No.

IN THE

Supreme Court of the United States

JAMES R FOUTS;

Petitioner

v.

THE WARREN CITY COUNCIL, THE WARREN CITY ELECTION COMMISSION; ANTHONY G FORLINI in his official capacity as MACOMB COUNTY CLERK, and SONJA D BUFFA in her official capacity as WARREN CITY CLERK, jointly and severally,

Respondents

On Petition For Writ Of Certiorari
To The United States Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an individual plaintiff challenges under the First and Fourteenth Amendments, *as applied* to him only, the constitutionality of a city charter provision which bars him from the ballot by providing a lesser term limit for him than for others, are courts to apply the doctrine of *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), or does the Sixth Circuit's carveout for "term-limit challenges" apply to automatically subject the plaintiff's claims to rational basis review?

2. Is the charter provision which kept Petitioner off the 2023 ballot 'rational' for purposes of rational basis scrutiny, when its only purpose is to limit all elected officials time in office, and it does not do that, as shown by Michigan state court case *Boike v. Green*, No. 365681, 2023 WL 3588168, at *1 (Mich. Ct. App. May 22, 2023), in which it was decided that the same charter provision at issue here could not preclude one of Petitioner's political rivals from running for a fourth term, because he had left one of his prior terms early?

3. Is ineligibility for a public office a legal disability for purposes of analyzing whether a laws application to Petitioner is impermissibly "retroactive?"

LIST OF PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURT

This petition arises out of the United States District Court for the Eastern District of Michigan, case *James R. Fouts v Warren City Council, et al*., no. 23-cv-11868. Petitioner appealed the dismissal of that case to the United States Sixth Circuit Court, appeal no. 23-1826, which affirmed the district court.

The district court dismissal and circuit court affirmation are the subject of this petition.

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I. PETITION FOR WRIT OF CERTIORARI

James R. Fouts petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

II. OPINIONS BELOW

The district court's Opinion and Order Granting Warren City Council's and Macomb County Clerk's Motions to Dismiss is unpublished. *Fouts v. Warren City Council*, No. 23-11868, 2023 WL 5737793 (E.D. Mich. Sept. 5, 2023), aff'd, 97 F.4th 459 (6th Cir. 2024). (**Appx. A., a. 1.**) The circuit court's Opinion affirming the district court's dismissal is reported. *Fouts v. Warren City Council*, 97 F.4th 459 (6th Cir. 2024). (**Appx. B., a. 21.**)

III. JURISDICTION

This petition requests review of the Sixth Circuit's April 2, 2024 Opinion and Judgment (**Appx. B, a. 21.**) It is brought pursuant to Supreme Court Rule 13.

This Court has jurisdiction pursuant to 28 USC § 1254.

IV. STATUTES INVOLVED IN THE CASE

The statute at issue in this case is a city charter, Warren, Michigan, City Charter §§ 4.3(d) and 4.4(d), which states:

> Sec. 4.3—Certain persons ineligible for city office.

> (d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.
>
> Sec. 4.4—Terms of office.
>
> (d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.
>
> **Amended Charter Provisions, Appx. C, a, 41.**

V. STATEMENT OF THE CASE

At the time of Petitioner's filing of his complaint in the US district court, he was the Mayor of Warren (Michigan's third most populous city), finishing out his fourth term as mayor. Petitioner has historically had exceptionally high approval ratings amongst the voters of the City of Warren, having won multiple elections in landslide victories. During his fourth term, Respondent the Warren City Council proposed and successfully had enacted an amendment to the Warren City Charter which decreased the mayoral term limits from five to three… sort of. The wording of the charter amendment limited any individual mayor—or city council member—to "the ***greater of*** three (3) ***complete*** terms or twelve (12) years."

Amended Charter Provisions, Appx. C, a, 41 (emphasis added). The City Council's president at the time happened to be Petitioner's political rival, also running for Mayor of Warren, Patrick Green. Despite the same language applying to him, Patrick Green was on his fourth term as City Council Member, as a Michigan court interpreted the "***greater of*** three (3) ***complete*** terms" language to mean that the charter term-limit allowed for an individual to serve two-complete terms plus indefinite near-complete terms; Because it is only the third completion of a term that triggers the term-limit and bars one from the ballot. *Boike v. Green*, No. 365681, 2023 WL 3588168, at *1 (Mich. Ct. App. May 22, 2023). For that reason, at the time the charter amendment passed, the only person alive who it would definitely limit from running for mayor in perpetuity was Petitioner, because he was the only person with three complete terms as mayor under his belt.

