No. 21-1129

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIKE KOWALL; ROGER KAHN; PAUL OPSOMMER; JOSEPH HAVEMAN; DAVID E. NATHAN; SCOTT DIANDA; CLARK HARDER; MARY VALENTINE; DOUGLAS SPADE; MARK S. MEADOWS,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official capacity as Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court
Western District of Michigan

BRIEF FOR DEFENDANT-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants have requested oral argument. However, Defendant-Appellee Michigan Secretary of State Jocelyn Benson believes that oral argument is unnecessary for the Court to decide the issues presented in this appeal of the District Court's well-reasoned opinion and that the issues raised in this appeal are resolved by established law—including this Court's previous opinion in *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), which decided similar constitutional arguments.

JURISDICTIONAL STATEMENT

Defendant-Appellee Michigan Secretary of State Jocelyn Benson concurs in the Plaintiffs-Appellants' Statement of Jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether the amendment to Michigan's Constitution imposing terms limits for the offices of state representative and state senator violates the First or Fourteenth Amendments of the U.S. Constitution.

2. Whether the amendment to Michigan's Constitution imposing terms limits for the offices of state representative and state senator violates the Title-Object Clause of the Michigan Constitution.

3. Whether the amendment to Michigan's Constitution imposing terms limits for the offices of state representative and state senator violates Article XII, § 2 of the Michigan Constitution pertaining to ballot language.

INTRODUCTION

In 1992, the People of Michigan amended the state Constitution by initiative to enact term limits for state legislators. Mich. Const., Art. IV, § 54. In doing so, the People expressed a preference for a legislature led by citizens—not professional politicians.

Six years later, and on the eve of its first application, the amendment withstood two constitutional challenges. In *Citizens for Legislative Choice v. Miller*, this Court held that the amendment did not violate voters' First and Fourteenth Amendment rights to associate under the federal Constitution. And in *Massey v. Secretary of State,* the Michigan Supreme Court held that the amendment's petition format and ballot language did not violate the state Constitution.

Since those decisions, and for the last 23 years, term limits have applied to state legislators in Michigan. And in that time, no effort has been made to repeal or modify these limits by amending the Michigan Constitution—the same vehicle by which they were added. *See* Mich. Const., Art. XII, §§ 1, 2.

Instead, Plaintiffs, former legislators and would-be candidates for their "old seats," filed this lawsuit challenging the constitutionality of § 54 under the federal and state Constitutions.

But Plaintiffs' First and Fourteenth Amendment claims, premised upon their interests as candidates, are indistinguishable from the voter claims this Court dismissed in *Miller*. The right impacted by term limits is the right to associate, which right voters and candidates hold in tandem. Plaintiffs' novel argument that their claims should be reviewed under a higher standard than voter claims is unsupported by existing precedent and provides no persuasive grounds for this Court to reverse course. *Miller* applies to bar Plaintiffs' claims, and the District Court properly granted summary judgment in Defendant's favor as a result.

Plaintiffs' state constitutional claims fare no better. Both claims are reimaginations of those rejected by the Michigan Supreme Court in *Massey*. And Plaintiffs' strained interpretation of the Michigan Constitution and its requirements for constitutional amendments is unsupported by its plain text and existing state-court precedent. Further, given the untimeliness of Plaintiffs' attack on the mechanics of

the amendment, Plaintiffs must clear a high hurdle to prove illegality, which they did not do. As a result, the District Court properly granted summary judgment in Defendant's favor on both claims.

Finally, Plaintiffs spend significant time complaining of the harshness of Michigan's term limits provision and alleging that its purposes have failed to materialize and that instead it has wreaked havoc on state government. But the proper audience for these arguments is the People of Michigan. This Court already upheld the constitutionality of Michigan's terms limits provision, and in doing so it "express[ed] no views on the wisdom of term limits," but rather "respect[ed] Michigan's views." *Miller*, 144 F.3d 916, 923 (6th Cir. 1998). This Court should do so again by affirming the District Court's grant of summary judgment in Defendant's favor.

STATEMENT OF THE CASE

A. Michigan's term limits amendment

The People of Michigan have reserved to themselves the right to amend the Michigan Constitution, the state's foundational document. *See* Mich. Const., Art. XII, § 2.

Michigan voters exercised this right in 1992 and adopted Proposal B, which established term limits on state legislators.[1] Under the amendment, state representatives are limited to three terms of two years each, and state senators are limited to two terms of four years. Mich. Const., Art. IV, § 54. The amendment added the following language to the state constitution:

> No person shall be elected to the office of state representative more than three times. No person shall be elected to the office of state senate more than two times. . . . This limitation on the number of times a person shall be elected to office shall apply to terms of office beginning on or after January 1, 1993.
>
> This section shall be self-executing. Legislation may be enacted to facilitate operation of this section, but no law shall limit or restrict the application of this section. If any part of this section is held to be invalid or unconstitutional, the remaining parts of this section shall not be affected but will remain in full force and effect.

Mich. Const. Art. IV, § 54. Notably, the amendment does not preclude candidates from serving the maximum in both houses. For instance, a candidate could be elected three times and serve six years in the House, and then seek election to the Senate, and serve two four-year terms

[1] The people also imposed term limits on state executive officers and congressional candidates. *See* Mich. Const., Art. V, § 30. But the term limits adopted for congressional candidates are unconstitutional. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779 (1995).

there, and vice versa. Thus, a candidate could run for legislative office at least five times and serve 14 years in the Michigan Legislature.[2]

A large majority of voters—58.8 percent—approved the proposal. *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 918 (6th Cir. 1998). Section 54 became operative as to state legislators beginning with the 1998 primary elections in Michigan. *Id.*

In the same year, four voters and two public interest groups filed a lawsuit challenging the constitutionality of § 54 under the First and Fourteenth Amendments in *Citizens for Legislative Choice v. Miller*. The *Miller* Court upheld the constitutionality of the amendment in a published decision. 144 F.3d at 918. A challenge was also filed in the Michigan Supreme Court. In that case, the Court rejected a challenge to the manner in which Proposal B was placed upon the ballot. *Massey*

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[2] In addition to Michigan, 14 other states impose term limits on state legislatures. (R. 33, Joint Statement, Page ID # 318, ¶3-5) (citing National Conference of State Legislators website). Of those, four other states impose lifetime term limits. (*Id.*) Missouri limits its legislators to serving eight years in the house and senate for a total of 16 years. California and Oklahoma limit legislators to serving 12 years total. And Nevada limits legislators to serving 12 years in both the house and senate for a total of 24 years. *See* The Term-Limited States, available at https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx, (accessed May 19, 2021).

v. Secretary of State, 579 N.W.2d 862 (Mich. 1998). The amendment has thus remained an operational part of the Michigan Constitution for 23 years.

