No. 19-2420

United States Court of Appeals
For the Sixth Circuit

MICHIGAN REPUBLICAN PARTY, LAURA COX, TERRI LYNN LAND, SAVINA ALEXANDRA ZOE MUCCI, DORIAN THOMPSON, AND HANK VAUPEL,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE,

Defendant-Appellee,

and

COUNT MI VOTE, DOING BUSINESS AS VOTERS NOT POLITICIANS,

Intervenor-Appellee.

On Appeal from the United States District Court
for the Western District of Michigan

PLAINTIFF-APPELLANTS' PETITION FOR REHEARING *EN BANC*

Charles R. Spies (P83260)
Robert L. Avers (P75396)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
Attorneys for Appellants

Gary Gordon (P26290)
Jason Hanselman (P61813)
Dykema Gossett PLLC
201 Townsend St, Ste 900
Lansing, MI 48933
(517) 374-9181
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution Provisions

Statutes

Rules

STATEMENT IN SUPPORT OF REHEARING EN BANC

This interlocutory appeal involves an issue of exceptional importance to the citizens of Michigan. In a decision recommended for publication, a partially split panel of this Court held that Appellants' constitutional challenge to those provisions of the Michigan Constitution governing the redistricting process were subject to review under the *Anderson-Burdick* legal standard, which, until now, was limited in application to cases challenging election-mechanics provisions. The panel also held that the challenged eligibility criteria for serving on the State's redistricting committee did not violate the unconstitutional conditions doctrine. The panel's decision requires consideration by the full court for two reasons.

First, the majority applied the *Anderson-Burdick* standard to Appellants' claims despite the fact the claims do not arise in an election setting. The majority's application of *Anderson-Burdick* in a non-election setting directly conflicts with *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995), and also with the Supreme Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Therefore, *en banc* review of the majority's decision is necessary to "maintain uniformity of this Court's decisions." Fed. R. App. P. 35(a)(1); (b)(1)(A).

Second, the panel misapplied the unconstitutional conditions standard by relying on government employment cases that restrict only present constitutionally protected activity, rather than retroactive restrictions like those in this case. That

holding conflicts with the D.C. Circuit's decision in *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014). This proceeding therefore involves questions of exceptional importance where, among other reasons, the panel's decision conflicts with an authoritative decision of another United States Court of Appeals addressing the same issue. *See* Fed. R. App. P. 35(a)(2); (b)(1)(B).

For these reasons, and as further discussed below, *en banc* rehearing is necessary to ensure uniformity of this Court's decisions.

INTRODUCTION

Michigan adjusts its legislative and congressional districts every ten years based on changes reflected in the decennial census. For decades, Michigan's Legislature was responsible for redrawing those districts, its redistricting plans subject to gubernatorial approval. On November 6, 2018, after an expensive campaign financed by national Democratic and progressive interests, Michigan voters passed a ballot proposal amending the Michigan Constitution to provide for a new redistricting commission (the "Commission") to adjust legislative and congressional districts following each decennial census (the "Amendment"). *See* Mich. Const. art. IV, § 6.

But not just anyone can serve on the Commission. In fact, many cannot. The Amendment sets forth certain activities and associational relationships, many of which are subject to constitutional protections, which disqualify citizens from

serving on the Commission. For example, the Amendment precludes from serving on the Commission any citizen that currently, *or in the past six years*, has been: a candidate or elected official of a partisan federal, state, or local office; an officer of a political party; a paid consultant or employee of an elected official, candidate, or political action committee; an employee of the legislature; a registered lobbyist; a political appointee not subject to civil service classification; or any parent, stepparent, child, stepchild, or spouse of *any* individual falling into *any* of the above categories. *See id*. at § 6(1).

The Michigan Republican Party ("MRP"), Laura Cox, Terri Lynn Land, Savina Alexandra Zoe Mucci, Dorian Thompson, and Hank Vaupel (collectively "Appellants") commenced this action against the Michigan Secretary of State challenging the constitutionality of the above-described Commission eligibility criteria, as well as the process for selecting Commission members under the Amendment. MRP is a major political party under Michigan law, *see* M.C.L. § 168.16, and the individual Appellants include MRP's current chair and members, affiliates, and relatives precluded from serving on the Commission by the eligibility criteria challenged in this case.

