No. 20-1734

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

ANTHONY DAUNT, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
AT GRAND RAPIDS

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Jason Torchinsky
Jonathan P. Lienhard
Shawn Sheehy
Dennis W. Polio
Kenneth C. Daines
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
P: (540) 341-8808
F: (540) 341-8809
jtorchinsky@hvjt.law
jlienhard@hvjt.law
ssheehy@hvjt.law
dwpolio@hvtj.law
kdaines@hvjt.law

John J. Bursch
BURSCH LAW
9339 Cherry Valley, S.E., Suite 78
Caledonia, MI 49316
616-450-4235
jbursch@burschlaw.com

Eric E. Doster
DOSTER LAW OFFICES, PLLC
2145 Commons Parkway
Okemos, MI 48864
(517) 977-0147
eric@ericdoster.com

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THIS COURT'S PRIOR DECISION AT THE PRELIMINARY INJUNCTION STAGE DOES NOT COMPEL AFFIRMANCE OR THE APPLICATION OF *ANDERSON-BURDICK*. 2

II. THE *ANDERSON-BURDICK* FRAMEWORK CANNOT BE APPLIED IN THIS CASE. 4

A. Defendants Argue for Multiple Confusing Standards to Trigger *Anderson-Burdick*. 5

B. The Laws at Issue do not Govern Election Administration nor Implicate Voting Rights and so *Anderson-Burdick* is Inappropriate Here. 6

III. THE COMMISSION'S EXCLUSIONARY CRITERIA ARE UNCONSTITUTIONAL CONDITIONS. 11

A. The Exclusionary Criteria Differ from Traditional Conflict-of-Interest Laws Because of Their Severe Retroactive Effect. 11

B. The Exclusionary Criteria Cannot be Severed from the Rest of the Commission Scheme. 15

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze, 460 U.S. 780 (1983) .....*passim*

Briggs v. Ohio Elections Commission, 61 F.3d 487 (6th Cir. 1995) 9

Burdick v. Takushi, 504 U.S. 428, 433 (1992) .....*passim*

Citizens for Legislative Choice v. Miller, 144 F.3d 916 (6th Cir. 1998).....10

Clements v. Fashing, 457 U.S. 957 (1982).....12, 13

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).....4, 10

Daunt v. Benson, 956 F.3d 396 (6th Cir. 2020).....1, 4, 7, 13

Gilles v. Garland, 281 Fed. Appx. 501 (6th Cir. 2008).....6

Green Party of Tenn. v. Hargett, 791 F.3d 684 (6th Cir. 2015).....4

Howe v. City of Akron, 801 F.3d 718 (6th Cir. 2015).....1, 3

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).....4, 8, 9

Miller v. C.A. Muer Corp, 362 N.W.2d 650 (Mich. 1984).....13

Moncier v. Haslam, 570 Fed. Appx. 553, 559 (6th Cir. 2014).....4, 9

Montgomery v. Carr, 101 F.3d 1117 (6th Cir. 1996) 13

Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011) 13

Thompson v. Dewine, 959 F.3d 804 (6th Cir. May 26, 2020) 4, 7

Thompson v. Dewine, 976 F.3d 610 (6th Cir. Sept. 6, 2020) 4, 7

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).....4

United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 (1947) 12

United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973).....12, 13

Universal Title Ins. Co. v. United States, 942 F.2d 1311 (8th Cir. 1991) 13

Vieth v. Jubelirer, 541 U.S. 267 (2004).....6

INTRODUCTION

This Court's decision reviewing a preliminary injunction order implicates the law of the case doctrine only when this Court's decision was made "based on a fully developed factual record." *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (cleaned up) (internal quotation marks omitted). And when this Court made its initial decision affirming the denial of preliminary injunctive relief, there was no fully developed factual record. Accordingly, a reconsideration of the legal issues is appropriate.

In any event, this Court always has discretion to revisit an earlier preliminary injunction ruling, *see id.*, and this case certainly warrants reexamination. The *Anderson-Burdick* framework has no place in a case that involves the criteria for membership on a state commission rather than rules governing election mechanics. It is imperative that this Court set the record straight regarding the appropriate framework to apply given the important areas of law that this case concerns and the fact that lower courts will rely upon this Court's opinion for guidance in the future. As one member of this Court previously observed, "*Anderson-Burdick* is a dangerous tool. In sensitive policy-oriented cases, it affords far too much discretion to judges in resolving the dispute before them." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring).

