Nos. 19-2377, 19-2420

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,

and

MICHIGAN REPUBLICAN PARTY, 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
Western District of Michigan, Southern Division
Honorable Janet T. Neff

SECRETARY OF STATE JOCELYN BENSON'S RESPONSE TO DAUNT PLAINTIFFS' PETITION FOR REHEARING EN BANC

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INTRODUCTION

The *Daunt* Plaintiffs' Petition for Rehearing En Banc makes two arguments that the Panel's decision conflicts with existing Supreme Court precedent. First, they argue that the application of the *Anderson-Burdick* standard was erroneous because the subject matter of the case was insufficiently connected to election administration. Second, they argue that the Panel erred in deciding to uphold the provisions of Michigan's constitution limiting who may be a member of its newly created redistricting commission based upon their political or familial associations.

For the reasons set forth below and for those reasons stated fully in the earlier briefing and arguments, the arguments presented in the petition fail to demonstrate that the Panel's decision was erroneous or inconsistent with established law.

ARGUMENT

I. The Panel did not err in applying the *Anderson-Burdick* standard to a state constitutional provision altering the method for drawing state legislative districts.

The petition suggests that the *Anderson-Burdick* analysis was inapt in this case because the subject matter was too far removed from election mechanics, and that its use here portends a precarious

expansion of the standard beyond what this and other courts have previously recognized. That argument, however, simply misses the mark. First, the petition incorrectly limits *Anderson-Burdick* to only cases specifically concerned with the tension between "voting rights" and "administering elections." (Doc. 75, Petition, p. 12-13.) But as the Panel noted, the underlying rationale espoused by the Supreme Court in *Burdick*—ensuring "the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system"—applies just as readily to the case at hand. (Doc. 72-2, Panel Decision, p. 9-10.) The Supreme Court in *Burdick* described the test as applying when a court is "considering a challenge to a state election law" brought under the First and Fourteenth Amendments. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). *See also Anderson v. Celebrezze*, 460 U.S. 780 (1983). That is exactly the nature of the challenge raised by Appellants here, and so the application of *Anderson-Burdick* is appropriate in this case.

In its effort to avoid the application of *Anderson-Burdick*, the petition suggests that Michigan's constitutional amendment establishing an independent redistricting commission concerns

something other than "election laws administering elections and burdening voting rights." (Doc. 75, Petition, p. 13.) But this framing ignores the direct consequences of the redistricting commission's work—the drawing of legislative districts that will control the candidates for whom voters may cast their vote, and how effective their votes may be. The redistricting commission has no other function—it is entirely dedicated to this central component of administering an election. The eligibility criteria determining who may serve on that commission, therefore, have a direct effect on the drawing of legislative districts and the administration of elections in those districts.

Regardless, the petition's critique of the Panel's use of *Anderson-Burdick* disregards that the Panel opinion pointedly did *not* rely solely on that test to decide the case. Instead, the Panel reviewed the Appellants' challenge under both the *Anderson-Burdick* test and the unconstitutional conditions doctrine and found the amendment constitutional under both approaches. (Doc. 72-2, Panel Decision, p. 9.) As a result, the Panel expressly stated that it "need not choose between the two," and instead discussed why the amendment was constitutional under both tests. *Id.* A similar approach was used by this Court in

Citizens for Legislative Choice v. Miller, 144 F.3d 916, 920 (6th Cir. 1998), which brought a challenge to Michigan's adoption of term limits for state offices. There, just as here, the issues of the case blended election laws with eligibility for public offices. This Court was nonetheless able to determine the constitutionality of the proposal under both *Anderson-Burdick* and the deferential approach used by the Ninth Circuit in *Bates v. Jones*, 131 F.3d 843, 858 (1997) ("*Bates II*").[1]

So the Panel's decision did not simply rely on *Anderson-Burdick* to reach its result, and instead also considered the same unconstitutional conditions doctrine cited approvingly by the Petition. (Doc. 75, Petition, p. 13.) The Petition makes no argument against the Panel's use of the unconstitutional conditions approach, under which the Panel also concluded that the redistricting commission was constitutional.

Last, contrary to the Petition's arguments, the Panel's decision is not in direct conflict with decisions from either the Supreme Court or

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[1] The Panel, holding that the deferential approach under *Bates II* had not been further developed in this circuit, did not consider that approach. If this Court decides that the Panel's consideration of both *Anderson-Burdick* and the unconstitutional conditions doctrine was insufficient, the Appellees' arguments in the earlier briefs on the deferential approach should also be re-considered.

this Court. The Petition first refers to *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), which concerned a prohibition against anonymous distribution of campaign literature. But *McIntyre* offers no broad declaration of the scope of *Anderson-Burdick*. Instead, it confronted a "direct regulation of the content of speech." *McIntyre*, 514 U.S. at 345. In distinguishing that situation from the "ordinary litigation" of election cases, the Court noted that the specific statute at issue—Ohio Code §3599.09(A)—did not "control the mechanics of the electoral process." *Id.* At best, *McIntyre* merely instructs that connection to a political campaign does not transform an otherwise straight-forward free-speech claim into an election case. But there is no "direct regulation of speech" at issue in the eligibility criteria of Michigan's redistricting commission, and *McIntyre* offers little other guidance on the application of *Anderson-Burdick*. There is certainly no explicit proscription against the use of *Anderson-Burdick* in this situation that would constitute a direct conflict between the Panel decision and the Supreme Court.

