UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al,

Plaintiffs,

v

JOCELYN BENSON,

Defendant,

COUNT MI VOTE (d/b/a Voters Not Politicians),

Intervening-Defendant.

No. 1:19-cv-00614
(Lead)

HON. JANET T. NEFF

MAG. ELLEN S. CARMODY

MICHIGAN REPUBLICAN PARTY, et al,

Plaintiffs,

v

JOCELYN BENSON,

Defendant,

COUNT MI VOTE (d/b/a Voters Not Politicians),

Intervenor-Defendant.

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

HON. JANET T. NEFF

MAG. ELLEN S. CARMODY

John J. Bursch (P57679)
Attorney for Plaintiffs Daunt et al
9339 Cherry Valley SE, #78
Caledonia, Michigan 49316
616.450.4235

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Eric E. Doster (P41782)
Attorney for Plaintiffs
2145 Commons Pkwy
Okemos, Michigan 48864
517.977.0147

Graham Crabtree (P31590)
Attorney for Voters Not Politicians
123 W. Allegan, Ste 1000
Lansing, Michigan 48933
517.377.0895

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Constitutional Provisions

DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S REPLY IN SUPPORT OF HER MOTION TO DISMISS

A. The Amendment's self-affiliation process is constitutional.

MRP's argument is presented as though they had binding authority that controls the outcome of this case, when the reality is that none of the cases they cite are on point or compel a particular outcome in this case. MRP continues to rely on *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), without really addressing the critical distinction that those cases dealt with *nominees* for partisan political office that would go on to represent the party in a subsequent election. There is a considerable and essential difference between a party's nominee for public office, and a voter who simply affiliates themselves with one of the parties.

Notably, MRP also cites to *LaRouche v. Fowler*, 152 F.3d 974, 996 (D.C. Cir. 1998) for the proposition that, "[t]he Party's ability to define who is a 'bona fide Democrat' is nothing less than the Party's ability to define itself." MRP's citation for this premise encapsulates their fundamental misunderstanding that underlies their claim: nothing about the Amendment or the Commission has anything to do with who is or who is not "bona fide" anything. Commissioners are not chosen to advocate for public policy, or to defend party platforms. They are not there to be champions for Republican or Democratic values. Commissioners' positions on the political issues of the day are categorically irrelevant to their service on the Commission. Their only function is to decide the boundaries of districts within which legislators will seek to be elected, and to draw a fair map. The fact that the

Plaintiffs appear to believe that this function is so intrinsic to the ideologies of the major parties that it can only be done by hand-picked party operatives does much to confirm many of the rationales advanced in support of the Amendment.

Again, it bears repeating that there is there is no such office as "Republican Commissioner," and the four Republican-affiliated Commission positions are not even required to be members of MRP. They need only attest, under oath, that they affiliate themselves with one of the two major parties, or neither of them. The purpose of declaring an affiliation is not to name themselves champions of a party's ideals—merely that their biases and preferences be known so that the balance of the Commission will not be randomly skewed in favor of a party. MRP is not being required to adopt or accept commissioners as party members or representatives, and the commissioners need not be recognized or imputed to represent any party. Nothing about the process provided in the Amendment impugns any right of association under the First Amendment.

Because Commissioners are not partisan offices and have no role in championing party ideals, *Jones* and *Reed* are inapt and offer little instruction on the outcome of this case. Significantly, the United States Supreme Court has already rejected extending the *Jones* decision to situations that do not involve party nominees. In *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 453 (2008), the Supreme Court rejected a challenge to a blanket primary that was essentially the same used in *Jones,* for the nomination of *non*-partisan candidates.

The plaintiffs there raised a similar "right to association" claim as Plaintiffs raise here, but the Supreme Court held:

> The flaw in this argument is that, unlike the California primary, the I-872 primary **does not, by its terms, choose parties' nominees**. The essence of nomination--the choice of a party representative--does not occur under I-872. **The law never refers to the candidates as nominees of any party, nor does it treat them as such.**
>
> * * *
>
> Respondents counter that, even if the I-872 primary does not actually choose parties' nominees, it nevertheless burdens their associational rights because voters will assume that candidates on the general election ballot are the nominees of their preferred parties. This brings us to the heart of respondents' case--and to the fatal flaw in their argument. At bottom, respondents' objection to I-872 is that voters will be confused by candidates' party-preference designations. Respondents' arguments are largely variations on this theme. Thus, they argue that even if voters do not assume that candidates on the general election ballot are the nominees of their parties, they will at least assume that the parties associate with, and approve of, them. This, they say, compels them to associate with candidates they do not endorse, alters the messages they wish to convey, and forces them to engage in counterspeech to disassociate themselves from the candidates and their positions on the issues.
>
> We reject each of these contentions for the same reason: They all depend, not on any facial requirement of I-872, but on the possibility that voters will be confused as to the meaning of the party-preference designation. But respondents' assertion that voters will misinterpret the party-preference designation is sheer speculation. It "depends upon the belief that voters can be 'misled' by party labels. But '[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.'" **There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate.** [Emphasis added, citations omitted].

