Ed.2d 659 (1976) (noting that government interest in preventing "appearance of corruption" is "[o]f almost equal concern as the danger of actual quid pro quo arrangements" and sufficient to withstand First Amendment scrutiny).

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 119-120. And the categories of disqualified persons are viewpoint-neutral and apply to all persons with conflicts regardless of party. *See Id.,* 564 U.S. 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—redrawing district lines. There would be no purpose in permitting someone to be a commissioner but requiring their recusal from voting on the maps. Indeed, the Supreme Court cited statutes disqualifying conflicted persons from membership on commissions in reaching its decision that the First Amendment was inapplicable. *See Carrigan*, 546 U.S. at 124. Michigan's voters did not violate the First Amendment by seeking to guard against conflicts of interest, or the appearance thereof, in drawing the districts from which their representatives would be elected.

Disregarding this authority, Plaintiffs instead contend that Michigan cannot disqualify people with conflicts of interest from serving on the Commission because those conflicts relate to their connection to protected political activities, and thus the First Amendment prohibits their

exclusion from the Commission on the basis of those activities. For support, plaintiffs rely upon a line of cases invalidating patronage personnel decisions for low-level, nonpolicymaking governmental positions. PageID,71-74. (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62; 110 S.Ct. 2729; 111 L.Ed.2d 52 (1990); *Elrod v. Burns*, 427 U.S. 347; 96 S.Ct 2673; 49 L.Ed.2d 547 (1976)). Plaintiffs' reliance on these cases is misplaced.

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 political party in power—for "nonpolicymaking individuals [with] limited responsibility." 427 U.S. 347, 367 (1976). In reaching its decision, the *Elrod* Court noted that it was faced with resolving conflicting First Amendment interests: the right of political parties to engage in patronage employment to support their political activities versus the right of individual employees to associate freely. "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 between the competing First Amendment interests 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.*; *See also, Id.* at 372 ("There is [ ] a need to insure that policies which the electorate has sanctioned are effectively implemented."). The Court suggested that policymaking positions could include those "of broad scope" and where the employee "formulates plans for implementation of broad goals." *Id.* at 368.

The Court refined that exception four years later in *Branti v. Finkel*, 445 U.S. 507; 100 S.Ct. 1287; 63 L.Ed2d 574 (1980), 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. at 518. In *Rutan v. Republican Party of Illinois*, *supra,* the Court extended *Elrod*'s holding to "promotion, transfer, recall, and hiring decisions based on party affiliation." 497 U.S. at 79. In doing so, the Court reaffirmed the exception to the rule first stated in *Elrod* and refined in *Branti*: "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." *Id.* at 74. Applying these cases, Sixth Circuit has explained that the First Amendment does not prohibit taking political affiliation into account in "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.*

Contrary to Plaintiffs' contention, the Supreme Court's and the Sixth Circuit's patronage cases do not aid their claims in this case—tellingly, Plaintiffs entirely omit from their brief the Supreme Court's conclusion that personnel decisions for high-level policy positions may be based upon partisan considerations. This exception to the anti-patronage rule bars Plaintiffs' claims here. If policymaking positions can be limited to members of a given party, the membership on the Commission can be limited to persons who are not actively engaged in political activity in a manner that engenders conflicts of interests or the appearance thereof.

Certainly, the members of the Commission are high-level policymakers. The Michigan Constitution 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." Article IV § 6 (22) . The Commission has the sole power to decide the boundaries that govern how voters elect their representatives. *Id.* Each commissioner is empowered to create a proposed map for each type of district: congressional, state house, and state senate, *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) and (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) . These are plainly high-level policymaking powers, and nothing like the lower-level employees whose First Amendment claims were sustained in the Supreme Court's patronage cases.

If the First Amendment permits the government to prefer one partisan viewpoint over another in hiring high-level policymakers, *see, e.g.*, *Branti*, 445 U.S. at 518, it necessarily permits the government to prefer candidates who have avoided partisan politics altogether—equally disqualifying people regardless of their political viewpoints. 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. One of the policies that a supermajority of Michigan voters sanctioned was to "[p]rohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners,"[5] to ensure that the

[5] Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians* (2019), https://www.michigan.gov/documents/so/Official_Ballot_Wording_Prop_1802_632052_7.pdf.

maps drawn do "not provide a disproportionate advantage to any political party" and do "not favor or disfavor an incumbent elected official or a candidate." Mich. Const. art. IV, § 6 (13)(d) & (e) . The Commission falls within the policymaker exception to the patronage cases, and thus the First Amendment is not violated by Plaintiffs' exclusion from the Commission on account of their partisan political involvement or connections.