When the appropriate unconstitutional conditions framework and the appropriate motion to dismiss standards are applied, Plaintiffs' claims easily survive. Plaintiffs have not yet been given an opportunity to fully develop a factual record regarding the harm to their constitutional rights, yet their Complaint plausibly alleges sufficient constitutional violations to afford them such an opportunity.

This Court should reverse and remand for further proceedings or remand with instructions to declare the Commission unconstitutional and invalid in its entirety.

ARGUMENT

I. THIS COURT'S PRIOR DECISION AT THE PRELIMINARY INJUNCTION STAGE DOES NOT COMPEL AFFIRMANCE OR THE APPLICATION OF *ANDERSON-BURDICK*.

This Court's previous opinion affirming the denial of Appellants' Motion for Preliminary Injunction does not compel this Court's affirmance of the District Court's decision or the application of the *Anderson-Burdick* framework. Even assuming the law of the case doctrine does apply in this case—and that is not entirely clear given the differing standards at the preliminary injunction and motion to dismiss stages—Plaintiffs must be given an opportunity to develop the factual record regarding the harm inflicted by the exclusionary criteria and the absence of any conflicts of interest.

"Whether a panel should treat a prior panel's ruling on a preliminary injunction as the law of the case is tricky . . . Rulings on preliminary injunctions are

generally tentative decisions on the merits, which change the incentives of the parties . . .” *Howe*, 801 F.3d at 740 (cleaned up) (internal quotation marks omitted). “Where the earlier ruling, though on preliminary-injunction review, was established in a definitive, fully considered legal decision *based on a fully developed factual record* . . . then the law-of-the-case doctrine applies.” *Id.*

Appellees’ briefing makes clear that their position depends on doubts regarding Plaintiffs’ burdens or conflicts of interest. Accordingly, at a minimum, Plaintiffs should have an opportunity to develop the factual record regarding the harm inflicted by the exclusionary criteria and the absence of any conflicts of interest. Appellees repeatedly question the burdens Plaintiffs are suffering, (Doc. 24, State Br., Page ID # 28, 30, 53-57, 59); (Doc. 22, VNP Br., Page ID # 14-15, 20, 28-29, 31, 46), and how conflicted their interests would be if they served on the Commission. (*See, e.g.*, Doc. 24, State Br., Page ID # 40-53). But Appellees do so by assigning unreasonable and fictionalized intent without the benefit of any testimony. (*See, e.g.*, Doc. 22, VNP Br., Page ID # 52-53). Once that factual record is developed, the true over- and under-inclusivity of the exclusionary criteria will be readily apparent. For now, the fact that Plaintiffs have plausibly alleged that over- and under-inclusivity suffices.

Regardless, this Court “may revisit [the] earlier issues” at its discretion. *Howe*, 801 F.3d at 740. And the Court should do so given the important constitutional issues

involved and the wildly incorrect application of *Anderson-Burdick* by the District Court.

II. THE *ANDERSON-BURDICK* FRAMEWORK CANNOT BE APPLIED IN THIS CASE.

The State continues to insist—incorrectly—that *Anderson-Burdick* is the proper framework under which to examine Plaintiffs' claims. But the *Anderson-Burdick* framework is strictly limited to the examination of laws regulating election mechanics impacting voting rights. *Daunt*, 956 F.3d at 422 (Readler, J., concurring); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1995); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015); *Moncier v. Haslam*, 570 Fed. Appx. 553, 559 (6th Cir. 2014); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of *parties*, *elections*, and *ballots* to reduce election- and campaign-related disorder.") (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). *See also Thompson v. Dewine*, 959 F.3d 804, 808 n.2 (6th Cir. May 26, 2020) (noting that this Court has significant questions about the applicability of *Anderson-Burdick* outside of generally applicable restrictions on the right to vote); *Thompson v. Dewine*, 976 F.3d 610, 615 n.4 (6th Cir. Sept. 6, 2020) (accord).