Id. Likewise, MRP's challenge to the self-affiliation of commission applicants is also, at its core, premised upon a misplaced fear that the public will be confused by

the self-affiliation of the Commissioners. As a result, MRP's arguments fail for the same reason the arguments in *Washington State Grange* failed. Like the Washington statute discussed by the Supreme Court, Michigan's constitutional Amendment does not refer to Commissioners as party nominees, and they are not treated as such. Because the Supreme Court has already held that political parties' associational rights are not infringed by selection processes that do not involve choosing a party's nominees, or by a person's self-identification of political preferences, Plaintiff MRP's claims are contrary to law and must be dismissed.

MRP next takes issue with the ability of Democratic legislators to strike Republican-affiliating applicants. Again, this argument is expressly premised upon the belief that Commissioners will be party standard-bearers, which they are not. Consequently, the use of strikes by the legislative officers of the opposing party has nothing to do with the ability of a party to choose their nominees for partisan offices or to engage in political association.

It also warrants some discussion that, while the rationale for striking an applicant is not limited or prescribed by the Amendment, it would be strange for a strike to be premised upon an applicant's ideological stances on political issues rather than their ability to fulfill their duties in drawing legislative districts. Commissioners are drawing map lines, not passing legislation. An applicant could have views that are abhorrent to the opposing party, but still be rational and open to reasoned arguments about district boundaries. In other words, it is possible for an applicant to both have strongly-held partisan beliefs *and* desire electoral

districts that are not driven by partisan gerrymandering. And in any case, the Commission *must* include four members who self-affiliate as Republicans regardless of how Democratic legislators use their strikes.

The fact than an applicant might be perceived as "too" Republican, as phrased by MRP in their response (R.54, PageID 743), would be a waste of a strike where that applicant would otherwise be a potential vote for a map that both parties could accept—especially without knowing the identity of the substitute. There is no apparent advantage to be gained by the opposing party through striking an applicant for being "too" much an adherent of a party's ideological positions. As a result, MRP's hypothetical offers little reason to invalidate the will of the Michigan electorate as expressed through their adopting of the Amendment.

B. The categories of persons excluded from Commission eligibility are constitutional.

The individual Plaintiffs in these cases are the type of political insiders that the people of Michigan voted to exclude from public service on the Commission. And tellingly, not one of the Plaintiffs declared that—if selected to serve on the Commission—he or she would or could "perform his or her duties in a manner that is impartial" and that would "reinforce [ ] public confidence in the integrity of the redistricting process." Const. 1963, Art. 4, § 6(10). Plaintiffs do not even appear to dispute that their service as elected officials, party leaders, lobbyists, employees, and the like, would raise a conflict of interest with their service on the Commission. This is troubling.

As the Supreme Court has observed, conflict of interest laws are "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 562 (1961). Thus, federal and state governments "appropriately enact[ ] prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the [government]." *Crandon v. United States*, 494 U.S. 152, 164-65 (1990). Laws "designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public's confidence in the integrity" of government service. *Id.*

Members of the Commission are public officers, more precisely state officers. And the eligibility requirements set forth in article 4, § 6(1)(b) and (c) are prophylactic regulations designed to avoid real or potential conflicts of interest in the performance of the Commission's redistricting duties. Plaintiffs are not disqualified from service because they are engaging in or have engaged in partisan and nonpartisan political activity, but because they have, or can be perceived as having, acquired a biased interest in the outcome of the redistricting process.

Plaintiffs argue that rendering them ineligible to apply to be one of the four Republican members of the Commission burdens their political association rights. But the Supreme Court held long ago that a government employer, like the State of

Michigan, can circumscribe the rights of its employees to engage in political activity. *See, e.g*, *United Pub. Workers of Am. v. Mitchell,* 330 U.S 75, 99 (1947). *See also Loftus v. Bobzien*, 848 F.3d 278, 285 (4th Cir. 2017) (summarizing court decisions upholding political activity restrictions on public employees). As the Supreme Court noted then, a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 99 n.34 (quoting *McAuliffe v. New Bedford*, 29 N.E. 517 (1892) (Holmes, J.)).