Moreover, there is considerable irony in Plaintiffs' reliance upon cases whose outcome was to *limit* the ability of the politically powerful to reshape the government to their liking. Here, Plaintiffs—whose conflicts of interest related to redistricting were among the evils Michigan voters sought to eliminate by adopting an independent Commission—seek to overrule a supermajority of Michigan voters and return the power to shape the government to the politically powerful. The Supreme Court's decisions curbing political patronage practices do not compel that result. Indeed, the guiding principle behind the Court's patronage decisions—preservation of a "meaningful system of democratic [and] . . . . representative government," *Elrod*, 427 U.S. at 369-70—requires that the Commission's membership qualifications be upheld. As the Supreme Court has acknowledged, "[p]artisan gerrymanders . . . [are incompatible] with democratic principles." *Arizona Indep. Redistricting Comm'n*, *supra,* 135 S.Ct. at 2658 (second bracket in original).

Although the Supreme Court has foreclosed the federal judiciary as an avenue to curb the ability of politicians to choose their voters, the Court cited the power of states to enact independent commissions as a remedy to the problem. In fact, the Supreme Court highlighted Michigan's Commission in particular—the very entity under attack by the Plaintiffs in this case. *See, Rucho v. Common Cause*, __ U.S.__ ; 139 S.Ct. 2484, 2507; 2014 L.Ed2d 931 (2019) ("One way to [restrict partisan gerrymandering] is by placing power to draw electoral districts

in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible . . . for creating and approving district maps for congressional and state legislative districts."). Michigan's citizens have a constitutional right to structure their sovereign government and choose the qualifications of their officeholders. *Citizens for Legislative Choice*, 144 F.3d at 925. They do not exceed that right by excluding from the Commission those citizens with a self-interest in thwarting, rather than promoting, a functioning representative democracy.

To the extent that the Supreme Court's patronage cases have any bearing here, it is to foreclose Plaintiffs' claims.

MICHIGAN HAS A COMPELLING GOVERNMENTAL INTEREST IN ENFORCING THE COMMISSION'S MEMBERSHIP QUALIFICATIONS.

Even if could be found that Plaintiffs have identified a cognizable First Amendment interest, that interest would be overcome by the state's compelling interest in enforcing the Commission's membership qualifications. Courts have routinely recognized that states and the federal government have compelling interests advanced by laws limiting government officials' political activities or precluding government service based on prior political activities. For example, in *Citizens for Legislative Choice*, the Sixth Circuit upheld Michigan's lifetime term limits for state legislators. 144 F.3d at 925. Michigan's constitutional amendment imposed a lifetime limit of three terms in the state house and two terms in the state senate. Mich. Const. Article IV § 54. As a result, the amendment disqualified citizens from further legislative service, and precluded voters from voting to keep those legislators in office, based upon the prior political activities of those legislators. The court nonetheless rejected the plaintiffs' First

Amendment challenge, noting "Michigan['s] . . . fundamental interest in structuring its government." *Id.* at 923. The Sixth Circuit accepted Michigan's asserted compelling interests:

> "Michigan asserts that term limits are necessary to maintain the integrity of the democratic system. Michigan asserts, among other interests, that lifetime term limits will foster electoral competition by reducing the advantages of incumbency and encouraging new candidates. According to Michigan, lifetime term limits will also enhance the lawmaking process by dislodging entrenched leaders, curbing special interest groups, and decreasing political careerism. We, of course, express no views on the wisdom of term limits, but we simply respect Michigan's views."

Id. (quotation marks omitted).

All of the same interests that the Sixth Circuit accepted as compelling in *Citizens for Legislative Choice* support the Commission's membership qualifications here. The exclusion of applicants who are officeholders, candidates, or those financially tied to officeholders and candidates is necessary to maintain the integrity of the electoral system, to ensure district lines that will foster competition, reduce incumbency protection in line-drawing, and encourage new candidates. It will likewise dislodge entrenched leaders by ensuring districts drawn based upon partisan fairness and without regard to incumbency and will thereby curb the power of special interest groups and prevent political careerism by those with an interest in staying in power. All of these compelling interests can only be advanced by excluding from the Commission those whose interests are advanced by drawing districts that benefit their own political and financial interests, rather than drawing districts that foster a functioning representative democracy. If Michigan has a constitutional interest in prohibiting—for life—further legislative service by individuals, it plainly has a constitutional interest in prohibiting those with political or financial ties to legislators from drawing the districts that will determine who gets elected.[6]

[6] Indeed, as the Sixth Circuit noted in *Citizens for Legislative Choice*, the Supreme Court dismissed an appeal in a case challenging, on First and Fourteenth Amendment grounds, West