B. The Plaintiffs

Plaintiffs are all former state legislators. Plaintiff Mike Kowall was elected to serve as a member of the Michigan House of Representatives between January 1, 1999 and December 31, 2002 and then served as a member of the Michigan Senate from January 1, 2011 through December 31, 2018. (R. 33, Joint Statement, Page ID # 327, ¶29.) Plaintiff Roger Kahn was a member of the Michigan House of Representatives between January 1, 2004 and December 31, 2005 and a member of the Michigan Senate from January 1, 2007 through December 31, 2015. (*Id.*, ¶ 30.) Plaintiff Scott Dianda was elected to serve as a member of the Michigan House of Representatives between January 1, 2013 and January 1, 2019. (*Id.*, ¶ 31.) Plaintiff Clark Andrew Harder was elected to serve as a member of the Michigan House of Representatives between January 1, 1991 and January 1, 1999. (*Id.*, Page ID # 328, ¶32.) Plaintiff Joseph Haveman was elected to serve as a member of the Michigan House of Representatives

between January 1, 2009 and January 1, 2015. (*Id.*, ¶ 33.) Plaintiff David Nathan was elected to serve as a member of the Michigan House of Representatives between January 1, 2009 and January 1, 2015. (*Id.*, ¶15, Page ID # 328-29, ¶34.) Plaintiff Paul Edward Opsommer was elected to serve as a member of the Michigan House of Representatives between January 1, 2007 and January 1, 2013. (*Id.*, Page ID # 329, ¶35.) Plaintiff Douglas Spade was elected to serve as a member of the Michigan House of Representatives between January 1, 1999 and January 1, 2005. (*Id.*, ¶36.) Plaintiff Mark Meadows was elected to serve as a member of the Michigan House of Representatives between January 1, 2006 and December 31, 2012. (*Id.*, Page ID # 330, ¶37.) Plaintiff Mary Hostetler Valentine was elected to serve as a member of the Michigan House of Representatives between January 1, 2007 and January 1, 2011. (*Id.*, ¶ 38.)

All Plaintiffs but Valentine state that but for term limits they would seek to run again for their "old seats." (*Id.*, Page ID # 327-30, ¶¶29-38.) All Plaintiffs also believe that term limits have been harmful or destructive to the Legislature as an institution or to state government for various reasons. (*Id.*)

Plaintiffs' declarations reveal that no Plaintiff has exhausted their capacity to serve as a legislator in Michigan, i.e., no one has served the permissible combined 14 years in the House and Senate. (*Id.*) Rather, all Plaintiffs but Valentine have exhausted their ability to serve in one house. Plaintiffs Kowall and Kahn served two terms in the Senate. (*Id.*, Page ID # 327, ¶¶29-30.) Plaintiffs Dianda, Harder, Haveman, Nathan, Opsommer, Spade, and Meadows all served at least three terms in the House. (*Id.*, Page ID # 327-30, ¶¶31-37.) Only Plaintiff Kowall has served in both houses, serving two terms in the House and two terms in the Senate. (*Id.*, ¶ 29.)

C. The alleged effects of term limits in Michigan

In support of their motion for summary judgment, Plaintiffs referenced but did not submit several articles discussing or concluding that term limits in general or Michigan's term limits have had a deleterious effect on government or have not served the purposes for which they were adopted. (R. 25, Page ID # 168-72, 174.) Certain of these articles are also referenced in the parties' joint statement of facts filed below. (R. 33, Joint Statement, Page ID # 318-327, ¶¶6-28.) Defendant notes for the Court's benefit that Defendant stipulated that

the referenced articles state what Plaintiffs represent they say, i.e., the quotes or paraphrasing is accurate, not that the articles are true or correct in their analysis or conclusions regarding § 54.

D. Procedural history of the case

Plaintiffs filed this lawsuit on November 20, 2019 (R. 1, Compl., Page ID # 1-30), and filed an amended complaint on December 11, 2019 (R. 5, Amend. Compl., Page ID # 34). In Counts I and II, Plaintiffs alleged that § 54 violates the First and Fourteenth Amendments. (*Id.*, Page ID # 58-62.) In Count III, Plaintiffs alleged that § 54 violates the Guarantee Clause of the federal constitution. (*Id.*, Page ID # 62-63.) Plaintiffs alleged in Count IV that § 54 violates the Title-Object Clause of the Michigan Constitution. (*Id.*, Page ID # 63-64.) And in Count V, Plaintiffs alleged that § 54's ballot language violates Article XII, § 2 of the Michigan Constitution. (*Id.*, Page ID # 64.)

Defendant Benson sought permission from the District Court to file a motion to dismiss under Fed. R. Civ. P 12(b)(6) (R. 11, Pre-Motion Conference Request, Page ID # 72), but that request was denied, and Defendant was ordered to file an answer and the parties were directed

to file cross-motions for summary judgment pursuant to a briefing schedule (R. 17, Pre-Conference Order, Page ID # 85).[3]

The parties conducted no discovery in this case. On July 9, 2020, Plaintiffs filed their motion and brief in support of summary judgment (R. 25, Page ID # 155); Defendant Benson filed her response in opposition and in support of her motion for summary judgment (R. 27, Page ID # 263); Plaintiffs filed their response in opposition to Defendant's motion and reply in support of their motion (R. 29, Page ID # 284); and Defendant filed her sur-reply in support of her motion for summary judgment (R. 31, Page ID # 303).

The District Court did not hold a hearing on the cross-motions. On January 20, 2021, the District Court issued its opinion and order granting summary judgment in favor of Defendant Benson on all counts. (R. 34, Opinion & Order, Page ID # 336.) Plaintiffs filed their notice of appeal on February 3, 2021. (R. 36, Page ID # 354.)

[3] This judge does not permit parties to file dispositive motions without seeking leave of the court. See page 3, https://www.miwd.uscourts.gov/sites/miwd/files/Neff_Civil_Guidelines.pdf, (accessed May 19, 2021).

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, "applying the same standards as the district court." *Morehouse v. Steak N Shake*, 938 F.3d 814, 818 (6th Cir. 2019) (quoting *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 629 (6th Cir. 2014)). "Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotations omitted); *see also* Fed. R. Civ. P. 56(a). Ordinarily, the Court reviews the evidence in the light most favorable to the nonmoving party. *Morehouse*, 938 F.3d at 818. But, "[w]here, as here, the parties filed cross-motions for summary judgment, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 425 (6th Cir. 2019) (internal quotations omitted).

SUMMARY OF ARGUMENT

The District Court properly granted summary judgment in Defendant's favor. Plaintiffs' arguments to the contrary are

unpersuasive and reflect a misapplication of case precedent from this Court and the U.S. Supreme Court and a misunderstanding of the state election laws at issue.

First, Plaintiffs' argument that the District Court erred in failing to apply traditional, strict scrutiny review to their First and Fourteenth Amendment claims fails where Plaintiffs' claims as would-be candidates are indistinguishable from the voter claims rejected by this Court in *Citizens for Legislative Choice v. Miller* under an *Anderson-Burdick* analysis.

Second, Plaintiffs' argument that Michigan's term limits amendment violates the Title-Object Clause of the Michigan Constitution is wholly without merit where the plain text of that Clause and its surrounding provisions make clear that it applies only to legislation originating in the Legislature—not amendments to the Michigan Constitution.

And third, Plaintiffs' argument that the ballot language for Michigan's term limits amendment violated the Michigan Constitution is also without merit where the ballot language did not mislead voters by failing to explain the amendment's savings clause, which had the

effect of "saving" term limits as to state legislators when the federal limits were rendered unconstitutional by the decision in *U.S. Term Limits, Inc. v. Thornton*.