The same is true here. Neither Plaintiffs nor anyone else has a constitutional right to associate as a Republican (or a Democratic) member of the Commission. "Neither the right to associate nor the right to participate in political activities is absolute[.]" *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973) (citations omitted). If Michigan can constitutionally circumscribe the political activity of its state employees, it can likewise circumscribe or burden the political rights of those seeking appointment to a high-level, state office; here, through the application of the eligibility requirements to prospective Commission members. Like the restrictions upheld against an overbreadth challenge in *Letter Carriers*, the eligibility requirements help ensure the unbiased administration of Michigan law prescribing the redistricting process and avoid the appearance of impropriety. *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 565-567. The infringement on Plaintiffs' associational rights is minimal as Plaintiffs may associate as Republicans in all other ways, just not as members of the Commission (at least for this redistricting cycle). And because the infringement is minimal, the

MRP Plaintiffs' reliance on *Kusper v. Pontikes*, 414 U.S. 51 (1973) is distinguishable. (Doc. 48, MRP Resp., PageID.644).

The eligibility requirements, which function as conflict of interest provisions, fall within the ambit of the laws burdening political activity by public officers or employees upheld as constitutional by the Supreme Court. *See, e.g.*, *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548; *Broadrick v. Oklahoma*, 413 U.S. 601, 606 (1973); *Clements v. Flashing*, 457 U.S. 957 (1982). Surely if it is constitutional to compel a public employee or public officer to resign from office, *see Clements*, *supra*, it is constitutional to restrict who may apply or be eligible for an office in the first instance. Here, because the burden on Plaintiffs' rights is minimal, the State's legitimate if not compelling interest in preventing conflicts of interest on the Commission plainly outweighs that burden. Plaintiffs suggest the requirements are not narrowly tailored. But the requirements are tailored to individuals who have, or can be perceived as having, a private interest in the outcome of any redistricting plan. The fact that a regulation applies to many people does not mean it is not narrowly drawn. Because the requirements withstand First Amendment review, they withstand an equal protection analysis as well. *See, e.g., Clements*, 457 U.S. at 972.

The MRP Plaintiffs argue that the eligibility requirements are facially overbroad. (Doc. 48, MRP Resp., PageID.634). To prove an overbreadth claim, Plaintiffs must show substantial overbreadth, meaning the law prohibits a substantial amount of constitutionally protected speech "'both in an absolute sense

and relative to the [law's] plainly legitimate sweep.'" *Carey v. Wolnitzek,* 614 F.3d 189, 208 (6th Cir. 2010) (intern citation omitted). Courts will not apply the " 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 n. 6 (2008) (citation omitted). The plaintiff bears " 'the burden of demonstrating ... substantial overbreadth.' " *Connection Distrib. Co. v. Holder,* 557 F.3d 321, 336 (6th Cir. 2009) (quoting *Virginia v. Hicks,* 539 U.S. 113, 122 (2003)). A plaintiff " 'must demonstrate from the text of the statute and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.' " *United States v. Coss,* 677 F.3d 278, 289 (6th Cir.2012) (quoting *Am. Booksellers Found. for Free Expression v. Strickland,* 601 F.3d 622, 627 (6th Cir.2010)). A plaintiff may not "leverag[e] a few alleged unconstitutional applications of the statute into a ruling invalidating the law in all of its applications." *Connection Distrib. Co.,* 557 F.3d at 340.

To the extent Plaintiffs seek to challenge all eight of the eligibility requirements, Art. 4, § 6(a)(b)-(c), they need to plead and prove overbreadth as to each one. Neither the MRP Plaintiffs nor the Daunt Plaintiffs sufficiently plead an overbreadth claim as to each requirement, let alone any one of them. (Case No. 19-00669, Doc. 1, MRP Compl., PageID.1-15, 18-20; Doc. 1, Daunt Compl., PageID.1-29). Plaintiffs have not identified sufficient arguable instances of overbreadth of each of these contested requirements to bring an overbreadth claim. Plaintiffs have

failed to state claims showing that the eligibility requirements are unconstitutional, and their complaint should be dismissed.

C. The numerical composition of the Commission is constitutional.

The MRP Plaintiffs argument regarding their viewpoint discrimination claim is difficult to follow. They contend that the Amendment imposes viewpoint discrimination by favoring applicants who express no affiliation with either major party, and that a "non-affiliating applicant" will be more likely to be selected as compared to an applicant from one of the major party-affiliating pools. (R. 54, PageID.754-755). Plaintiffs offer no mathematic support for this argument, but it does not appear to be consistent with basic probability. Under the Mich. Const. Art. 4, §6(2)(d)(ii), 60 applicants will be chosen from each pool of affiliating applicants and 80 will be chosen from the non-affiliating pool. So, Plaintiffs' argument here appears to rest on the questionable premise that 1/80 is a better chance than 1/60. But the odds of knowing whether any individual applicant will be selected is also contingent on the number of each category of applicant (Republican-affiliated, Democratic-affiliates, affiliated with neither) who apply, so this is pure speculation. In any event, Plaintiffs' argument simply fails to show that any advantage is being provided to non-affiliating applicants.