Appellants challenged the constitutionality of those provisions burdening their exercise of the fundamental rights of speech and association by, among other restrictions, requiring the cessation of broad categories of political activity—for a

minimum of six years—as a precondition for eligibility to serve on the Commission. Worse yet, the Amendment imputes those same disqualifying criteria to family members of disqualified individuals, regardless of whether would-be applicants engaged in any political activity whatsoever.

Appellants sought a preliminary injunction enjoining the implementation of the Commission. The district court denied that motion, finding instead that Appellants were unlikely to succeed on the merits. Appellants pursued an interlocutory appeal,[1] and this Court affirmed in a partially split decision.

Applying *Anderson-Burdick*, the majority concluded the eligibility criteria did not subject Appellants' rights to "severe" restrictions. (Op. at 11). As a result, the majority applied *Anderson-Burdick*'s lower, more flexible levels of scrutiny to the eligibility criteria, and found them constitutional (Op. at 11-13). Concurring, Judge Readler disagreed with the majority's reasoning, noting that *Anderson-Burdick*, which "is tailored to the regulation of election mechanics," should not apply because "Michigan's redistricting initiative does not regulate the mechanics of an election." (Op. at 32). Rather than apply *Anderson-Burdick*, the concurrence would have

[1] Conceptually, Appellants do not oppose a redistricting commission, but the Amendment goes too far. As detailed in Appellants' Corrected Reply Brief, the circumstances surrounding the underlying ballot proposal shed light on the partisan motivations behind the Amendment. *See* Doc. 54, pp. 1-4 (describing concealment of highly partisan movement behind the Amendment and Commission). Those circumstances should not escape consideration in this matter.

applied an "objective, uniform standard," with "stricter rules and guidelines" leaving less room for "a judge's subjective determination." (Op. at 35-36).

The panel next rejected Appellants' unconstitutional conditions claim, through which Appellants contend the eligibility criteria comprise unconstitutional conditions that disqualify Appellants from Commission service due to their constitutionally protected activities and associational relationships. The panel disagreed, relying on decisions reviewing the Hatch Act and other restrictions on government employees as applied at the time of employment. The cases referenced by the panel, however, do not involve retrospective limitations on constitutionally protected activity such as the eligibility criteria in this case.

The panel's decision results in precedent setting error on two fronts. First, the majority's application of *Anderson-Burdick* to a non-election setting directly conflicts with a decision of the Supreme Court and with published precedent of this Court. Second, the panel's conclusion that the eligibility criteria do not comprise unconstitutional conditions conflicts with the D.C. Circuit's decision in *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014). Both errors will proliferate beyond the context of a redistricting commission, and *en banc* rehearing will maintain uniformity of this Court's decisions, while also providing the bench and bar with certainty regarding the appropriate legal standards to be applied in political cases for years to come.

For the reasons stated below, Appellants request rehearing *en banc*, and that the panel decision be overruled.

ARGUMENT

A. The Majority Decision Conflicts with Decisions of this Court

The majority compounded the district court's principal error by applying the deferential *Anderson-Burdick* standard to Appellants' First and Fourteenth Amendment claims despite the fact those claims arise in a non-election setting. While the *Anderson-Burdick* framework applies only to matters of election administration, the instant case challenges a provision governing the redistricting process. As acknowledged by the concurrence, the redistricting provision at issue has no bearing on election mechanics; therefore, *Anderson-Burdick* does not apply, and the majority's decision concluding otherwise conflicts with this Court's precedent limiting the application of *Anderson-Burdick* to cases challenging election-mechanics provisions. *See Briggs*, 61 F.3d 487, 493 n 5 (6th Cir. 1995); *McIntyre*, 514 U.S. 334 (1995).

A review of the origin of *Anderson-Burdick*, which stems from two Supreme Court decisions reviewing challenges to state election laws, demonstrates that framework was meant solely for application in election settings. First, in *Anderson v. Celebrezze*, the Supreme Court reviewed the constitutionality of an Ohio statute requiring independent candidates to file statements of candidacy by March to appear

on the November ballot. 460 U.S. 780 (1983). Finding the statute unconstitutional, the Supreme Court concluded the state's interests of voter education and political stability were outweighed by the burdens on "voters' freedom of choice and freedom of association." *Id*. at 806.

Nine years later in *Burdick v. Takushi*, the Supreme Court reviewed the constitutionality of Hawaii's prohibition against write-in voting. 504 U.S. 428 (1992). Applying "a more flexible standard" when "considering a challenge to a state election law" as "the full Court agreed in *Anderson*," the Supreme Court held that Hawaii's interests against party raiding and factionalism outweighed voters' interests in waiting until election day to choose their preferred candidates via write-in voting. *See* 504 U.S. at 434, 441-42.