ARGUMENT

I. The Michigan Constitution's term limits amendment for state legislators does not violate Plaintiffs' First or Fourteenth Amendment rights under the U.S. Constitution.

Under this Court's precedent, the *Anderson-Burdick* test is the correct framework to evaluate Plaintiffs' claims that Michigan's term limits violate the federal constitution. Plaintiffs' suggestion that this Court take a "fresh look" at that decision—in other words, overrule this Court's own precedent—is unsupported and unpersuasive. But even if this Court abandoned the applicability of *Anderson-Burdick* in this context, Michigan's term limits would pass strict scrutiny.

A. The *Anderson-Burdick* balancing test provides the proper framework for analyzing Plaintiffs' claims.

Plaintiffs argue that the District Court erred in analyzing their claims under the *Anderson-Burdick* balancing test, instead of applying traditional strict scrutiny review. (Doc. 15, Plfs' Brf, Page ID # 35-43.) But the District Court rightly followed this Court's opinion in *Citizens*

for Legislative Choice v. Miller, which applied *Anderson-Burdick* to the voters' challenge to § 54 in that case. 144 F.3d at 920.

Plaintiffs assert that their claims should be accorded different review because they are would-be candidates, not voters. Plaintiffs argue that § 54 functions as a substantive qualification for office and that the *Anderson-Burdick* test "is calibrated to the regulation of election processes, not candidate qualifications;" they propose a strict scrutiny review standard instead. (Doc. 15, Plfs' Brf, Page ID # 35-43.) But this argument is unpersuasive.

The U.S. Supreme Court has minimized the extent to which voting rights cases are distinguishable from ballot access cases, stating that 'the rights of voters and the rights of candidates do not lend themselves to neat separation.' " *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Voting has long been recognized by the Supreme Court as a "fundamental right." *See Harper v. Virginia Board of Elections,* 383 U.S. 663, 667 (1965); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). But "[f]ar from recognizing candidacy as a 'fundamental right,' [the Supreme Court has] held that the existence of barriers to a candidate's access 'does not

of itself compel close scrutiny.' " *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (quoting *Bullock v. Carter,* 405 U.S. 134, 143 (1972)).

The Supreme Court has recognized that every election law, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983). But "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 433-34. Thus, "the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.' " *Id.* (quoting *Bullock,* 405 U.S. at 143).

Plaintiffs' argument is based on selected sentences from *U.S. Term Limits, Inc. v. Thornton*, in which the Supreme Court struck down Arkansas's form of term limits for Congress under the Qualifications Clauses of the federal Constitution. 514 U.S. 779 (1995). In rejecting

the petitioners' arguments that the Elections Clause of the Constitution permitted Arkansas to enact term limits as a ballot access measure, the Court discussed its Elections Clause cases and observed that those cases had upheld procedural regulations that "did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." *Id.* at 835. The Court determined that its "cases upholding state regulations of election procedures thus provide little support for the contention that a state-imposed ballot access restriction is constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause." *Id.* In other words, petitioners could not use the Elections Clause as an end-run around the Qualifications Clause.

But this analysis has little to nothing to do with Plaintiffs' First and Fourteenth Amendment claims here. *Thornton* did not clarify or establish what review the federal courts should apply in analyzing state-created term limits on state offices. Thus, when the issue came before this Court in *Miller*, the Court had to determine what review should apply. And the Court, in fact, concluded that there were two

equally applicable standards that could be applied, *Anderson-Burdick* and a "deferential approach" discussed in other term limits cases.

The Court determined that term limits are in nature candidate eligibility requirements that may be reviewed under the *Anderson-Burdick* test. 144 F.3d 916, 920-921 (6th Cir. 1998). This determination was consistent with other federal courts' application of *Anderson-Burdick* in other term limits cases. *See, e.g.*, *Bates v. Jones,* 131 F.3d 843, 847 (9th Cir. 1997) (applying *Anderson-Burdick* where "[t]he rights which the plaintiffs seek to vindicate . . . are the right to vote for the candidate of one's choice and the asserted right of an incumbent to again run for his or her office."), *cert. denied* 523 U.S. 1021 (1998); *League of Women Voters et al v. Diamond*, 923 F. Supp. 266 (D. Me. 1996), aff'd 82 F.3d 546 (1st Cir. 1996). Plaintiffs' statuses as would-be candidates do not render the *Anderson-Burdick* test inapplicable to them where the interests of both candidates and voters are grounded in the First and Fourteenth Amendments right to associate. Indeed, other courts applied that test in term limits cases involving candidate plaintiffs. *See, e.g.*, *Bates,* 131 F.3d at 846; *League of Women Voters,* 923 F. Supp. at 268-72.

Moreover, term limits, which arguably function as a qualification for office, implicate the State's fundamental right to structure its government through the election of its leaders. *Miller*, 144 F.3d at 923 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). This Court recently applied *Anderson-Burdick* review in another case involving election laws that implicate the State's structural interests. *See Daunt v. Benson*, 956 F.3d 396, 407 (6th Cir. 2020) (challenging the composition of Michigan's Independent Citizens Redistricting Commission on First and Fourteenth Amendment grounds) (appeal pending). The District Court, therefore, did not err in applying *Anderson-Burdick* to resolve Plaintiffs' claims.

B. Plaintiffs' claims fail under *Anderson-Burdick* because the burden imposed by term limits is not severe and is outweighed by the State's compelling interest in structuring its government.

The *Anderson-Burdick* analysis from *Anderson v. Celebrezze* and *Burdick v. Takushi* requires the following considerations:

> [T]he court must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it must determine the legitimacy and strength of each of those interests and consider the extent to which

> those interests make it necessary to burden the plaintiff's rights.

Green Party of Tenn. v. Hargett (Hargett II), 791 F.3d 684, 693 (6th Cir. 2015) (internal quotation marks and citations omitted).

If a state imposes "severe restrictions" on a plaintiff's constitutional right, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "'the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett (Hargett I)*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). Regulations falling somewhere in between—"i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'" *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

In Count I of their amended complaint, Plaintiffs alleged that § 54 violates their First and Fourteenth Amendments by "interfer[ing] with the ability of both individuals and political parties to select the candidate of their choice." (R. 5, Am. Compl., Page ID # 59, ¶ 123.) They argued that § 54 imposes a severe burden on this right, and as a result, it "must be narrowly drawn to advance a state interest of compelling importance" in order to survive review. (*Id.*, Page ID # 59, ¶¶ 12324.) Plaintiffs alleged that "Michigan's term limits do [not] serve a compelling state interest and are not narrowly tailored to achieve that interest[.]" (*Id.*, Page ID # 59, ¶127.)

Similarly, in Count II, Plaintiffs alleged that § 54 violates their First and Fourteenth Amendment associational rights because it "denies voters the opportunity to participate on an equal basis with other voters in the election of their choice of representative, and denies such voters the ability to support an entire class of candidates—experienced legislators." (*Id.*, Page ID # 60, ¶135.) They further alleged that it "imposes a content-based restriction on which candidates voters may support." (*Id.*, Page ID # 60, ¶136.) Plaintiffs argued that § 54 severely burdens these rights and because it is not narrowly drawn to

advance a compelling state interest, it is unconstitutional. (*Id.*, Page ID # 61, ¶¶ 140-144.)

