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' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(c)
(DOCKET NO. 1:19-cv-669)

ORAL ARGUMENT REQUESTED

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Respectfully submitted,

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I. THE INDIVIDUAL PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR LACK OF STANDING.

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

The arguments and authorities made and cited in support of VNP's claim that the individual Plaintiffs lack standing in this matter have been set forth at length in its prior briefing in this matter and its Reply Brief filed in support of its dispositive motion in the consolidated *Daunt* case. VNP will not burden the Court with a repetition of all that been said with respect this issue in those briefs, which it will incorporate by reference, but it does wish to respond to these Plaintiffs' argument that their challenges amount to more than a statement of generalized grievances.

As previously discussed, the individual Plaintiffs have asserted that they wish to serve on the new Commission and are aggrieved by their inability to do so, although the sincerity of that claim seems doubtful in light of the relief that they seek, which would prevent any implementation or use of the Commission. Plaintiffs have not retreated from their request that the new Redistricting Commission be invalidated in its entirety in any meaningful way, and they have continued to vigorously assert that the challenged qualifications for service cannot be severed from the new constitutional provisions in spite of the plain and unambiguous

constitutional language to the contrary.[1] Thus, it is appropriate to note, once again, that these Plaintiffs are not really seeking a remedy that would allow them an opportunity to serve on the new Commission without limitation. Plaintiffs' arguments and prayer for relief have shown that they are instead 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 individual 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.

Plaintiffs have maintained that this is not so, and their argument appears to be based upon the premise that their objections are more particularized than the general grievance felt by those who were opposed to the adoption of Proposal 18-2 because they belong to a smaller group of persons who are actually excluded from eligibility for service by the challenged restrictions. Although this argument could support a suggestion that these Plaintiffs had suffered an injury sufficient to confer standing if they were asking to have the challenged restrictions eliminated or limited so as to allow them to serve, the relief that they continue to seek would prevent anyone from serving on the Commission.

[1] In their responsive brief, these Plaintiffs have now stated, for the first time, that they are requesting an equal opportunity to serve on the Commission if the Court should find offending provisions severable, citing their Complaint's customary boilerplate request for "such other and further relief as the Court deems equitable and just" as support for their suggestion that this was intended as an alternative request for that relief all along. (Lead case, ECF No. 54, PageID.44-45) This newly presented suggestion rings hollow in light of the Plaintiffs' vigorously continued assertion that the challenged provisions are not severable, and that all implementation and use of the Commission should therefore be enjoined. Plaintiffs' argument that the challenged provisions are not severable is meritless for the reasons discussed in VNP's briefs previously filed.

Plaintiffs have overlooked the fact that the character of the grievance must be evaluated in light of the relief requested when evaluating whether it is based upon a particularized injury that is sufficient to confer standing, or is instead the expression of a generalized grievance that is not. This, of course, is the very essence of the "redressability" requirement for standing previously discussed – that there is "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *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); *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)

VNP acknowledges that a commonly shared injury is not *per se* a generalized grievance, and that a claim is not a generalized grievance *solely* because the injury is shared in substantially equal measure by a large group of citizens, as Plaintiffs have asserted on page 40 of their responsive brief. (Lead case, ECF No. 54, PageID.40) But Plaintiffs' discussion of decisions finding that a particular challenge was or was not an expression of a generalized grievance in factually dissimilar cases is not helpful. Although other persons dissatisfied with the passage of proposal 18-2 could certainly voice the same general objections, the federal court is not the proper venue for that discussion because the people of Michigan have expressed their preference at the polls, and those opposed to the adoption of the proposed amendment have not prevailed. The question that the Court must ask is whether the objections voiced by the Plaintiffs in this case are any different. VNP submits that they are not.

When the individual Plaintiffs' alleged injury is evaluated in light of the relief that they have sought, and continue to seek, it becomes clear that their objection ***is*** a generalized grievance, notwithstanding their arguments to the contrary, because their ultimate objective is

precisely the same as the objective sought by every voter who opposed the adoption of the proposed constitutional amendment at the polls – to preserve the prior *status quo* by preventing the use of an independent Redistricting Commission for establishment of election districts.

In their responsive brief, Plaintiffs have claimed that they have standing to challenge the new constitutional provision limiting the Commissioners' ability to discuss redistricting matters outside of public hearings of the Commission, based upon their argument that Plaintiff MRP has associational standing to assert that challenge. In support of that argument, Plaintiffs contend they have standing for Count IV of their complaint because "[i]t is undisputed that four Commissioners will be MRP members or affiliates." MRP Br., PageID.776. Not so. The Commission will have four commissioners who have self-identified as being affiliated with the Republican party—not four commissioners who necessarily are *members* of MRP in the organizational sense. The vast majority of voters are not official members of a political party, even if they identify with parties. For MRP to have associational standing to assert this challenge on behalf of its members, it must prove that the affected individuals are actual members—not just like-minded members of the public. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (noting affidavits proffered by affected members). MRP merely speculates that one of its members will be selected—such speculation is not enough to invoke this Court's jurisdiction. And the individual Plaintiffs do not have standing to raise this challenge in their own right for the reasons previously discussed. Thus, none of the Plaintiffs have standing to challenge the requirement that commissioners discuss redistricting matters only at public meetings.

II. PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT CLAIMS FAIL AS A MATTER OF LAW.

Plaintiffs' First and Fourteenth Amendment claims fail as a matter of law. Plaintiffs contend that their facial challenge is an overbreadth challenge. MRP Br., PageID.737. As the Supreme Court has explained, the facial invalidation of a law on overbreadth grounds is "strong medicine" and only applies where "a 'substantial number' of [a law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). Plaintiffs do not establish a single application of Michigan's Commission law that is unconstitutional, let alone a "substantial number" of applications. Plaintiffs' opposition brief largely fails to engage with VNP's arguments in favor of dismissal—ignoring entire arguments altogether and failing to discuss controlling case law. Instead, Plaintiffs' brief—which spans 47 pages—largely repeats (sometimes verbatim) the arguments they set forth in their preliminary injunction motion, and stitches together a series of quotes from other areas of First Amendment jurisprudence that have no bearing on this matter. The First Amendment does not require that Plaintiffs and their preferred politicians control redistricting.

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

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

The commissioner selection process does not violate MRP's freedom of association. As explained in VNP's opposition brief, PageID.504-509, the Supreme Court's decision in *Washington State Grange* forecloses MRP's contention that the commissioner selection process cause MRP an associational injury because such claims are limited to processes regulating the

nomination of a party's candidate for elected office. In *Washington State Grange*, the Court held that a state primary election system in which candidates self-identified as members of political parties did not violate those parties' associational rights because the purpose of the primary was not to select the nominees of the parties, but rather to winnow the field of candidates for the general election. 552 U.S. at 443. That was so even though "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." *Id.* at 447. The Court concluded that "[t]here 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," particularly given that it was "the voters . . . themselves, rather than their elected representatives, who enacted [the law]." *Id.* at 454, 458-59.

MRP offers no response. Rather than engage with VNP's argument, MRP mentions *Washington State Grange* just *once* in its entire brief, in its recitation of the standard for overbreadth challenges. *See* MRP Br., PageID.737. MRP disregards the Court's holding that associational claims fail where the challenged process is not intended to identify a party's nominee, and its approval under those circumstances of self-selection of party affiliation by candidates. *Washington State Grange* controls the outcome here, yet MRP entirely ignores it. It has thus waived any argument that *Washington State Grange* does not require dismissal of its associational claim. *See Garmou v. Kondaur Capital Corp.*, 2016 WL 3549356, *7 (E.D. Mich. 2016) ("It is well understood . . . that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those

arguments that the plaintiff failed to address as conceded.") (quoting *Rouse v. Caruso*, 2011 WL 918327, *18 (E.D. Mich. 2011)).

MRP objects again to the fact that legislative leaders of the other party may strike prospective commissioners who affiliate with the Republican Party, MRP Br., PageID.743-44, but this argument is without merit. By striking Republican-affiliated commissioner candidates, the Democratic legislative leaders are not injuring MRP's associational rights. The candidates are not nominees of MRP, they are just self-affiliating citizens. If MRP wishes to associate with them, they may do so outside the commissioner selection process, just as the Washington State Republican Party was free to associate with its preferred candidates outside the state-run primary. *Wash. State Grange*, 552 U.S. at 453. The striking procedure cannot violate MRP's associational rights because MRP has no associational right implicated by the selection process. Moreover, governmental leaders of one party frequently select—or strike—potential candidates for bipartisan governmental bodies. No one contends that a Republican Governor violates the Democratic Party's associational rights by choosing Democratic appointees for bipartisan commissions, nor would their associational rights be implicated if Republicans in the legislature rejected Democratic appointees to such commissions.

MRP does not engage with any of VNP's arguments on its associational claims, and it has thus waived any response. The Supreme Court's holding in *Washington State Grange* requires dismissal of MRP's associational claim.

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

The Commission's qualification requirements do not violate the individual Plaintiffs' freedom of association or deny them equal protection. VNP incorporates here its arguments in

its reply brief filed in the *Daunt* matter, which likewise support dismissal of the individual Plaintiffs' claims in this case.