To this day, courts use the standards stemming from those two election law challenges—the *Anderson-Burdick* framework—"[t]o evaluate [laws] respecting the right to vote—whether [they] govern[] voter qualifications, candidate selection, or the voting process." *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 204-05 (2008) (Scalia, J., concurring). Courts in this circuit "generally evaluate First Amendment challenges to state election regulations under the three-step *Anderson-Burdick* framework, in which [courts] weigh the character and magnitude of the burden the State's rule imposes on [Plaintiffs' First Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the

State's concerns make the burden necessary." *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019) (citations and internal quotation marks omitted)).

The first step of the *Anderson-Burdick* framework requires courts to consider the severity of the challenged election law. Under that approach, "[l]aws imposing 'severe burdens on plaintiffs' rights' are subject to strict scrutiny, but 'lesser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (citations and internal quotation marks omitted). Election laws falling in the middle, however, "warrant a flexible analysis that weighs the state's interests and chosen means of pursuing them against the burden of the restriction." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) (citation and internal quotation marks omitted). Under the second step of *Anderson-Burdick*, courts "identify and evaluate the state's interests in and justifications for the regulation." *Schmitt*, 933 F.3d at 639 (citation omitted). For the final step, courts "assess the legitimacy and strength of those [state] interests and determine whether the restrictions are constitutional." *Id*. (citations and internal quotation marks omitted).

This Court generally limits application of *Anderson-Burdick* to cases challenging election administration provisions. In *Briggs*, for example, this Court reasoned that while *Anderson-Burdick* "set[s] forth the standard for scrutiny of regulations of the voting process, which are subject to a balancing of the relative

interests of the State and the injured [party]," *Anderson-Burdick* "is inappropriate to evaluate the constitutionality of a statute that burdens rights protected by the First Amendment." 61 F.3d at 493 n 5 (6th Cir. 1995) (citing *McIntyre*, 514 U.S. at 344-46 (1995) (internal quotations and citations omitted). Likewise, this Court declined to apply *Anderson-Burdick* when it considered whether a state's judicial selection provision violated a plaintiff's constitutional rights when he was denied ballot access and the right to association. *See Moncier v. Haslam*, 570 F. App'x 553, 559 (6th Cir. 2014) (holding *Anderson-Burdick* "offer[s] no refuge" where both cases "presupposed that [the challenged] state law required an election for a particular office in the first place.") (citations omitted). Finally, the Supreme Court also declined to apply *Anderson-Burdick* in non-election settings. *See McIntyre*, 514 U.S. at 345 (rejecting application of *Anderson* where the challenged statute "d[id] not control the mechanics of the electoral process.").

Both the majority and concurring opinions acknowledged that the Supreme Court, and this Court, limit the application of *Anderson-Burdick* to cases challenging election-mechanics provisions. *See* Op. at 9 ("most—if not all—of the cases considered by the Supreme Court and this court under the *Anderson-Burdick* test have involved laws that regulate the actual administration of elections. . . ."); Op. at 32 ("Following the Supreme Court's lead," this Court has "utilized [the *Anderson-Burdick*] framework in cases where it is alleged that a state election law burdens

voting, from ballot-access laws, *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015), to early-voting regulations, *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012), to prohibitions on party-line voting. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, (6th Cir. 2016)).

Yet, despite acknowledging that this Court's decisions limit *Anderson-Burdick* to those cases challenging election-mechanics, and despite the fact that the challenged provisions do not govern election-mechanics, the majority applied *Anderson-Burdick* anyway. Reasoning that "the rationales for applying the *Anderson-Burdick* test—ensuring that 'the democratic processes' are 'fair and honest,' and 'maintain[ing] the integrity of the democratic system,' resonate here, too," the majority applied the lenient *Anderson-Burdick* standards to Appellants' claims in this case. (Op. at 9-10 (internal citations omitted)). As the majority would have it, the Commission eligibility criteria challenged in this case "could *conceivably* be classified as an 'election law.'" (Op. at 10 (emphasis added)). The majority then found that the eligibility criteria did not subject Appellants' rights to "severe" restrictions, (Op. at 11), and, as a result, disposed of Appellants' First and Fourteenth Amendment claims by applying *Anderson-Burdick*'s lower levels of scrutiny. (Op. at 11-13).