A. Defendants Argue for Multiple Confusing Standards to Trigger *Anderson-Burdick*.

In supporting *Anderson-Burdick*'s application, Defendants engage in mental gymnastics, arguing for conflicting and unclear standards, pushing the framework beyond its logical and practicable limits. First the State argues incorrectly that *Anderson-Burdick* is *not* limited to only laws specifically concerned with the administration of elections. (Doc. 24, State Br., Page ID # 32). Then the State argues that the *Anderson-Burdick* framework applies "to the Commission because it *fundamentally concerns matters that are intrinsic and essential* to the administration of elections." (Doc. 24, State Br., Page ID # 27 (emphasis added)).

Not to be outdone, Intervenor VNP analyzes the exclusionary criteria under *both* the *Anderson-Burdick* framework and the unconstitutional conditions doctrine, eventually even suggesting that a third "deferential approach" may be appropriate. (Doc. 22, VNP Br., Page ID # 30-32, 37, 40). VNP argues that so long as the rationales underlying the *Anderson-Burdick* test "resonate" with the present case, the *Anderson-Burdick* framework must apply. (Doc. 22, VNP Br., Page ID # 28). These rationales include "ensuring that the democratic processes are fair and honest, and 'maintaining the integrity of the democratic system . . .'" *Id*. (cleaned up). This pushes any practicable bounds of *Anderson-Burdick*, permitting nearly any law to be subject to the framework.

In the end, either the Commission's exclusionary criteria are part of Michigan's administration of elections and implicate voting rights, or they are not and do not. The criteria plainly are not part of election administration and do not implicate voting rights, so *Anderson-Burdick* cannot apply even in the alternative.

Defendants' and VNP's imprecise language and competing tests stretch the *Anderson-Burdick* framework beyond its breaking point, causing confusion to the lower courts, practitioners, and states. Words and standards have meanings and consequences. As the Supreme Court has repeatedly stated, "judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278-79 (2004) (plurality opinion). "[I]t is the *absence* of clear standards guiding the discretion of the public official that invites abuse and offends due process." *Gilles v. Garland*, 281 Fed. Appx. 501, 508 (6th Cir. 2008). Appellees' constantly mutating and amorphous standards threaten just such concerns, and this Court should properly cast those standards aside.

B. The Laws at Issue do not Govern Election Administration nor Implicate Voting Rights and so *Anderson-Burdick* is Inappropriate Here.

Not only does the State offer ever-changing standards to trigger *Anderson-Burdick* in this case, but it gets them wrong. The Commission's exclusionary criteria do not fundamentally concern matters that are "intrinsic" or "essential" to election

administration. (Doc. 24, State Br., Page ID # 27). Neither do the exclusionary criteria "absolutely . . . regulate the mechanics of election administration" directly. (Doc. 24, State Br., Page ID # 37). The laws at issue in this case—Article IV, Section 6(1)(B) and (C) of Michigan's Constitution—concern *eligibility* for Commissioners. These laws do not concern election administration and do not implicate voting rights whatsoever. *See Daunt*, 956 F.3d at 422 (Readler, J., concurring). *See also Thompson*, 959 F.3d at 808 n.2; *Thompson*, 976 F.3d at 615 n.4.

"Far from" "regulat[ing] the mechanics of an election," the exclusionary criteria "simply set[] the qualifications for" Commission membership. *Daunt*, 956 F.3d at 422 (Readler, J., concurring). Furthermore, the Commission itself is tasked with redrawing Michigan's congressional and state legislative districts, not administering elections. (Doc. 20, Appellants' Br., Page ID # 15).

The State argues that the very character of the Commission's task—redistricting—is what justifies the application of *Anderson-Burdick*. But *Anderson-Burdick* does not apply to direct challenges to redistricting plans or redistricting commissions. (*See* Doc. 20, Appellants' Br., Page ID # 33-34). The State is conspicuously silent as to how it can justify the Court's application of *Anderson-Burdick* in challenges to a redistricting commission's membership restrictions, but not to redistricting challenges themselves. The State argues that "[r]edistricting is an essential process to holding an election and is effectively the first step that must be

taken before there can be an election." (Doc. 24, State Br., Page ID # 37-38). Why then does the *Anderson-Burdick* framework not apply to redistricting challenges? The answer is that the framework applies in neither situation.