In their opposition brief, the individual Plaintiffs acknowledge that courts have routinely upheld limitations on government employees' political activities. *See* MRP Br., PageID.746, but claim that this case is different because the disqualification rules constitute a "total bar" and consider prior activities, rather than just limiting conduct during the current term of office. *Id.* PageID 745-46. The individual Plaintiffs are mistaken. Courts have upheld disqualification rules that are based on *prior* political activity. For example, the Supreme Court and the Sixth Circuit have held that it is not an unconstitutional condition on a potential government employee's free speech rights to deny employment in policymaker roles based on prior partisan activities and affiliation. *See Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Sowards v. Loudon Cnty., Tenn.*, 203 F.3d 426, 436 (6th Cir. 2000). This exception—addressed nowhere in the MRP or Daunt Plaintiffs' briefs—despite being a central argument in VNP's dismissal motion—plainly applies here and requires dismissal of plaintiffs' claims. Likewise, the Sixth Circuit has held that a person can be permanently disqualified from elective office based on prior terms of such office. *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 925 (6th Cir. 1998). Just as these cases foreclose the Daunt Plaintiffs' free speech claims, they likewise foreclose the MRP individual Plaintiffs' associational claim.

Because the individual Plaintiffs have no associational interest that is injured, their tailoring arguments regarding the conflict of interest provisions, MRP Br., PageID.748-50, are without merit. Although the individual Plaintiffs take issue with the disqualification of family members, such a rule is necessary to guard against conflicts of interest, or the appearance thereof, because family members may likely—or would likely be perceived to—have a

pecuniary interest in the job prospects of those whose livelihood is determined by the district lines. Although the individual plaintiffs contend only those family members who *actually* are financially dependent should be disqualified, *id.* PageID.749-50, Michigan may avoid the *appearance* of a conflict of interest, *see Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (noting government's interest in avoiding "appearance of corruption"), and the public reasonably could believe that family members might gain a present or future financial benefit from a family member's pecuniary interest in the districting process.

For these reasons and those outlined in VNP's reply brief filed in the *Daunt* case, the individual Plaintiffs' associational claim should be dismissed.

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

The provisions governing the composition of the Commission and regulating its activities do not violate Plaintiffs' speech rights or deny them equal protection. Plaintiffs' contention that the voters of Michigan violated the First Amendment by choosing to have five unaffiliated commissioners, and eight commissioners split equally between the two major parties, is without merit. So too is their argument that it violates the First Amendment to preclude commissioners from discussing redistricting matters outside public meetings.

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

The Commission's allocation of seats does not constitute viewpoint discrimination in violation of the First Amendment by allocating five seats to those unaffiliated with the two major parties and four seats each to the major parties. As VNP explained in its opening brief, Plaintiffs are mistaken in (1) characterizing the five unaffiliated commissioners as a monolithic

bloc, (2) characterizing the role of commissioners as advocating on behalf of particular partisan viewpoints, (3) challenging commission structures—summarily affirmed in the past by the Supreme Court—that allocate seats to parties, and (4) challenging the voters' choice—a choice they exercise in every election that is held—of how to allocate power among affiliates of various parties. *See* VNP Br., PageID.513-16.

Plaintiffs contend they are not presuming that the unaffiliated commissioners will be a monolithic bloc because "[w]hat distinguishes the third class of applicants is not the identity of the minor party, if any, with which the applicant affiliates—it is that the applicants do not affiliate with either major party." MRP Br., PageID.755 (emphasis omitted). But this simply rephrases VNP's argument. The third category is equally open to anyone not affiliated with the major parties, which will necessarily include a diverse array of Michiganders, including, *e.g.*, members of the Green Party, the Libertarian Party, the Constitution Party, or no party at all. The fact that they do not affiliate with either of the major parties may be the *only* thing that unites them. So it is speculative at best, and more likely flat wrong, for MRP to contend that there will be some other group of commissioners with more seats than those allocated to either major party. There will instead be eight commissioners affiliated with the major parties, and five who represent a panoply of everyone else.

MRP acknowledges that commissioners have no First Amendment right in casting a vote on the Commission, but relies upon a concurring opinion from *Carrigan* to contend that they nonetheless have a First Amendment interest in how the commissioner seats are allocated because of speech interests on the Commission outside of voting on adopting plans. *See* MRP Br., PageID.756. But nothing about the allocation of seats on the Commission affects any potential ancillary speech rights of commissioners. And nor is the Commission—with its

singular purpose of adopting final districting plans—like a typical legislative body, tasked with voting on hundreds or thousands of matters and engaging in constituent services.

Moreover, if it somehow violates the First Amendment for the voters to allocate the number of seats they wish to be controlled by those affiliated with various viewpoints, then MRP's suggestion that this harm could be avoided by allocating equal numbers of seats to each major party makes no sense. Under MRP's reasoning, this would also violate the free speech rights of those unaffiliated with either major party.