Courts have likewise upheld state and federal laws prohibiting employees from engaging in partisan political activities. For example, the Hatch Act imposes a number of restrictions on federal employees related to partisan activities, including prohibiting them from holding partisan office. *See,* 5 U.S.C. § 7323(a)(3). The Supreme Court has held that the First Amendment does not preclude the Hatch Act's limitations. The Court endorsed the Hatch Act's "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; 93 S.Ct. 2880; 37 L.Ed2d 796 (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 "Government 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. The Court thus concluded that federal employees could be prohibited from engaging in a bevy of political activities, including,

> "organizing a political party or club; actively participating in fund-raising activities for a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternative or proxy to a political party convention. Our judgment is that neither the First Amendment

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Virginia's gubernatorial term limits, concluding that the case did not even present a substantial federal question. *See, Moore v. McCartney*, *supra.*

> nor any other provision of the Constitution invalidates a law barring this kind of partisan conduct by federal employees."

Id. at 556.

The Supreme Court has likewise upheld the ability of states to enact their own versions of the Hatch Act, *see Broadrick v. Oklahoma*, 413 U.S. 601; 98 S.Ct. 2908; 37 L.Ed.2d 830 (1973), and the Sixth Circuit has upheld the application of the Hatch Act to state employees whose agencies receive federal funds, *see Molina-Crespo v. U.S. Merit Systems Protection Bd.*, 547 F.3d 651 (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).[7] As the Sixth Circuit 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*, *supra,* 547 F.3d at 665, citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89; 98 S.Ct. 1407; 55 L.Ed.2d 707 (1978). ("Preserving the integrity of the electoral process; preventing corruption, and [sustaining] the active, alert responsibility of the

[7] The composition of government commissions is frequently limited in partisan terms, and those membership requirements are not considered to violate the First Amendment by excluding potential members on partisan grounds. The Federal Election Commission, for example, cannot have a majority of its positions filled by members of the same political party. *See,* 52 U.S.C. § 301016(a)(1). The Federal Trade Commission, 15 U.S.C. § 41, the Securities Exchange Commission, 28 U.S.C. § 78d, and the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b), for example, cannot have more than three of their five members be of the same political party. Similar requirements exist for various commissions established by the Michigan Constitution, which may not have one political party holding a majority of the seats. *See,* Mich. Const. Article II § 7 (Board of Canvassers); *Id.* Article II § 29 (Civil Rights Commission); *Id.* Article XI §5 (Civil Service Commission). The prior version of the Michigan redistricting commission, though invalidated by the Michigan Supreme Court on other grounds in 1982, likewise excluded from its membership officers of federal, state, or local governments and made commissioners ineligible for legislative service for a period of years following the enactment of the districting plan. *See,* Mich. Const. of 1963, Article IV § 6, as adopted in 1963.

individual citizen in a democracy for the wise conduct of government are interests of the highest importance.").

If Michigan can fire employees for engaging in partisan political activities without violating the First Amendment, then it necessarily follows that Michigan can disqualify those engaged (or financially dependent upon those engaged) in partisan political activities from serving on a Commission tasked with deciding the very structure of its representative democracy. The same interests that permit the Hatch Act likewise support the exclusion of those with a direct or indirectly political or pecuniary interest in districting.[8]

Finally, Plaintiffs contend that the Commission's membership qualifications are not adequately tailored because some people who are not excluded might hold even greater partisan beliefs than Plaintiffs, and that the Commission is not designed to be impartial because it includes "an amalgam of a variety of views across the political spectrum." Page ID.83-86. Plaintiffs' arguments are unpersuasive. Plaintiffs misunderstand the state's interest in excluding candidates, officeholders, and those financially tied to candidates and officeholders from service on the Commission. The purpose is not to identify and disqualify those people with the strongest ideological beliefs, but rather to identify and disqualify those with a direct or indirect personal political or financial interest in the outcome of the line-drawing. An officeholder's or candidate's job (or potential job) is on the line in redistricting—as are the jobs of their employees and the lobbyists hired based upon their relationships with those officeholders. Their family members are financially dependent upon them retaining districts likely to elect them. A

[8] In general, the government may regulate its employees' free speech interests to a greater extent than it can private citizens. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568; 88 S.Ct. 1731; 20 L.Ed2d 811 (1968); *Shirvell v. Dep't of Atty. Gen.*, 308 Mich. App. 702, 731; 866 N.W. 2d 478, 495-96 (2015).

regular voter may well be more ideologically liberal or conservative than these people and remain eligible to serve on the Commission, but that voter is substantially less likely to vote for maps that contravene the districting principles mandated by the Michigan Constitution in order to advance some personal pecuniary interest in determining district boundaries. For the same reason, plaintiffs' partiality argument is without merit. An "amalgam of a variety of views across the political spectrum" can be represented on the Commission while retaining impartiality with respect to *personal* political or pecuniary interests in the outcome of the districting.