Because the 2020 charter amendment did not contain any language indicating it should be applied retroactively, and because Petitioner had always planned to run for five terms as mayor, Petitioner filed with the Warren City Clerk to be placed on the ballot for the November 2023 mayoral election.

On February 21, 2023, the Warren City Council brought suit in Michigan state court against the City Clerk and County Clerk (**but not Petitioner, who was never a party to any state court action regarding the charter amendment**) to have Petitioner removed from the ballot.

On March 23, 2023, the Macomb County Court decided against the City Council:

The court expressed two concerns regarding the 2020 amendment. First, that the [originally proposed] language "any terms or years served prior to this amendment are included" was not included in the proposal question on the ballot or in the charter. Second, that there was a discrepancy on the ballot between the explanatory portion's statement that that the amended term limits would be "three (3) terms or twelve (12) years" and the proposal question's statement that the amended term limits would be "**the greater of** three (3) **complete** terms or twelve (12) years." The court stated that the failure to include the "terms served prior" language was especially troubling because the Council had included similar language in the 1998 proposal.

The court then discussed retroactivity, and observed that the charter language reflected no clearly manifested intent for term limits to include prior terms served… the Council's interpretation would attach a new disability with respect to past considerations, as it would prevent Mayor Fouts from running on the basis of his prior terms served… The court decided that the ballot language and charter were unclear on whether previous terms served are counted toward the current term limits

> and denied mandamus and granted summary disposition to defendants.
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> *Warren City Council v. Buffa*, No. 365488, 2023 WL 3046530, at *4 (Mich. Ct. App. Apr. 21, 2023), appeal denied, 511 Mich. 962, 989 N.W.2d 679 (2023) (emphasis added).

The City Council appealed and, on April 21, 2023, the Michigan Court of Appeals decided, without hearing oral arguments, against the City Clerk and ordered her to remove Petitioner from the mayoral ballots. An application for leave to appeal was filed with the Supreme Court of Michigan.

On May 17, 2023, the Supreme Court of Michigan declined to hear an appeal of Defendant City Council's case.

The City Clerk complied with the Michigan Court of Appeals order and removed Petitioner from all mayoral election ballots.

Petitioner began the process of attempting to ascertain and enforce his own rights, which have never been represented before the Michigan courts.

After two other law firms were unable to assist Petitioner, Petitioner retained his current counsel.

On August 2, 2023, the district court lawsuit was filed against only necessary defendants.[1] By August 3, 2023, all defendants were served. On

[1] The defendants are The Warren City Council; The Warren City Election Commission; The Macomb County Clerk; and the Warren City Clerk. Counsel for the Election Commission and City Clerk did not file a motion to dismiss in the district court, but answered that they would comply with whatever the district court ordered of them.

August 3, 2023, Petitioner filed his motion to expedite with the district court.

On August 7, 2023 and August 9, 2023, Defendants filed the two motions to dismiss pursuant to FRCivP 12(b)(6). On August 15, 2023, Petitioner filed a dual response. On August 22, 2023, two replies were filed. On September 5, 2023, the district court issued its order and opinion and judgment granting Defendants' motions and dismissing Petitioner's case. **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 1.**

On September 8, 2023, the notice of appeal in this case was filed with the district court. Simultaneously with the filing of appellant's brief in the United States Court of Appeals for the Sixth Circuit. Petitioner filed a motion for expedited review, which was denied. On April 2, 2024, the Sixth Circuit entered its opinion and order, denying Petitioner's appeal. **Circuit Court's 4/2/24 Opinion & Order Affirming, Appx. B, a, 21.**

Jurisdiction was proper in this case, in the district court, because it arises under the Constitution and laws of the United States. The district court had subject-matter jurisdiction pursuant to 28 USC §§ 1331 and 1343(3) & (4). The damages suit was authorized by 42 USC § 1983. The district court also had jurisdiction to grant both the requested declaratory and injunctive relief under 28 USC §§ 2201 and 2202.