The majority erred by applying *Anderson-Burdick* and its lower tiers of scrutiny despite the fact the challenged eligibility criteria do not regulate election

mechanics. As explained in the concurring opinion, "Michigan's redistricting initiative does not regulate the mechanics of an election. Far from it, in fact." (Op. at 32). Rather, the challenged provision sets forth qualifications for Michiganders who, "if they satisfy certain eligibility criteria and are selected by the Secretary of State, will serve as commissioners who, working together as a commission, will draw electoral districts for the State, districts in which as-yet-unknown candidates will seek legislative office in a general election, following party primaries." (Op. at 32). "[T]he only sense that an election comes into play is the one that will ensue once these many tasks are completed," the concurrence continued, concluding, "neither the commissioners nor the commission, it bears noting, will have an impact or influence on how that election is administered." (Op. at 32).

It was, as characterized by the concurrence, "quite a jurisprudential leap to view this case through *Anderson-Burdick*'s election-focused lens." (Op. at 32). Simply put, *Anderson-Burdick* applies only to challenges of election-mechanics provisions, and the majority's application of that framework outside an election context conflicts with circuit precedent. *See Briggs*, 61 F.3d at 493 n 5. While conflicting with circuit precedent constitutes reason enough for rehearing *en banc*, two additional factors warrant further consideration by the full court.

First, the practical reasons for reviewing election laws through flexible legal standards do not exist outside the election context. Indeed, as this Court recognized,

"the list of responsibilities of [election administrators] is long," and officials "undoubtedly have much to accomplish during the final few days before the election." *Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020) (citation omitted). Among the many moving parts of election administration, officials must "authenticate, prepare, and mail absentee ballots; examine, verify, and count completed absentee ballots . . . staff early-voting locations; locate, hire, and train poll workers . . . [and] deliver physical voting equipment, ballots, and supplies to polling locations." *Id.* Then, on Election Day, officials "must oversee each polling place, answer questions from voters and poll workers . . . resolve any unforeseen responsibilities that arise," and, of course, tally the votes. *Id.* at 787-88.

It was for these election settings realities that the Supreme Court created the *Anderson-Burdick* framework in the first place. Otherwise, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. But those election-specific considerations behind *Anderson-Burdick*'s lenient tiers of scrutiny do not exist in settings such as here, where there is a full year for the Commission to be constituted, and, of course, *there is no election*. Therefore, application of *Anderson-Burdick* in this non-election matter is unjustified as a practical matter.

Second, as the concurring opinion recognized, extending *Anderson-Burdick* beyond election settings is dangerous because "it affords far too much discretion to judges" in resolving "sensitive policy-oriented cases." (Op. at 34). While there may be some utility in flexible standards in election-mechanics contexts, *Anderson-Burdick* "does little to define the key concepts a court must balance, including when a burden becomes 'severe,'" such that strict scrutiny be applied. (Op. at 34 (citing *Crawford*, 553 U.S. at 191, (noting in prior cases the Supreme Court did not "identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters"))). Therefore, "tests like *Anderson-Burdick* allow a judge 'easily [to] tinker[ ] with levels of scrutiny to achieve [his or her] desired result.'" (Op. at 36 (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting))).

That being the case, the majority's expansion of *Anderson-Burdick*'s reach is even more dangerous due to the "risk [of] trading precise rules and predictable outcomes for the imprecision and unpredictability of how the judicial-assignment wheel turns." (Op. at 36. Citation omitted). Absent *en banc* review, the instant case provides the perfect example of the moving target that is *Anderson-Burdick*'s sliding scale of scrutinies. Considering the eligibility criteria challenged in this case, for example, it is difficult to square the majority's conclusion that the burden on Appellants' constitutional rights is "less-than-severe" when the challenged criteria

completely disqualify Appellants from serving on the Commission as a result of otherwise constitutionally protected activities and associations (or that of family members) dating back six years. (Op. at 10-11). Whether strict scrutiny applies to constitutionally protected activity should not depend on the judge hearing the case.

As further recognized by the concurring opinion, "[i]f *Anderson-Burdick* can be stretched this far, why would it not reach any situation that tangentially touches elected office?" (Op. at 33). Indeed, if that lenient standard applies to this non-election setting, then issues with at least tangential relation to elections, such as campaign finance regulations and laws regulating electioneering or the conduct of legislators, are within *Anderson-Burdick*'s growing reach. (Op. at 33.) "*Anderson-Burdick* leaves much to a judge's subjective determination," (Op. at 35), and the majority's opinion therefore cannot stand.