2) THE PLAINTIFFS HAVE NOT SHOWN A DENIAL OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAW GUARANTEED UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Plaintiffs' equal protection challenge fails for much the same reasons that their First Amendment challenge fails. Plaintiffs rest their equal protection argument on their quibbles with various categories of people who are either permitted or disqualified from serving on the Commission. Plaintiffs note that those involved in partisan politics are excluded while those not so involved are not excluded. PageID.80. They likewise note that paid employees are excluded but volunteers are not. *Id.* They object to the reliance on registered lobbyists for the exclusion determination, the potential inclusion of employees of non-partisan candidates, and the failure to exclude Michigan Supreme Court justices from eligibility. *Id.*

These arguments do not implicate a cognizable equal protection claim. They do not involve any protected class. Nor are the categories of people subject to Plaintiffs' comparisons "similar in 'all relevant respects,'" *Paterek v. Vill. of Armada, Mich.*, 801 F.3d 630, 650 (6th Cir. 2015) (quoting *United States v. Green*, 654 F.3d 637, 651 (6th Cir. 2011)), so as to trigger the Equal Protection Clause. The excluded persons have a direct or indirect political or

pecuniary interest in districting, while others do not. For example, volunteers are not similarly situated to employees; their paychecks do not depend upon their preferred candidates prevailing. Michigan Supreme Court justices are not similarly situated, because they are elected in nonpartisan elections and are "ineligible to be nominated for or elected to an elective office other than a judicial office during the period of [ ] service and for one year thereafter." Mich. Const. Article IV § 21. They thus lack the same personal or pecuniary conflict that the excluded persons have. None of the differences that plaintiffs cite implicate the Equal Protection Clause of the Constitution, and none is sufficient—let alone "*plainly*" so—to overcome the great deference "Michigan deserves [ ] in structuring its government" and "'determin[ing] the qualifications of [its] most important government officials.'" *Citizens for Legislative Choice*, 144 F.3d at 925, quoting *Gregory*, *supra,* 501 U.S. at 463) (emphasis added).[9]

Plaintiffs' constitutional claims are without merit, and their request for a preliminary and permanent injunction should therefore be denied.

3) THE PLAINTIFFS HAVE ERRONEOUSLY IGNORED THE EXISTENCE AND EFFECT OF THE SEVERABILITY CLAUSE NOW INCLUDED IN ARTICLE IV, § 6.

As the proposed remedy for their allegedly improper exclusion from service on the new Independent Redistricting Commission, the Plaintiffs have asked that the new Commission be declared unconstitutional and invalid, and that the Secretary of State and her employees and agents be preliminarily and then permanently enjoined from administering or preparing for selection of commissioners to serve on the Commission. In other words, the Plaintiffs are

[9] Courts routinely reject underinclusiveness arguments like those raised by Plaintiffs so long as the distinction is not "the result of invidious discrimination." *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 576 (6th Cir. 2002) (citing *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489; 75 S.Ct. 461; 99 L.Ed2d 563 (1955), for proposition that legislature may properly "take one step at a time" in making reform).

asking to have the use of the new Commission scrapped in its entirety. Plaintiffs have contended, unpersuasively, that this result is required because the challenged provisions are un-severable. This argument should not occupy the Court's attention for long because it inexplicably ignores the existence and effect of the severability clause now included in Article IV, § 6 (20) .

As previously discussed, that severability clause provides, in pertinent part, that:

> "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."

It is difficult to imagine how the will of the people could have been expressed with greater clarity. As the unequivocal language states, it was their preference and directive that any provision of § 6 found to be in conflict with the U.S. Constitution or federal law be considered severable, and that all remaining portions be "implemented to the maximum extent that the United States constitution and federal law permit."

Plaintiffs' discussion of cases addressing the question of when legislative enactments may be considered severable are unhelpful because it is a constitutional provision that is being challenged in this case. Plaintiffs' reliance upon *In re Apportionment of State Legislature – 1982,* 413 Mich. 96; 321 N.W.2d 565 (1982), is also misplaced. In that case, which addressed Article IV, § 6 as originally approved by the people in 1963, there was no severability clause that could be applied to the original constitutional language, and the Court was unable to assume that the people would have voted to approve the proposed Constitution without the highly

significant provisions held unconstitutional by that decision.[10] Plaintiffs' citation of *Lucas v. Forty-Fourth General Assembly,* 377 U.S. 713; 84 S.Ct. 1459; 12 L.Ed.2d 632 (1964) is equally unhelpful in light of the Court's observation 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." 377 U.S. at 735.