But this Court rejected virtually the same First and Fourteenth Amendment arguments in *Miller*. There, as here, the plaintiff voters and voters' rights groups alleged that § 54 "violate[d] their First and Fourteenth Amendment rights to vote for their preferred legislative candidates." 144 F.3d at 919. Employing the *Anderson-Burdick* balancing test, the Court first concluded that § 54 does not impose a severe burden because voters do not have a right to "vote for a specific candidate or even a particular class of candidates," e.g., legislators with experience, *id*. at 921, the provision does not impose "a content-based burden," and voters "have many other avenues to express their preferences," including their preference for experience, *id*. at 922. "Moreover," as the Court observed, "nothing prevents [voters] from overturning § 54 through Michigan's constitutional processes, and thereby convincing others that experience counts." (*Id.*)

In addition, this Court determined that the "State of Michigan has a compelling interest in enacting § 54." (*Id*. at 923.) It observed that "Michigan has a fundamental interest in structuring its government,"

and that "[e]very court to address the issue has found that a State has a compelling interest in imposing lifetime term limits." (*Id.* (citations omitted).) Recognizing the State's asserted interests of " 'maintaining the integrity of the democratic system,' " "foster[ing] electoral competition," "enhanc[ing] the lawmaking process," "curbing special interest groups," and "decreasing political careerism," this Court "express[ed] no views on the wisdom of term limits," but rather "respect[ed] Michigan's views." (*Id.*)

Lastly, this Court determined that "Michigan narrowly tailored § 54 to satisfy its compelling interests." (*Id.* at 924.) "Michigan asserts that only lifetime term limits will ensure a complete turnover of all legislative seats every few years, and that only lifetime term limits can erase all of the problems associated with incumbency. We defer to Michigan's judgment." (*Id.*) The Court concluded that "even if [it] found that lifetime term limits burdened voters severely, [it] would still uphold § 54 under the compelling interest standard," and thus § 54 "passes the *Anderson-Burdick* balancing test regardless of whether" rational basis or strict scrutiny review applied. (*Id.*)

Plaintiffs' legal arguments here, as grounded in their complaint, are indistinguishable from those that were rejected by this Court in *Miller*.

In their briefing below, Plaintiffs shifted their argument to focus on their status as would-be candidates. Plaintiffs argued that term limits should be treated like ballot access fees because they disadvantage a class of candidates and have been reviewed under strict scrutiny. (R. 34, Opinion & Order, Page ID # 339.)[4] Plaintiffs argued that § 54 fails strict scrutiny because it is not narrowly tailored in that the imposed limits are not the least restrictive means to advance the State's interests. (*Id.*, Page ID # 339-340.) Plaintiffs argued in the alternative that § 54 should be analyzed as a severe burden under *Anderson-Burdick*, and that § 54 is not narrowly tailored to prevent political careerism, the advantages of incumbency, or increased diverse representation. (*Id.*, Page ID # 340.)

[4] At least one judge has rejected this comparison. *See Bates*, 131 F.3d at 850 (O'Scannlain, J., concurring) ("While a failure to provide access to the ballot for new or small political parties or independent candidates or on the basis of wealth may effectively result in the exclusion of unique ideas and viewpoints from the political marketplace, the imposition of term limits raises no similar concerns.")

The District Court correctly rejected these arguments, observing that § 54 had not changed since this Court upheld it in 1998. And while Plaintiffs asserted that their status as would-be candidates required a " 'fresh look and different result,' " Plaintiffs offered "no justification for such a 'fresh look.' " (*Id.*, Page ID # 344) (citing R. 29, Page ID # 291, 306.) The court agreed with Defendant that seeking to be candidates did " 'nothing to change the *Anderson-Burdick* review of any alleged burden on the right to associate that is implicated by candidate qualifications.' " (*Id.* (quoting R. 31, Page ID # 306).) And that "by suggesting that their claims should succeed where the plaintiffs' claims in *Miller* failed, 'Plaintiffs' argument necessarily requires that there be a higher degree of First Amendment protection for elected officials than is provided for voters,' yet Plaintiffs offer no explanation or justification for such a disparity." (*Id.*) The District Court further rejected Plaintiffs' reliance on *Thornton*, noting that its decision on federal term limits did not compel a different result in this case, and that this Court had taken note of *Thornton* in *Miller* and observed that it had not addressed state term limits. (*Id.*, Page ID # 344-345.)

The District Court thus concluded that "Plaintiffs offer no basis on which this Court may properly disregard the clear and binding precedent in *Miller*." (*Id.*, Page ID # 345.)

Plaintiffs similarly fail on appeal to offer any persuasive argument that this Court should revisit its decision in *Miller* simply because Plaintiffs are would-be candidates. Again, Plaintiffs have no fundamental right to run for an elective office, much less a specific elective office. *See, e.g.*, *Bullock,* 405 U.S. at 142-43. Further, this Court in *Miller* held that, "[a] voter has no right to vote for a specific candidate." *Miller*, 144 F.3d at 921. Instead, candidate qualification laws implicate the First and Fourteenth Amendment rights of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast votes effectively. *Anderson*, 460 U.S. at 786-87 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). But this Court already reviewed Michigan's term limits under the First and Fourteenth Amendments using both the *Anderson-Burdick* analysis and the "deferential approach" and found them constitutional. *Miller*, 144 F.3d at 920-25. So, the fact that Plaintiffs seek to be candidates does

nothing to change the *Anderson-Burdick* review of any alleged burden on the right to *associate* that is implicated by candidate qualifications.

Plaintiffs' argument instead attempts to shift the discussion from the right to associate to their inability to be candidates for particular offices—their "old seats." But this argument is contrary to the cases cited above. Moreover, as the District Court stated, by suggesting that their claims should succeed where the plaintiffs in *Miller* failed, Plaintiffs' argument necessarily requires that there be a higher degree of First Amendment protection for elected officials than is provided for voters. Plaintiffs again offer no explanation or justification for such a disparity.

Plaintiffs urge this Court to reject its analysis in *Miller* and instead apply strict scrutiny because they believe that term limits impose a severe burden. But again, as the District Court noted, the term limits at issue have not changed since this Court reviewed them in *Miller*. And there this Court held that "courts evaluate *candidate eligibility requirements by* balancing the state's interests against the individual voter's interests" and then applied the *Anderson-Burdick* balancing test to determine that Michigan's term limits were

constitutional. *Miller,* 144 F.3d at 920 (emphasis added). To apply any other standard to a challenge of the same term limits would conflict with the Court's longstanding precedent.

But, even if strict scrutiny did apply, Michigan's term limits nonetheless satisfy such scrutiny under the *Anderson-Burdick* test. That is because—as discussed above—the Court in *Miller* already held that Michigan's term limits amendment was narrowly tailored to advance the State's compelling interest in "structuring its government" since only "lifetime term limits will ensure a complete turnover of all legislative seats every few years." *Miller*, 144 F.3d at 923-924 (citing *Ashcroft*, 501 U.S. at 460.)