Redistricting is not the same as the mechanics of a voter voting. If courts do not use the *Anderson-Burdick* framework to analyze challenges to redistricting plans or redistricting commissions, how then can they utilize it to examine challenges to exclusionary selection schemes for redistricting commissioners? They cannot and should not. Further, the State has yet to cite *any* other challenge to a redistricting plan or redistricting commission that was adjudicated under the *Anderson-Burdick* framework.

In attempting to shore up their sloppy *Anderson-Burdick* arguments, the State wrongly reassures this Court that the District Court's decision to apply *Anderson-Burdick* does not conflict with decisions from this Court and the Supreme Court. First, the State attempts to distinguish *McIntyre*, 514 U.S. 334 because that case confronted a "direct regulation of the content of speech" and this case does not. (Doc. 24, State Br., Page ID # 35-36 (citing *McIntyre*, 514 U.S. at 345)). But this case *does* confront a regulation of the content of speech: the exclusionary criteria punish Appellants for their exercise of certain kinds of constitutionally protected speech and associations. (*See* Doc. 20, Appellants' Br., Page ID # 35-40). Accordingly, *McIntyre* demonstrates *Anderson-Burdick*'s inapplicability here.

The State next attempts to distinguish this Court's on point and broadly applicable statement that the *Anderson-Burdick* standard "is inappropriate to evaluate the constitutionality of a statute that burdens rights protected by the First Amendment" in *Briggs v. Ohio Elections Commission*, 61 F.3d 487, 493 n.5 (6th Cir. 1995) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *McIntyre*, 514 U.S. at 344-46), by arguing that *Briggs* did not sufficiently analyze the scope of *Anderson-Burdick*. (Doc. 24, State Br., Page ID # 36). But this Court did not need to overanalyze *Anderson-Burdick*'s scope in that case as it relied on the Supreme Court's analysis in *McIntyre* and cited that reasoning in the same breath. Both this Court and the United States Supreme Court have unequivocally stated that *Anderson-Burdick* does not apply to First Amendment cases like the one Plaintiffs bring.

Both the State and VNP also attempt to distinguish *Moncier*, 570 Fed. Appx. 553, not because of the character of the laws involved, but because the posture of that case differs from the present case. (Doc. 24, State Br., Page ID # 37); (Doc. 22, VNP Br., Page ID # 38). There is no question that this case is of a different procedural posture than *Moncier*. But the broad nature of the challenged laws in each case are unquestionably similar enough for *Anderson-Burdick* purposes, though not completely parallel on the merits due to the differences in the positions at issue in each case. (*See* Doc. 20, Appellants' Br., Page ID # 30-31).

Appellees' continued reliance on *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), is just as misplaced as the District Court's. (Doc. 24, State Br., Page ID # 34, 38); (Doc. 22, VNP Br., Page ID # 28, 37-38); (*See* Doc. 20, Appellants' Br., Page ID # 34 n.4). The *Anderson-Burdick* framework properly applied in that case because those plaintiffs were voters and political groups—*not* the legislative candidates themselves. *Miller*, 144 F.3d at 918. The voters in *Miller* were arguing that they had a right to vote for a specific candidate or class of candidates, and that the term limits at issue in that case violated that right. *Id*. at 918-919 ("The plaintiffs contend that § 54 violates their First and Fourteenth Amendment *rights to vote for their preferred legislative candidates*."). No such rights to vote are implicated in the present case and that is precisely why *Anderson-Burdick* does not apply here. *See Anderson*, 460 U.S. at 787-789; *Burdick*, 504 U.S. at 423-34; *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) ("To evaluate a law *respecting the right to vote*—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick* . . . .") (emphasis added); (Doc. 20, Appellants' Br., Page ID # 28-34).

In sum, this case cannot be decided under the *Anderson-Burdick* framework. This Court's application of *Anderson-Burdick* in the alternative during the preliminary injunction stage may have been permissible due to the nature of that inquiry, but it cannot do so at this stage on the merits—not even in the alternative.

Any decision applying the *Anderson-Burdick* framework, even in the alternative, commits an error of law that threatens to throw this Circuit's jurisprudence and future review of election-related regulations into chaos.

III. THE COMMISSION'S EXCLUSIONARY CRITERIA ARE UNCONSTITUTIONAL CONDITIONS.

First and Fourteenth Amendment standards, rather than *Anderson-Burdick*, govern this case. Under these standards Plaintiffs have, at a minimum, stated a claim and so their claims should not be dismissed. Contrary to Appellees' arguments, this is not a traditional conflict-of-interest case due to the severe retroactive effect the exclusionary criteria cause, and neither have Appellants somehow waived their ability to distinguish caselaw.