The First Amendment does not require MRP's favored commissioners to hold 50% or more of the commissioner seats. The voters of Michigan have a First Amendment right to select how many commissioner seats to allocate to whichever parties they choose—and that is exactly what they did.

Nor does the allocation of seats violate the Equal Protection Clause. MRP acknowledges that a host of federal and state commissions permit one political party to hold a majority of seats, *see* MRP Br., PageID.768-69, but contends these are all different because they merely *permit*, rather than "guarantee," that one party will hold a majority of the seats. MRP's argument is misplaced. First, as explained above, there is no guarantee at all that there will be five unaffiliated commissioners with similar viewpoints forming a plurality. Indeed, that is highly unlikely. The premise of MRP's argument is therefore misplaced. Second, MRP offers no explanation for why it matters, as a matter of constitutional law, whether a party is guaranteed, or merely potentially capable, of having a majority of seats on a commission. Most federal and state commissions *in fact* have a majority of members belonging to a single political party, and none has ever been deemed unconstitutional on that basis. Here, *no party* has a majority of the Commission's thirteen seats.

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

The provision restricting commissioners from discussing redistricting matters outside of public meetings does not violate the First Amendment. First, as discussed above, Plaintiffs have no standing to raise this speculative claim—only those actually selected as commissioners could raise such a claim. Second, as VNP explained in its opening brief, courts have upheld similar restrictions preventing government officials from discussing public matters in private. *See Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012). The Fifth Circuit's decision in *Asgeirsson* is squarely on point, yet MRP attempts to distinguish it because "[t]he Amendment's regulation does not purport to apply to discussions regarding any business or decisions of the Commission, but to 'redistricting matters' only." MRP Br., PageID.758. In *Asgeirsson*, the court was considering the Texas Open Meetings Act, which applies generally to governmental bodies. It prohibits private discussions of "public business or public policy over which the governmental body has supervision or control." 696 F.3d at 458.

MRP's effort to distinguish *Asgeirsson* is based on semantics, and is without merit. The Commission has only *one* matter of "public business or public policy over which [it] . . . has supervision or control," *id.*—redistricting. It could be worded exactly like the law in *Asgeirsson*, and it would regulate the exact same set of speech. And MRP's suggestion that a broader wording—which could arguably sweep in *more* speech to its restriction—would be *better* is odd.

As VNP explained in its opening brief, Michigan's interests in ensuring that redistricting matters are discussed only at public meeting is strong. *See* VNP Br., PageID.29-30. Moreover, MRP wrongly contends that strict scrutiny applies to this time, place, and manner restriction in

the context of government employment. Rather, in the context of government employment, courts apply the *Pickering* balancing test. *See, e.g. Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing to *Pickering*) ("The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) ("[W]here a government employer takes adverse action on account of an employee or service provider's right of free speech . . . we apply the balancing test from *Pickering*."); *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968).

Under the *Pickering* balancing test, courts must "seek 'a balance between the interests of the [employee], as a citizen'" engaging in otherwise protected speech, and "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568).[2] This balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id*. at 150; *see also Shirvell v. Dep't of Atty. Gen.*, 308 Mich. App. 702, 737 (Mich. Ct. App. 2015) (asserting that "it is sufficient if the government employer can show a reasonable likelihood that the speech may lead to" adverse effects such as whether the speech in question might "undermine[] a legitimate goal or mission of the employer" or "impede[] the performance of the speaker's duties").

Michigan's interest in ensuring transparency and preventing improper motives from animating the selection of which precincts to include in which districts, far outweighs whatever

[2] Plaintiffs ought to be aware that the *Pickering* balancing test applies in cases such as these given that the Supreme Court's articulation of that standard in *Connick* came in the sentence directly following one cited by Plaintiffs in their opposition brief. *See* Daunt Br., PageID.824.

interest commissioners or Commission staff might have in discussing redistricting matters outside public meetings of the Commission.

RELIEF

WHEREFORE, Intervenor-Defendant Count MI Vote d/b/a Voters Not Politicians respectfully requests that this Honorable Court dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) with respect to the individual Plaintiffs, and that upon consideration of Plaintiffs' constitutional challenges, the Court also grant a final judgment in favor of the Defendant and Intervenor-Defendant on the pleadings against all of the Plaintiffs pursuant to Fed. R. Civ. P. 12(c).

Respectfully submitted,

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Dated: October 10, 2019

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CERTIFICATE OF COMPLIANCE

This document was prepared using Microsoft Word. The word count for Intervenor-Defendant's Reply Brief in Support of its Motion to Dismiss as provided by that software is 4,049 words which is less than the 4,300-word limit for a reply brief filed in support of a dispositive motion.

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

Respectfully submitted,

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