The Petition next turns to *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (1995), but *Briggs* provides virtually no analysis on the

scope of *Anderson-Burdick*. Instead, the only discussion of *Anderson-Burdick* occurs in a footnote, and consists of a citation to *McIntyre* and a generic recitation that the *Anderson-Burdick* standard should not be applied to First Amendment challenges to regulations limiting the content of political speech, such as the campaign billboard at issue in that case. *Id.* at 493 n.5.

Finally, the Petition contends that the Panel decision conflicts with the unpublished decision in *Moncier v. Haslam*, 570 Fed. App'x 553 (6th Cir. 2014). But, as discussed in Appellee's brief before the Panel, the Court in *Moncier*, 570 Fed. Appx. at 559-560, only addressed standing, and referred to *Anderson-Burdick* only for the point that neither case substantively supported the plaintiffs' First and Fourteenth Amendment claims. (Doc. 45, Appellee's Br., p. 31.) While the Petition strains to find similarity to *Moncier* because "both involve selection of government employees without regulating the election of candidates," such a comparison misreads both the decision in *Moncier* and Michigan's redistricting amendment. Nonetheless, nothing in *Moncier* may be read as an analysis on the application of *Anderson-Burdick* to the composition of a redistricting commission like

Michigan's, and so the Panel decision cannot be said to be in "direct conflict" as the Petition claims.

To the contrary, the redistricting commission does regulate the mechanics of election administration. The commission's work directly determines what candidates are available to voters, and thereby the content of their ballots. Redistricting is an essential process to holding an election and is effectively the first step that must be taken before there can be an election. And the eligibility criteria for members of the commission closely resemble candidate-qualification laws that have been reviewed by this Court under *Anderson-Burdick*. *See Citizens for Legislative Choice v. Miller*, 144 F.3d at 920. As a result, not only is the Panel's decision not in conflict with decisions of either the Supreme Court or this Court, the Panel's use of *Anderson-Burdick* was consistent with this Court's prior decision in *Citizens for Legislative Choice*.

The Petition argues that the application of *Anderson-Burdick* in this case presents a question of "exceptional importance." (Doc. 75, Petition, p. 16.) But that is premised largely upon Judge Readler's concurring opinion, which—although it questioned the scope of *Anderson-Burdick* and raised concerns about its potential over-

application or misuse—nonetheless agreed that Michigan's redistricting amendment was constitutional as an exercise of state sovereignty. (Doc. 72-2, Panel Decision, p. 44.) It is difficult, therefore, to say that the application of *Anderson-Burdick* is a question of exceptional importance when the basis for that argument would nonetheless result in the rejection of the Appellants' claims.

II. The Panel did not err in upholding the eligibility criteria for Michigan's constitutional amendment establishing an independent redistricting commission.

The Petition asks for en banc review to take a second look at the constitutionality of the eligibility criteria for Michigan's redistricting commission. But while the Petition complains that the Panel gave "short shrift" to Appellants' arguments, the Panel decision spent 31 pages going through each argument and claim raised by the Appellants before holding that the amendment was likely constitutional. The Petition does not identify any particular error or oversight by the panel, and instead basically repeats the same arguments already raised in the briefs before both the Panel and the lower court.

The Petition once again raises the unconstitutional conditions argument it already presented to the Panel and asserts that there is "no basis" for the disqualification of family members, and claims that the

Panel's analysis fails to address the "look back" provisions of the eligibility criteria. (Doc. 75, Petition, p. 19-20.) The Petition does not appear to recognize that the Panel decision discussed familial exclusions in its treatment of the Eleventh Circuit's decision in *Grizzle v. Kemp*, 634 F.3d 1314, 1325 (11th Cir. 2011), where that Court declined to apply strict scrutiny to eligibility criteria for public office that prohibited "immediate family members" of school district employees from running for school boards. (Doc. 72-2, Panel Decision, p. 16.) Nor does the Petition reconcile its arguments about the "look back" provisions of the Panel's review of the "retroactive effect" of the amendment. (Doc. 72-2, Panel Decision, p. 16.) The Panel concluded that Michigan's interest in addressing even the *appearance* of undue influence allowed it to disqualify not only active partisans, but those whose recent partisan involvement—or whose association with active partisans—could create the appearance that the commission was staffed with political insiders. (*Id.*) The Panel correctly noted that "efforts to purge conflicts of interest from the democratic process 'have been commonplace for over 200 years.'" *Id.* (quoting *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011)). The Panel was "loathe to

disturb" that practice, especially when "public confidence in the integrity of redistricting" is at stake. *Id.* (citing *Rucho v. Common Cause,* 139 S. Ct. 2484, 2507 (2019)). This Court should share the Panel's reservations. While the Appellants may disagree with the Panel's decision, that does not equate to the Panel's decision being erroneous.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the Petition has not demonstrated any error or infirmity in the Panel's decision that would require rehearing en banc. The petition should be denied and the Panel's decision should remain undisturbed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the page limitation of this Court's May 15, 2020 letter directing a response to the petition for rehearing en banc not to exceed ten pages.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on May 29, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee Benson, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the appellate record on appeal:

Description of Entry	**Date**	**Record Entry No.**
Appellee's Brief	02/03/2020	Doc. 45
Panel Decision	04/15/2020	Doc. 72-2
Petition Rehearing En Banc	05/13/2020	Doc. 75