Plaintiffs simply cannot demonstrate a severe burden. All the Plaintiffs could exercise their associational rights and run for seats in the house in which they are not term limited. And when those opportunities are exhausted, they could run for state executive-level office, Congress, or any number of local offices. In this way, § 54 does not unfairly or unnecessarily burden the "availability of political opportunity." *Clements v. Flashing*, 457 U.S. 957, 964 (1982). And as the *Miller* Court observed, § 54 is content neutral (it applies to all

candidates) and does not disparately impact any legally cognizable group. *Miller*, 144 F.3d at 922 ("Apart from the term limits issue, voters who favor experience are not in any sense a recognized 'group,' and we are aware of no historical bias against incumbent politicians or their supporters.")

As they did below, Plaintiffs spend a significant portion of their brief on appeal attacking the wisdom and efficacy of term limits, citing articles and their self-serving affidavits. (Doc. 15, pp 20-30.) But this Court previously declined to decide the wisdom of term limits, and instead respected the decision of Michigan voters. *Miller*, 144 F.3d at 923 ("We . . . express no views on the wisdom of term limits, [ ] we simply respect Michigan's views."). Plaintiffs' time would be better spent educating Michigan voters as to Plaintiffs' opinions on term limits. Indeed, Plaintiffs may present their arguments on the merits of term limits to the People of Michigan, who retain the ability to remove or modify term limits on their own through initiative. Mich. Const., Art. XII, § 2. Plaintiffs could also prevail upon sitting legislators to

propose an amendment to § 54. Mich. Const., Art. XII, § 1.[5] As this Court observed in *Miller*, "nothing prevents [voters] from overturning § 54 through Michigan's constitutional processes, and thereby convincing others that experience counts." *Miller*, 144 F.3d at 922.

But what Plaintiffs cannot do is succeed on their arguments that § 54 violates the First and Fourteenth Amendments. Those arguments fail for the same reasons this Court articulated in *Miller*. This Court should affirm the District Court's grant of summary judgment in Defendant's favor.

[5] This is the course other states have taken. In 2012, California voters approved an initiative to lower the total number of years a legislator could serve from 14 to 12 years but eliminated the chamber limits of six years in the Assembly and eight in the Senate. Also, through a measure referred to the voters by the legislature in 2012, Arkansas eliminated chamber limits and expanded the limit on total years of service to 16. And while both states initially retained lifetime bans on returning to the legislature, Arkansas voters have eliminated that prohibition. *See* National Conference of State Legislatures, February 8, 2021, As Term-Limit Laws Turn 30, Are States Better off?, state legislative term limit laws turn 30 (ncsl.org) (accessed May 19, 2021).

II. The Michigan Constitution's term limits amendment does not violate the Title-Object Clause of the state constitution.

Plaintiffs raise a novel claim that Michigan's Title-Object Clause not only applies (by its plain terms) to legislation enacted by the Michigan Legislature, but also to amendments to Michigan's Constitution. But that Clause's words and context plainly refute this strained interpretation. Plaintiffs also claim that imposing term limits fundamentally changed Michigan's Constitution by restructuring the government, but the challenged amendment simply added a candidate qualification, a provision well within the authority of Michigan's Constitution.

A. The District Court properly rejected Plaintiffs' state constitutional challenge, consistent with Michigan law.

Plaintiffs alleged in Count IV of their amended complaint that Proposal B, the ballot proposal that led to the enactment of § 54, violated the Title-Object Clause of the Mich. Const., Art. IV, § 24 which provides that "[n]o law shall embrace more than one object, which shall be expressed in its title." (R. 5, Amend. Compl., Page ID # 63, ¶ 158.)

The District Court swiftly, and correctly, disposed of this claim. As that court observed, the purposes of the Title-Object Clause are

directed at legislation enacted by the Michigan Legislature. (R. 34, Opinion & Order, Page ID # 348) (citing *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 230 (Mich. 2002); *City of Livonia v. Dep't of Soc. Svcs.*, 378 N.W.2d 402, 417 (Mich. 1985).) The Court concluded that Plaintiffs failed to identify any "basis upon which th[e] Court could properly conclude that the framers intended the Michigan Constitution's Title-Object clause from Article IV to apply to proposals to amend the Constitution under Article XII." (*Id.*)

Plaintiffs' arguments on appeal are no more persuasive than they were below.

As an initial matter, Plaintiffs bear a heavy burden regarding their untimely challenge to the mechanics of Proposal B. In *Massey v. Secretary of State*, the Michigan Supreme Court rejected a post-enactment challenge to the term limits amendments. 579 N.W.2d 862 (Mich. 1998). There, six years after the voter's approved § 54, the plaintiffs alleged that Proposal B had violated Article XII, § 2 of the Michigan Constitution by failing to set forth additional sections of the Constitution that would have been altered or abrogated by the amendment. *Id.* at 864-865. The plaintiffs further alleged that the

ballot language violated the constitution because it was not a true and impartial statement of the purpose of the amendment. *Id.*

Before addressing, and rejecting, the merits of the plaintiffs' claims, the Michigan Supreme Court noted its "long expressed [ ] preference that challenges" to procedural errors "be filed sufficiently before an election . . . for the courts to have time to resolve the dispute and, if necessary, to direct election officials to take corrective action or to enjoin submission of the proposal to the electorate." *Id.* at 865 (citing *Carman v. Secretary of State,* 185 N.W.2d 1 (Mich. 1971); *City of Jackson v. Comm'r of Revenue,* 26 N.W.2d 569 (Mich. 1947); and *Attorney General ex rel Miller v. Miller,* 253 N.W. 241 (Mich. 1934).) But after enactment, "[b]ecause of the respect commanded by the vote of the people, postelection challenges bear a heavy burden of persuasion." *Id.* And the " 'Courts should look at procedural errors of submission through different eyeglasses, once the electors have voted affirmatively.' " *Id.* (quoting *Carman*, 185 N.W.2d at 6).) Indeed, an amendment should be upheld unless its illegality is beyond doubt:

> In reaching the decision, the court must necessarily have in mind the universal rule that, whenever a constitutional amendment is attacked as not constitutionally adopted, the question presented is, not whether it is possible to condemn,

> but whether it is possible to uphold; that every reasonable presumption, both of law and fact, is to be indulged in favor of the legality of the amendment, which will not be overthrown, unless illegality appears beyond a reasonable doubt. [*Id*. (citation omitted).]

To the extent this Court deigns to review Plaintiffs' argument, *see, e.g.*, *Bates*, 131 F.3d at 846 ("Assuming, without deciding, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure dealing with term limits on state officeholders, we hold that California's notice with regard to Proposition 140 was sufficient"), it must review this post-enactment challenge through the same lens applied by the Michigan Supreme Court in *Massey*.

B. The Title-Object Clause in Article IV, § 24 does not apply to petitions to amend the Michigan Constitution under Article XII, § 2.

Article IV, § 24 provides in full:

> No *law* shall embrace more than one object, which shall be expressed in its *title*. No *bill* shall be altered or amended *on its passage through either house* so as to change its original purpose as determined by its total content and not alone by its *title*. [Mich. Const. 1963, Art. IV, § 24 (emphasis added).]