The MRP Plaintiffs' response then reiterates their objection to more Commission seats being allocated to the non-affiliating pool. As stated in Defendant Benson's earlier brief, this argument overlooks that any redistricting

plan must be approved by at least two members from each pool. Mich. Const. Art 4, § 6(14)(c). So, there is no advantage in having five members as opposed to four. Plaintiffs' argument also assumes that being "non-affiliated" is a unified viewpoint—thus requiring the Court to accept the absurd position that "non-affiliating" commission members who separately affiliate with—for example—the Green and Libertarian parties share a unified viewpoint to the disadvantage of the Michigan Republican Party.

But moreover, Plaintiffs continue to erroneously equate being either Republican-affiliated or Democratic-affiliated as the opposite of being "not-affiliated with a major party," and thus fixate on the five non-affiliating seats as compared to the four allotted to those who affiliate with either major party. But, the opposite of "non-affiliating" is "affiliating"—that is, to whatever extent one assumes the existence of a unified "does not affiliate with either major party" viewpoint, the opposing viewpoint would necessarily have to be a *unified* "affiliated with either major party" viewpoint. Here, the Amendment provides for a total of eight members who affiliate with the major parties, and five who affiliate with any other party or no party. Again, Plaintiffs are not being disadvantaged on the basis of their viewpoint.

Simply put, while Plaintiffs have yet to clearly articulate what viewpoint they seek to claim is being disadvantaged, either approach is a losing argument—if they seek to claim a viewpoint as "Republicans," then they must be considered against any other political party or no party (an argument that fails because no

other group is given any advantage), and if they claim a viewpoint of "those who have a major party affiliation," then they must be included with the Democratic party-affiliating members as a group, and as a result the 8 "affiliated" members outnumber the five non-affiliating members. But again, raw numbers of members is irrelevant where the plan must be approved by at least two members from each pool. Plaintiffs' viewpoint discrimination claim fails to state a claim and must be dismissed.

D. The limitation restricting Commission members from discussing the topic of redistricting outside of public meetings or written correspondence is constitutional.

Plaintiffs offer no response to Defendant Benson's arguments. As stated in Defendant Benson's earlier brief, Plaintiffs have failed to show how they will suffer any "concrete and particularized" injury in fact as a result of the restriction on Commission members discussing redistricting with the public. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Again, the restriction imposed by section 6(11) of the Amendment will have absolutely no effect upon the rights of these Plaintiffs, and so they have failed to establish legal standing to raise a challenge to its application.

Further, Plaintiffs have offered no response to the Secretary's argument that the United States Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) upheld limitations on public officials' speech when they speak in their official capacity and are not speaking *as citizens* on a matter of public concern. Plaintiffs refer to *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), but they fail to follow

through on the balancing test required by that case and its progeny. The Supreme Court's decisions since *Pickering* have sought to balance the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. And the Supreme Court held in *Garcetti* that even when employees or public officers are speaking as citizens about matters of public concern, they may *still* be required to adhere to speech restrictions that are necessary for their employers to "operate efficiently and effectively." *Garcetti*, 547 U.S. at 419.

Plaintiffs have not shown how the interests of individual commissioners—whom Plaintiffs are not and might never be—outweigh the need for the Commission to perform its function effectively and without misleading or inaccurate information being released to the public, and without outside parties attempting to influence the Commission members outside of public view. This restriction is little different than the requirement that jurors not discuss a criminal case. M. Crim. JI 2.12. This restriction, however, is even less restrictive than that of jurors, since some public discussion is expressly allowed, provided it occur during a public meeting or in writing. Mich. Const., Art. 4, §6(11). And, once the Commissioners' service is over, they would be free to discuss their experience with whomever they choose.

Because Plaintiffs have failed to refute, or even address, Defendant Benson's arguments, Plaintiffs challenge to Section 6(11) should be dismissed.

CONCLUSION AND RELIEF REQUESTED

For these reasons and the reasons stated in the earlier briefs, Defendant Secretary of State Jocelyn Benson respectfully requests that this Honorable Court enter an Order dismissing the Plaintiffs' complaints in their entirety.

Respectfully submitted,

DANA NESSEL
Attorney General

s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
(P55439)

Dated: October 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

s/Heather S. Meingast
Heather S. Meingast (P55439)
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
P55439