VI. ARGUMENT

1. In affirming the dismissal of Petitioner's claim for violation of his rights to political expression and

> **association under the First Amendment, the lower courts erred requiring review by failing to apply the *Anderson-Burdick* doctrine, failing to apply strict or intermediate scrutiny, and by finding a rational basis for the law in question.**

The lower courts erroneously held that Petitioner could not show that any fundamental rights of his were implicated by the charter amendment. That amendment made him alone ineligible to run for or hold the office of mayor in the city of Warren. Based on that fallacy, the lower courts concluded that the statute (charter provision) at the center of Petitioner's claims should be subject to only rational basis constitutional review. "In the absence of a fundamental right, 'their voter claims fail on rational-basis review …' " **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 14**. In upholding the district court's ruling, the circuit court explained the Sixth Circuit's exception to the *Anderson-Burdick* doctrine:

> [W]e have held that the *Anderson-Burdick* framework is "inapposite" when a plaintiff brings a challenge to a term-limit law. *Kowall*, 18 F.4th at 547. This is because term-limit laws **define a candidate's eligibility for office**, whereas "prototypical ballot-access or freedom-of-association case[s]" challenge laws that "**keep[] eligible candidates off the ballot**" or otherwise limit voters

from casting their votes for eligible candidates. *Id.*

Circuit Court's 4/2/24 Opinion & Order Affirming, Appx. B, a, 29-30.

The Sixth Circuit's Kowall exception to this Honorable Court's *Anderson-Burdick* doctrine is a distinction without a difference. Petitioner brings an "***as-applied***" challenge to a law being wrongfully applied to him and limiting his favored candidate's (himself) access to a ballot, despite his 'candidate' being "otherwise qualified." It is inconsequential that the law being improperly applied to Petitioner is a term-limit law because, for all the reasons stated herein, it does not apply to him. It would be the same as if Petitioner had ***never been*** mayor before, but Defendants were applying a three-term limit to him to keep him off the ballot; Petitioner's is an "as-applied" challenge. One can imagine the conflict of doctrines if a municipality misapplied a term-limit law to a plaintiff of a protected minority class. Would the municipality be automatically entitled to rational basis scrutiny simply because their chosen method of discrimination was an irrelevant term limit provision?

In that way, the lower courts failed to apply the proper *Anderson-Burdick* review of Petitioner's case. [*Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).][2]

[2] The *Anderson-Burdick* doctrine requires courts to do a three-step analysis to determine whether to apply strict or intermediate (but not rational basis) scrutiny to a plaintiffs' election law challenges, and is described more fully below.

The lower courts cited to two cases in concluding that Petitioner had no fundamental right burdened by the retroactive application of the charter provision: *Kowall v. Benson*, 18 F.4th 542 (6th Cir. 2021), *cert. denied,* 143 S. Ct. 88, 214 L. Ed. 2d 15 (2022) and *Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982). In *Kowall*, the Plaintiffs challenged the term-limits themselves, which have long been held constitutional and which Petitioner here never challenged. "[V]eteran legislators challenge[] the term-limit provision ***again***." *Kowall*, at 545 (emphasis added). In *Clements*, the Plaintiffs challenged a law which would automatically resign them from public office if they announced their candidacy for a higher public office during that term, establishing a maximum waiting period (in Texis) of two-years for the Plaintiffs to run for state legislature, ***if*** those Plaintiffs did not want to automatically resign their current offices. "A 'waiting period' [of a maximum of two years] is hardly a significant barrier to candidacy." *Clements*, at 967.

Here, however, the lower courts recognized in their opinions that Petitioner did not challenge a waiting period and "Petitioner [did] not challeng[e] the constitutionality of term limits in general, **but only as applied *retroactively* [and] to [only] *him[]***." **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 13** (emphasis added).[3] "[B]ringing an as-applied

[3] The district court acknowledged that Petitioner's challenge to the charter provision was "as-applied" as opposed to "facial." "A facial challenge to a law's constitutionality is an effort to invalidate the law in each of its applications, to take the law off the books completely… In contrast to an as-applied challenge, which argues that a law is unconstitutional as enforced against

challenge does not change the level of scrutiny…" **Circuit Court's 4/2/24 Opinion & Order Affirming, Appx. B, a, 31.** "Under the *Anderson–Burdick* test, the court must first 'consider the character and magnitude ***of the asserted injury*** to the rights protected by the First and Fourteenth Amendments that the Plaintiff seeks to vindicate.' " *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015) (emphasis added, quoting *Anderson,* 460 U.S. at 789, 103 S.Ct. 1564).[4]