The first sentence is referred to as the Title-Object Clause. As the district court observed, § 24 appears in Article IV of the Michigan

Constitution, which pertains to the Legislature. And it is plain from the text of § 24 that its prohibitions apply to legislation. The references to "title,"[6] "bill,"[7] and "passage through either house,"[8] make that abundantly clear. Thus, the words "law" and "title" used in the first sentence refer to legislation. This is further supported by review of various other sections in Article IV referring to "bills" and "laws." *See*, *e.g.*, Mich. Const. 1963, Art. IV, §§ 23, 25-26, 28, 32-36.

Notably, the words "bill" and "title" appear nowhere in Article XII, § 2. Relevant here, § 2 provides that "[a]mendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected."

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[6] " 'The title to an act is required by the constitution. It is as much a part of the act as the body thereof.' " *Leininger v. Alger*, 26 N.W.2d 348, 351 (Mich. 1947) (quoting *Fillmore v. Van Horn*, 88 N.W. 69, 70 (Mich. 1901).)

[7] Article IV, § 22 of the Michigan Constitution provides that "[a]ll legislation shall be by bill and may originate in either house."

[8] Article IV, § 1 of the Michigan Constitution provides that "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives."

Mich. Const. 1963, Art. XII, § 2. The Michigan Election Law then prescribes the format of a petition to amend the Constitution. See Mich. Comp. Laws § 168.482. Nowhere is a "title" required for an initiative petition to amend the Constitution.

Plaintiffs argue that Michigan cases have held that people-initiated laws are on equal footing with laws enacted by the Legislature (Doc. 15, Pls' Brf, p 51) (citing *Leininger v. Alger*, 26 N.W.2d 348, 350 (Mich. 1947); *In re Advisory Opinion re Constitutionality of 1982 PA 47*, 340 N.W.2d 817, 825 (Mich. 1983) ("The courts have reasoned that the legislative power retained by the people, through the initiative and referendum, does not give any more force or effect to voter-approved legislation than to legislative acts not so approved.").

The Secretary agrees with this general statement of law. But Plaintiffs then argue that this "equal footing requires that voter-initiated amendments to the Michigan Constitution satisfy the requirements" of the Title-Object Clause. (Doc. 15, Pls' Br, pp 51-52.) There is simply no support for this assertion, legally or logically. The cases Plaintiffs cite discuss initiated legislation under Article II, § 9 of the Michigan Constitution or other voter-approved legislation—not

amendments to the Constitution under Article XII. And Plaintiffs' reliance on *Leininger* is further misplaced since that case interpreted the former version of Article II, § 9, which expressly required a petition to initiate legislation to include a "title." *Leininger*, 26 N.W.2d at 350 (quoting Mich. Const. 1908, Article 5, § 1.) The "title" requirement no longer appears in Article II, § 9, and it has never appeared as a requirement in Article XII, § 2 or its predecessor, Mich. Const. 1908, XVII, § 2.[9]

Further, Plaintiffs make absolutely no effort to provide a textual interpretation of § 24 to support their argument that it applies to amendments to the Michigan Constitution. This may be because no credible argument can be made. The Constitution or an amendment to the Constitution is not legislation subject to Article IV, § 24, or any other provision in Article IV.

At bottom, Plaintiffs' argument is simply that they think § 24 should apply to constitutional amendments because the "goals" of the

[9] Courts have subsequently concluded that a petition to initiate legislation still must contain a title consistent with Article IV, § 54. *See Automobile Club of Mich. Comm. for Lower Rates Now v. Secretary of State*, 491 N.W.2d 269, 274 (Mich. Ct. App. 1992).

Title-Object Clause could apply "equally" to amendments. (Doc. 15, Plfs' Brf, p 52.) The Michigan Court of Appeals has neatly explained the purpose of the clause:

> The goal of the Title–Object Clause is notice, not restriction, of legislation, and it is only violated where the subjects are so diverse in nature that they have no necessary connection. The purpose of the clause is to prevent the Legislature from passing laws not fully understood, and to ensure that both the legislators and the public have proper notice of legislative content and to prevent deceit and subterfuge. [*Lawnichak v. Dep't. of Treasury,* 543 N.W.2d 359, 361 (1995) (citations omitted).]

But Article XII includes its own, specific provisions that serve these purposes. As far as notice to the Legislature and the public of the content of an amendment, Article XII, § 2 provides that the "proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law." Mich. Const. 1963, Art. XII, § 2; Mich. Comp. Laws § 168.480. In addition, § 2 has specific requirements regarding ballot language for constitutional amendments, including that it "shall consist of a true and impartial statement of the purpose of

the amendment in such language as shall create no prejudice for or against the proposed amendment." *Id.*

Article XII also contains its own version of a multiple-object prohibition. Section 3 prescribes the methods for effecting a general revision of the Constitution. Mich. Const. 1963, Art. XII, § 3. As Plaintiffs recognize, § 3 is the vehicle that ballot proposal opponents have used to argue that a proposed constitutional amendment includes too many disparate revisions, i.e., multiple objects. *See Citizens Protecting Michigan's Constitution (CPMC II) v. Secretary of State*, 921 N.W.2d 247 (Mich. 2018); *Citizens Protecting Michigan's Constitution (CPMC I) v. Secretary of State,* 761 N.W.2d 210 (Mich. Ct. App. 2008), aff'd 755 N.W.2d 157 (Mich. 2008).

Plaintiffs' argument that the Title-Object Clause applies to § 54 as a constitutional amendment under Article XII is contrary to the plain language of the Constitution, is unsupported by any existing case law, and is meritless. Plaintiffs have not shown "illegality [ ] beyond a reasonable doubt" that would support rendering this 29-year-old amendment by the People invalid. *Massey*, 579 N.W.2d at 865.

C. The term limits amendments do not violate the Michigan Constitution by failing to identify Article 4, § 7 or by imposing term limits on federal offices.

Proposal B amended the Michigan Constitution to add four new sections. These are found at Article II, § 10, dealing with limitations on terms of office of members of the United States House of Representative and United States Senate from Michigan[10]; Article IV, § 54, dealing with limitations on terms of office of state legislators; Article V, § 30, dealing with limitations on terms of executive officers; and Article XII, § 4, dealing with severability of the other three amendments.

Plaintiffs argue Proposal B violates the Constitution because it "changed the fundamental structure of Michigan's form of government by adding new qualifications for state legislators without mentioning the modification to Article 4, Section 7."[11] (Doc. 15, Pls' Br, pp 53-54.) But this argument is a riff on another argument the Michigan Supreme Court rejected in *Massey*.

---

[10] Again, the term limits for federal offices are unconstitutional under *Thornton*.

[11] Article IV, § 7 provides, in part, that "[e]ach senator and representative must be a citizen of the United States, at least 21 years of age, and an elector of the district he represents."

In *Massey*, the plaintiffs argued that Proposal B violated Article XII by not identifying Article 4, § 7 as an existing provision of the Constitution that would be altered or abrogated by Proposal B. *Id*. at 865-866. The court rejected that argument, concluding that Article IV, § 7 was not an exclusive list of qualifications, and that adding an additional qualification somewhere else in the Michigan Constitution did not alter or amend § 7 within the meaning of the "alter or abrogate" clause of Article XII because Proposal B did "not add, delete, or change the wording of art. 4, § 7," nor did it "render it wholly inoperative." *Id*. at 866-867. Plaintiffs suggest in a footnote that *Massey* is no longer controlling under the Michigan Supreme Court's decision in *CPMC II*, 921 N.W.2d 247. (Doc. 15, Pls' Br, p 54, n. 8.) But that decision principally interpreted the revision clause of Article XII, § 3—not the alter or abrogate language of § 2.