For these reasons, rehearing *en banc* is necessary to achieve uniformity in this Court's decisions.

B. The Panel's Decision Conflicts with the D.C. Circuit's Decision in *Autor*.

Appellants also challenged the eligibility criteria as violating the unconstitutional conditions doctrine. As the Supreme Court explained in *Perry v. Sindermann*, the unconstitutional conditions doctrine provides that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [it] may not

deny a benefit to a person on a basis that infringes his constitutionally protected interests." 408 U.S. 593, 597 (1972). Appellants contend the eligibility criteria comprise unconstitutional conditions because they disqualify Appellants from serving on the Commission based on Appellants' constitutionally protected activities and associational relationships—meaning, in other words, the State conditioned eligibility for the benefit of serving on the Commission on Appellants' willingness to limit their First Amendment rights.

Relying on decisions applying the Hatch Act, 5 U.S.C. §§ 7321-7326, and other patronage cases applying similar reasoning, the panel rejected Appellants' challenge to the eligibility criteria. (Op. at 15). If the government could restrict "partisan political activity" of employees in those cases, the panel reasoned, then "we discern no constitutional limitation on Michigan making the forbearance from such activity a condition of sitting on an independent redistricting commission." (Op. at 15-16). The panel, however, erred in its reasoning, and its decision conflicts with the D.C. Circuit's decision in *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014).

The panel's principal error in rejecting Appellants' unconstitutional conditions claim was its reliance on cases reviewing current and prospective limitations on government employees' political activities, despite the fact the instant eligibility criteria apply retrospectively to restrict protected activity as far as six years prior to Commission membership. The panel cites not a single case for the

proposition that the government may condition Appellants' eligibility on their willingness to limit their First Amendment rights for *six years* prior to applying for the Commission. Rather, the panel relies on cases permitting government to require civil servants to check at the door their current political activities as a condition of government employment, reasoning that Michigan's interest in addressing the "appearance of undue influence" justifies not only the eligibility criteria, but also their six-year retrospective nature and imputing the criteria to family members. (Op. at 14-19). The panel's reasoning conflicts with the unconstitutional conditions doctrine as set forth by the Supreme Court in *Perry*.

Likewise, the Panel's decision conflicts with the D.C. Circuit's *Autor* decision. In *Autor*, registered lobbyists challenged a regulation barring lobbyists from serving on federal government advisory committees, alleging, as Appellants do here, that eligibility criteria comprised unconstitutional conditions under *Perry*. *See* 740 F.3d at 177. The D.C. Circuit agreed, finding the challenged regulations, which sought to reduce the culture of special interest access, were unconstitutional conditions because they conditioned plaintiffs' eligibility for the advisory committee on plaintiffs' "willingness to limit their First Amendment right to petition government." *Id*. at 183. So, too, here, as even the panel acknowledged the activities restricted by the eligibility criteria are subject to First Amendment protection. (Op. at 14). Therefore, the eligibility criteria are subject to the test set forth by the

Supreme Court in *Perry*—not the cases applied by the panel weighing current and prospective limitations on government employees—and the outcome is the same as *Autor*: the blanket, retrospective limitations imposed on Appellants by the eligibility criteria constitute unconstitutional conditions.[2]

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court grant rehearing *en banc*.

Dated: May 13, 2020

Respectfully submitted,

/s/ Charles R. Spies

Charles R. Spies (P83260)
Robert L. Avers (P75396)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672

Gary Gordon (P26290)
Jason Hanselman (P61813)
Dykema Gossett PLLC
201 Townsend St, Ste 900
Lansing, MI 48933
(517) 374-9181

Counsel for Appellants

[2] Appellants agree with the concurrence's proposition that federal courts should defer to states on matters of state governance. (Op. at 39). That deference, however, does not permit states to deprive individuals of First Amendment rights. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (while the Constitution grants "the States specific power[s] . . . these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution").

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Federal Rule of Appellate Procedure 35(b)(2)(A), that this Petition for Rehearing complies with the type-volume requirements and contains 3,889 words, not counting items excluded from length under Federal Rule of Appellate Procedure 32(f).

/s/ Robert L. Avers
Robert L. Avers (P75396)

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 13, 2020 the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. Participants in this case who are registered CM/EC users will be served by the CM/ECF system.

/s/ Robert L. Avers
Robert L. Avers (P75396)