The new constitutional language of Const 1963, Article IV, § 6 includes a severability clause, which the people voted to approve, so there is no uncertainty as to what the people intended when they voted to approve the constitutional language in question, as there was in 1982 with respect to the original language establishing the original Redistricting Commission. By their overwhelming vote to approve Proposal 18-2, the people have clearly expressed their preference and directive that any provision of § 6 found to be in conflict with the U.S. Constitution or federal law be considered severable, and that all remaining portions be "implemented to the maximum extent that the United States constitution and federal law permit." This being the case, there is no basis for Plaintiffs' present unreasonable suggestion that the new Commission must be scrapped in its entirety so that the Legislature may regain its control of the redistricting function. That is not what the people intended, and thus, it would be wholly inappropriate to disregard their will by granting the relief requested. If the Court should ultimately determine that one of more of the challenged restrictions runs afoul of constitutional

[10] The new provisions created by the approval of VNP's ballot proposal are similar to the original provisions of Article IV, § 6, which provided for apportionment of the state Senate and House of Representatives districts by a politically-balanced Redistricting Commission. That Commission was not utilized for apportionment of Michigan's Senate and House districts after 1972 because the Supreme Court's decision in *In re Apportionment of State Legislature* held that the constitutionally prescribed use of weighted land area/population formulae violated the Equal Protection Clause of the U.S. Constitution, and that the invalid provisions were not severable because it could not assume that the people would have voted to approve the proposed Constitution without the highly significant provisions later held unconstitutional.

protections, it can and should prescribe an appropriately limited remedy which may then be properly applied in accordance with the new severability provision.

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

With regard to irreparable harm, Plaintiffs erroneously contend that "once the makeup of the [Independent Citizens Redistricting] Commission is finalized," their harms "will become" irreparable. PageID.87. As explained above, Plaintiffs are wrong. Their constitutional rights will not be violated by the creation of the Independent Citizens Redistricting Commission. However, for purposes of considering Plaintiffs' argument regarding irreparable harm, it must be noted that even Plaintiffs do not claim that they are currently suffering irreparable harm or that irreparable harm is imminent. Rather, they contend that the alleged harm is destined to become irreparable at some point next year when the Redistricting Commission is eventually finalized. In making this contention, Plaintiffs overlook the obvious – namely, that this Court has ample time to resolve their constitutional claims 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." *Id*. Consequently, no citizen will have the ability to 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 will not be "finalized" until September

1, 2020, when the members of the Commission are randomly selected from the pools of applicants. *Id*., §6 (2)(f).

Stated otherwise, 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 might 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. Instead, it presents questions of law. A single round of briefing is likely all that is required. 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 ever arises.

Certainly, Plaintiffs do not, and cannot, 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 Michigan's Constitution. In fact, whether or not the Secretary of State continues preparing the applications while the Court decides this case will have no impact whatsoever on Plaintiffs' rights. If Plaintiffs are eventually successful on the merits (and that is highly unlikely), then the Court can easily order the Secretary of State to stop taking actions to establish the Commission at that time. There is no valid reason to short-circuit the process now. *Sampson v. Murray*, 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 injunction, 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,

Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Intervenor-Defendant
Count MI Vote, d/b/a Voters Not Politicians

By: */s/ Graham K. Crabtree*
Peter D. Houk (P15155)
Graham K. Crabtree (P31590)
Jonathan E. Raven (P25390)
Ryan K. Kauffman (P65357)
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

and

Paul M. Smith
Mark Gaber
Campaign Legal Center
1101 14th Street N.W., Suite 400
Washington D.C. 20005

Annabelle Harless
Campaign Legal Center
73 W. Monroe Street, Suite 302
Chicago, Illinois 60603

Dated: September 19, 2019

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 10,565 words which is less than the 10,800-word limit for a brief filed in support of a dispositive motion.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
Attorneys for Proposed Intervenor-Defendant
Count MI Vote d/b/a Voters Not Politicians

Dated: September 19, 2019

By: */s/Graham K. Crabtree*

Peter D. Houk (P15155)
Jonathan E. Raven (P25390)
Graham K. Crabtree (P31590)
Ryan K. Kauffman (P65357)
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

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,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
Attorneys for Intervenor-Defendant
Count MI Vote d/b/a Voters Not Politicians

Dated: September 19, 2019

By: */s/ Graham K. Crabtree*
Graham K. Crabtree (P31590)
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800