Plaintiffs also argue that Proposal B is unconstitutional because by including the federal term limits provision, "which is factually and legally different from term limits for state legislators," the proposal included "multiple and diverse" objects contrary to Article IV, § 24. (Doc. 15, Plfs' Brf, p 54.) But while Plaintiffs cite the Title-Object

Clause, they rely on the decision in *CPMC II* interpreting and applying Article XII, § 3—the multiple-object prohibition for constitutional amendments. But Plaintiffs did not plead a violation of Article XII, § 3. Nevertheless, Secretary Benson agrees that *CPMC II* and others interpreting § 3 provide the correct analysis. And in that case, Plaintiffs' argument that Proposal B "fundamentally altered the framework of Michigan's government" by imposing state and federal term limits fails.

The four discrete amendments in Proposal B are nothing like the wide-ranging revisions rejected by the Michigan Court of Appeals in *CPMC I*, 761 N.W.2d at 214-215, 221-229. While Proposal B amended four different articles, the three principal amendments had a singular purpose—to create term limits for elected officials. The fourth amendment simply made these provisions severable. Nor were these "changes that significantly alter or abolish the form or structure of [Michigan] government in a way that is tantamount to creating a new constitution." *CPMC II*, 921 N.W.2d at 265. Proposal B did not change the number of elected officials or the processes for their election, nor did

the proposal remove any powers from these officials. It simply limited the number of years these officials could serve in any one office.

Proposal B does not violate Article IV, § 24 because that section does not apply, and it does not violate Article XII, § 3 because the proposal did not significantly alter or abolish the form or structure of Michigan's government. Again, Plaintiffs have not shown "illegality . . . beyond a reasonable doubt" that would support rendering the amendment invalid. *Massey*, 579 N.W.2d at 865.

III. The ballot language for Michigan's term limits amendment did not violate the Michigan Constitution.

Finally, Plaintiffs alleged in Count V that § 54 violates Article XII, § 2 of the Michigan Constitution because its ballot language did not "consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment." (R. 5, Amend. Compl., Page ID # 64, ¶ 164.) *See* Mich. Const. Art. XII, § 2; Mich. Comp. Laws § 168.485. Plaintiffs alleged that "[w]hen Proposal B was placed on the ballot, it contained the following savings clause: 'If any part of this section is held to be invalid or unconstitutional, the remaining parts of this section shall not be affected but will remain in full force and effect.' " (*Id.*, Page ID # 64,

¶165.) Plaintiffs argue that the savings clause prejudiced the vote in favor of the amendment. (*Id.*, Page ID # 166.)

In their summary judgment motion, Plaintiffs argued that Michigan voters were "effectively misled" into voting for a different constitutional amendment, one that they believed would place term limits on both federal and state offices. (R. 25, Page ID # 191-192.) Plaintiffs argued that "[t]he Savings [clause] effect on Proposal B led to voters not being adequately informed that the effect of their vote was only to place term limits on *state* legislative offices." (*Id.* at Page ID # 191 (emphasis in original)). According to Plaintiffs, "[t]his serves as an independent basis to overturn Proposal B's passage," just as the Nebraska Supreme Court struck down Nebraska's term limit provision in its entirety in *Duggan v. Beermann,* 544 N.W.2d 68 (Neb. 1996). (*Id.* at Page ID # 191-192.)

The District Court properly disposed of Plaintiffs' argument, determining that the ballot language could not have misled voters since the savings clause was not part of the ballot language, and that the Nebraska case was not compelling or dispositive with respect to determining whether § 54 violated Michigan's Constitution. (R. 34,

Opinion & Order, Page ID # 351) (citing *Ray v. Mortham*, 742 So. 2d 1276, 1282 (Fla. 1999) (rejecting *Duggan* as distinguishable, both factually and legally, and noting that in *Duggan*, "there were numerous proposed amendments, poorly and confusingly drafted").) The District Court did not err in rejecting Plaintiffs' arguments.

Under Michigan Election Law, the full text of a proposed constitutional amendment must be included on an initiative petition. Mich. Comp. Laws § 168.482(3). Article XII, § 2 of the Constitution requires the preparation of ballot language:

> The ballot . . . shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment. [Mich. Const. 1963, Art. XII, § 2.]

The ballot language, i.e., the statement of purpose, for Proposal B stated:

> A PROPOSAL TO RESTRICT/LIMIT THE NUMBER OF TIMES A PERSON CAN BE ELECTED TO CONGRESSIONAL, STATE EXECUTIVE AND STATE LEGISLATIVE OFFICES.
>
> The proposed constitutional amendment would:

> Restrict the number of times a person could be elected to certain offices as described below:
>
> 1) U.S. Senator: two times in any 24–year period.
>
> 2) U.S. Representative: three times in any 12–year period.
>
> 3) Governor, Lieutenant Governor, Secretary of State or Attorney General: two times per office.
>
> 4) State Senator: two times.
>
> 5) State Representative: three times.
>
> Office terms beginning on or after January 1, 1993 would count toward the term restrictions. A person appointed or elected to an office vacancy for more than ½ of a term would be considered elected once in that office.
>
> Should this proposal be adopted? [*Massey*, 579 N.W.2d at 867.]

As noted above, under Article XII, § 2 the proposed amendment, existing provisions of the Constitution that would be altered or abrogated, and the ballot language, must be "published in full" and copies placed in polling locations and provided to the media.

Proposal B added the savings clause to Article XII, § 4, which now provides, "[i]f any section, subsection or part of Article 2, Section 10, Article 4, Section 54 or Article 5, Section 30 is for any reason held to be invalid or unconstitutional, the remaining sections, subsections or parts of those sections shall not be affected but will remain in full force and

effect." Mich. Const. 1963, Art. XII, § 4. The savings clause was not reflected in the statement of purpose; however, it was included on the petitions voters signed and was widely available to voters both before the election and on election day in polling places.

In *Massey*, the plaintiffs argued that the ballot language was not a true and impartial statement of the purpose of § 54 under Article XII because "it should have stated that the limits on the federal offices were severable from those on state offices." *Massey*, 579 N.W.2d at 867. (*Massey* was decided three years after the U.S. Supreme Court invalidated state-imposed term limits on federal offices in *Thornton*.) The *Massey* Court rejected the plaintiffs' argument. The Court concluded that ordinary electors would have been confused rather than helped "by a statement on such a technical matter as severability," and that the ballot language did not violate Article XII's requirement for a true and impartial statement of the purpose of § 54 in its absence. *Id.* at 868.