A. The Exclusionary Criteria Differ from Traditional Conflict-of-Interest Laws Because of Their Severe Retroactive Effect.

Rather than simply picking one standard (or three), Appellees argue that this Court can rule under any number of different standards, including unconstitutional conditions. (Doc. 24, State Br., Page ID # 35, 39-61); (Doc. 22, VNP Br., Page ID # 30-32, 37, 40). But when the proper unconstitutional conditions standards are applied, and this case is properly examined under either heightened scrutiny or exacting scrutiny, it is clear that Plaintiffs have stated valid claims and their suit should not have been dismissed. (Doc. 20, Appellants' Br., Page ID # 44-58).

Appellees argue that a lesser standard should apply because this case is more akin to conflict-of-interest cases. (Doc. 24, State Br., Page ID # 40-60) (Doc. 22, VNP Br., Page ID # 15-16, 32-37). But that argument loses much of its teeth when the exclusionary criteria are viewed as what they are: attenuated and retroactive. Included in these criteria are exclusions of family members who are punished for simply sharing a bloodline with someone who has engaged in protected activities regardless of whether the individual has had any contact with the family member—even in years past. Further, a person who engaged in protected political activity over a half decade ago is then retroactively punished for that activity by being denied eligibility for a valuable government benefit. A proper conflict-of-interest prohibition deals with prospective or current conflicts of interest, and does not levy retroactive and attenuated punishment. (Doc. 20, Appellants' Br., Page ID # 50-52).

This retroactivity and attenuated applicability are what distinguishes the claims here from cases like *United Public Workers of America* (*C.I.O.*) *v. Mitchell*, 330 U.S. 75 (1947); *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973); and *Clements v. Fashing*, 457 U.S. 957 (1982). (*See* Doc. 20, Appellants' Br., Page ID # 50-52). The State says that Plaintiffs have somehow waived any right to distinguish these cases because they did not distinguish them below in their opposition to the Motion to Dismiss. (Doc. 24, State Br., Page ID # 41). But the State never raised these cases in its Motion.

In the next breath, the State says that the District Court noted that "this Court previously considered attempts to distinguish these cases and found them 'unpersuasive.'" (Doc. 24, State Br., Page ID # 41 (citing (Op., R. 75, Page ID # 1059) (quoting *Daunt*, 956 F.3d at 411))). Parties waive issues, not mere shifts in approaches to arguments. Indeed, "[O]ne of the primary purposes of appellate review" would be undermined if a court "refuse[d] to consider each nuance or shift in approach urged by a party simply because it was not simply urged below." *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991). Plaintiffs sufficiently distinguished Appellees' arguments to encompass any passing mention of those cases, and Plaintiffs have not waived their rebuttal distinguishing *Mitchell*, *United States Civil Service,* and *Clements*.

Nearly every other conflict-of-interest or nepotism case cited by Appellees similarly concerns laws regulating concurrent or prospective conflict. *See, e.g.*, *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011) (law requiring legislators to recuse themselves from voting on, or advocating the passage or defeat of, matters as to which they have a current conflict of interest); *Montgomery v. Carr,* 101 F.3d 1117 (6th Cir. 1996) (anti-nepotism policy prevented married couples from working together as teachers at same campus at the same time); *Miller v. C.A. Muer Corp,* 362 N.W.2d 650, 653 (Mich. 1984) (spouses prohibited from working in same restaurant at the same time). These cases stand in stark contrast to the retroactive punishment

that Plaintiffs suffer under the exclusionary criteria. This demonstrates that this case does not fit squarely within conflict-of-interest jurisprudence. (*See* Doc. 20, Appellants' Br., Page ID # 50-52).

Appellees' efforts to overcome constitutional scrutiny by characterizing the burdens suffered by Plaintiffs as "insignificant" and "minimal," (Doc. 24, State Br., Page ID # 53); (Doc. 22, VNP Br., Page ID # 29, 31, 46), are also wrong and demonstrate the need to develop a more robust factual record in this case. The exclusionary criteria force Plaintiffs to choose between exercising constitutionally protected rights such as free speech and association or being eligible to receive a valuable benefit—a salary equaling roughly $40,000 a year. (Doc. 20, Appellants' Br., Page ID # 19).