Plaintiffs argue that the U.S. Supreme Court's decision in *Thornton*, which rendered Michigan's term limits provision for federal offices invalid, Art. II, § 10, retroactively rendered Proposal B's ballot

language an "untrue" statement because the voters could not, in fact, enact term limits for federal offices. (Doc. 15, Pls' Br, p 59.) Plaintiffs argue that there is "no evidence Michigan voters would have approved Proposal B" without federal term limits, and "[s]evering Proposal B's state limits from the federal limits renders the truthfulness requirement" of Article XII, § 2 "meaningless." (*Id.*) Plaintiffs go on to argue that "the typical voter would not recognize, understand, and consider that certain aspects of Proposal B could be construed as unconstitutional by a federal court, and that a Savings Clause in the Michigan Constitution could dramatically alter the effect of what they were voting for." (*Id.* at Page ID # 61.) They also argue that the "[s]avings effect on Proposal B led to voters not being adequately informed that the effect of their vote was only to place term limits on state legislative offices." (*Id.*)

Plaintiffs' argument is nothing more than a claim that they think voters should have been provided even more information about the effect of the savings clause. Voters bear the responsibility of reading the petitions they sign and reviewing the language of ballot proposals they are asked to vote upon. The State bears the burden of ensuring

that the form of the petitions comply with the law, and that ballot language is true, impartial, and creates no prejudice for or against an amendment. Under *Massey*, Proposal B's ballot language was a true and impartial statement of the purpose of the proposal at the time it was submitted to the voters, and that language did not need to refer to the savings clause. The full text of the amendment, including the savings clause, was readily available to voters. And the text of the savings clause was not so dense or technical that an ordinary voter could not understand the basic purpose of it.

Further, as the District Court observed, Plaintiffs' suggestion that voters would not have voted for the proposal if they had known then that the federal term limits would fail is entirely speculative. Plaintiffs offered no support for their assertion, and it runs contrary to the fact that 59% of Michigan voters approved the amendments—*with* the savings clause. Moreover, Plaintiffs' argument that a post-enactment court decision can be used to retroactively attack the truthfulness of ballot language under Article XII is untenable. Especially where Michigan courts have rejected the idea that ballot language should consider future court actions. *See Citizens for the Protection of*

Marriage v. Board of State Canvassers, 688 N.W.2d 538, 542 (Mich. Ct. App. 2004) ("[A]ny attempt to determine how courts might eventually apply the proposed amendment, assuming it won voter approval, would be entirely speculative. Such speculation would not be a 'true' statement of the amendment's purpose[.]"). Plaintiffs' argument would leave constitutional amendments subject to attack in perpetuity on procedural grounds that would have nothing to do with the substance of the amendment.

Plaintiffs further rely on *Duggan v. Beermann*, a decision of the Nebraska Supreme Court interpreting its own constitution and applying it to the specific term limits ballot proposal before it. 544 N.W.2d 68 (Neb. 1996). Plaintiffs contend that this decision is "illustrative and highly persuasive." (Doc. 15, Plfs' Brf, pp 63-64.) But it is not clear how the case applies. The decision of the Nebraska Supreme Court is not binding in Michigan, and its value as persuasive authority is limited by its reliance on the specific amendment that was before the court in that case.

The pertinent provision of Nebraska's constitution that permits constitutional amendment—Article III, § 2—differs from Michigan's

Article XII, § 2. *See Duggan*, 544 N.W.2d at 75. Further, the Nebraska Supreme Court relied heavily on the particular ballot language (and its flaws) in determining that the state term limits could not be severed from the federal ones that were unconstitutional under *Thornton*. *Duggan*, 544 N.W.2d at 78-79, 80-81. Michigan's ballot language and the language of its amendment are not the same. Compare *Duggan*, 544 N.W.2d at 72-73 with Mich. Const. 1963, Art. IV, § 54. While the Court in *Duggan* did choose not to apply the savings clause to save the state term limits amendment, it did so for reasons that were expressly tied to the language of the amendment. *Duggan*, 544 N.W.2d at 81. In so doing, it further relied on a factual record showing that the imposition of federal term limits was the primary inducement to obtain voter approval. *Duggan*, 544 N.W.2d at 80. There is no such record in this case, and § 54's ballot proposal language expressly included both state and federal offices. Further, the savings clause is very clear that the individual term limits provisions are severable. Mich. Const. 1963, Art. XII, § 4.

To the extent that Plaintiffs argue the mere existence of a savings clause renders Proposal B invalid, that argument also fails, for three reasons. (Doc. 15, Plfs' Brf, pp 63-64.)

First, nothing in Article XII or the Michigan Election Law prohibits the inclusion of savings clauses in amendments to the Michigan Constitution. Nor has any Michigan court held that such clauses are prohibited in constitutional amendments.

Second, constitutional provisions are subject to a severability analysis. *See In re Apportionment of State Legislature*, 321 N.W.2d 565, 572 (Mich. 1982) (declining to sever unconstitutional portions of apportionment provisions that were "inextricably interdependent"). This includes initiated amendments to the Constitution. *See In re Proposal C*, 185 N.W.2d 9, 19 (Mich. 1971) ("We hold . . . that the quoted portion is severable and capable of being removed from Article 8, Sec. 2 without altering the purpose and effect of the balance of the sentence and section.") Thus, even if Proposal B did not contain a savings clause, it would still be subject to a severability analysis under Michigan law.

And third, the inclusion of the savings clause in Proposal B—rather than negating the public will—is an expression of that will. In

other words, by adopting the amendment, the People expressly stated that it was their intent that the amendment survive if any part of it were found unconstitutional. Plaintiffs assume that Michigan voters were unaware of what they were voting for, and—despite the savings clause expressly included in the amendment they adopted—the voters would not have wanted the amendment to continue if any part of it were later held unconstitutional. But the best demonstration of the voters' intent is the language of the amendment they adopted, which expressly included a savings clause to preserve amendments. *See Coal. of State Emp. Unions v. State*, 870 N.W.2d 275, 281 (2015) ("We locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification."). There is no voter intent for a court left to discern. The voters intended the amendment to be severable. Under these circumstances, it cannot be said that Proposal B's inclusion of a savings clause is unlawful.

Proposal B does not violate Article XII, § 2 because its ballot language complied with the law. As a result, Plaintiffs have not shown

"illegality [ ] beyond a reasonable doubt" that would support rendering the amendment invalid. *Massey*, 579 N.W.2d at 865.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant-Appellee Michigan Secretary of State Jocelyn Benson respectfully requests that this Court affirm the District Court's grant of summary judgment in favor of Defendant.

Respectfully submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	11/20/2019	R. 1	1-30
First Amended Complaint	12/11/2019	R. 5	34-65
Defendant's Request for Pre-Motion Conference	01/16/2020	R. 11	72-74
Pre-Motion Conference Order	02/25/2020	R. 17	85-86
Plaintiffs' Motion for Summary Judgment	07/09/2020	R. 25	155-260
Defendant's Response to Motion for Summary Judgment	07/09/2020	R. 27	263-281
Plaintiffs' Reply re Motion for Summary Judgment	07/09/2020	R. 29	284-300
Defendant's Surreply to Motion for Summary Judgment	07/09/2020	R. 31	303-313
Joint Statement of Material Facts	08/07/2020	R. 33	316-335
Opinion and Order	01/20/2021	R. 34	336-352
Notice of Appeal	02/03/2021	R. 36	354