Further, the criteria operate retroactively, depriving Plaintiffs of any choice in the matter. If Plaintiffs happened to engage in too much political speech or activity at some point in the preceding six years, they are deprived of their eligibility for the valuable benefit. Going forward, they have the choice to forego their political activity and be eligible to receive the benefit or engage in further political activity and be punished for that choice. Of course, by definition the vast majority of people who are harmed by the exclusionary criteria are excluded merely because they are related to

someone who exercised their First Amendment rights at some point during the preceding six years.[1] Those individuals never had a choice.

In sum, the exclusionary criteria impose real burdens—both constitutional and monetary. Appellees' characterization of Plaintiffs' burdens as minimal highlights the need to further develop the factual record in the District Court so that court can properly determine the weight of Plaintiffs' burdens under the exclusionary criteria. *See supra* Sec. I.

B. The Exclusionary Criteria Cannot be Severed from the Rest of the Commission Scheme.

The exclusionary criteria cannot properly be severed from the remainder of the Commission scheme because the wording of the ballot proposal which voters approved specifically included the exclusionary criteria as a central part of the Commission scheme and the criteria therefore play an integral role in accomplishing the Commission's goals. (Doc. 20, Appellants' Br., Page ID # 64-66). Striking the exclusionary criteria but leaving the Commission otherwise intact would create an entirely different body than the one which the Amendment contemplated. Regardless of the severability clause's language, it remains unclear whether the voters would have approved the initiative without the exclusionary criteria.

[1] Nearly every individual who is excluded from Commission eligibility due to his or her direct political or lobbying activities will have multiple blood relatives who are also excluded from Commission eligibility simply because they are related to the acting individual. (*See* Doc. 20, Appellants' Br., Page ID # 19, 47-48).

In arguing for severability, the State insists that Plaintiffs' severability arguments cut against their arguments that the criteria are not narrowly tailored. (Doc. 24, State Br., Page ID # 32). Not so. The exclusionary criteria are impermissibly both over- and under-inclusive—especially in disqualifying family members retroactively—and therefore fail under both heightened scrutiny and exacting scrutiny. (Doc. 20, Appellants' Br., Page ID # 35, 44-56). This has nothing to do with the fact that the criteria are so intertwined with the Amendment that it would be difficult for anyone to predict whether voters would have approved the initiative without it.

VNP posits that Plaintiffs must not really wish to serve on the Commission since they are arguing against severability. (Doc. 22, VNP Br., Page ID # 47). Not true. Plaintiffs wish to serve on the Commission if it can survive severability. But as noted above, it is difficult to envision what the Commission would look like without the criteria. Furthermore, VNP's confusion on this subject would certainly benefit from further development of the factual record. *See supra* Sec. I.

In sum, Plaintiffs have not only met their burden of stating a claim that the Commission's selection criteria are unconstitutional and invalid, they have also demonstrated that the Commission in its entirety should be declared invalid. It is not possible to say whether Michigan voters would have approved the ballot measure but for VNP's decision to include unconstitutional commissioner criteria.

CONCLUSION

For the foregoing reasons and those stated in their opening brief, Plaintiffs respectfully request that this Court reverse the decision of the District Court and remand.

/s/ Jason Torchinsky
Jason Torchinsky
Jonathan P. Lienhard
Shawn Sheehy
Dennis W. Polio
Kenneth C. Daines
Holtzman Vogel Josefiak
Torchinsky PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
P: (540) 341-8808
F: (540) 341-8809
jtorchinsky@hvjt.law
jlienhard@hvjt.law
ssheehy@hvjt.law
dwpolio@hvtj.com

John J. Bursch
Bursch Law
9339 Cherry Valley, S.E., Suite 78
Caledonia, MI 49316
616-450-4235

Eric E. Doster
DOSTER LAW OFFICES, PLLC
2145 Commons Parkway
Okemos, MI 48864
(517) 977-0147
eric@ericdoster.com

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 3,757 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

By: /s/ Jason Torchinsky
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, an electronic copy of the foregoing Reply Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in this case are represented by lead counsel who are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Jason Torchinsky
Attorney for Appellants