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the plaintiffs before the court…" *Speet v. Schuette*, 726 F.3d 867, 871–72 (6th Cir. 2013) (citations removed, cleaned up). Yet, the lower courts erred in holding that the law in question had the rational basis of applying the same "eligibility requirement to candidates for the office of mayor, city council, city clerk and city treasurer" [**District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 14**] **because the rational basis needed was that of applying the law retroactively to Plaintiff to burden him, exclusively, with a term limit for the mayor's office, when the statute cannot prohibit anyone else from holding any office for the rest of *their* lives if they wish, because 1) only Petitioner had three terms completed at the time of the laws enactment, and 2) so long as every future mayor (other than Petitioner) resigns before the last day of their third term, the charter provision does not apply to keep them from running for a fourth, fifth, sixth, *etc*. term.**

[4] It is of no consequence whether Plaintiff's injury is born out of the First Amendment or Fourteenth Amendment because the Sixth Circuit has held that Fourteenth Amendment rights become associative First Amendment rights for purposes of election law challenges. The issue is, therefore, the severity of the injury.

> While the Supreme Court has not yet applied this test to ballot-access challenges on pure equal-protection grounds, our cases hold that the *Anderson–Burdick* test serves as "**a single**

Accordingly, under the *Anderson-Burdick* doctrine, the Court was to determine the applicable level of scrutiny based on ***Petitioner's*** as-applied injury, not based on the lesser, generalized, injuries asserted in *Kowall* and *Clements*. Yet the lower courts ruled based on the injuries asserted in those other cases. "[W]e have held that the existence of barriers to a candidate's access to the ballot 'does not ***of itself*** compel close scrutiny.' *Clements v. Fashing*, 457 U.S. 957, 963 (1982). Therefore, rational basis review applies to Plaintiff's First Amendment challenge." **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 14; Circuit Court's 4/2/24 Opinion & Order Affirming, Appx. B, a, 32.**

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standard for evaluating challenges to voting restrictions." *Obama for Am. v. Husted,* 697 F.3d 423, 430 (6th Cir.2012). Further, many federal courts of appeals have applied the *Anderson–Burdick* balancing test to both First Amendment and Equal Protection Clause challenges to ballot-access laws. *See e.g., Rogers v. Corbett,* 468 F.3d 188, 193–94 (3d Cir.2006) (abandoning traditional tiers of equal-protection scrutiny and applying *Anderson*); *Republican Party of Ark. v. Faulkner Cnty., Ark.,* 49 F.3d 1289, 1293 n. 2 (8th Cir.1995) ("**In election cases, equal protection challenges essentially constitute a branch of the associational rights tree**."); *Fulani v. Krivanek,* 973 F.2d 1539, 1543 (11th Cir.1992) (applying the *Anderson* balancing test).

Green Party of Tennessee v. Hargett, 791 F.3d 684, 692 (6th Cir. 2015).

In concluding that the challenged statute was automatically subject to rational basis scrutiny, the lower courts erred by not applying the proper legal analysis. In the Sixth Circuit, the level of constitutional scrutiny in ballot-access cases is determined by applying the *Anderson-Burdick* doctrine. [*Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)] Accordingly, the lower courts were required to perform an analysis under the *Anderson-Burdick* framework to determine what level of constitutional scrutiny applied; It is not automatically rational basis scrutiny:

> In *Green Party V,* we decided to apply the framework of *Anderson–Burdick* to a ballot-ordering equal-protection claim because "the Plaintiffs' claim draws not only on the Equal Protection Clause, but also on the First Amendment: essentially, the Plaintiffs argue that they have been denied an equal opportunity to exercise their rights to association and political expression." 767 F.3d at 551. This case is markedly similar: the Plaintiffs argue that the ballot-retention statute denies them an equal opportunity to exercise their rights to association and political expression. Once again, we apply the *Anderson–Burdick* test.
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> *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 692–93 (6th Cir. 2015).

The lower courts' legal error in applying the wrong legal standard was not harmless, as—under the *Anderson-Burdick* doctrine—Petitioner's case warrants the application of heightened scrutiny to the statute in question.

> Under the *Anderson–Burdick* test, the court must first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiff seeks to vindicate." *Anderson,* 460 U.S. at 789, 103 S.Ct. 1564. Second, it must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* 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." *Id.*
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> When the burden on the right to vote is "severe," the statute will be subject to strict scrutiny and must be narrowly tailored and advance a compelling state interest. *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059. If the burden is "reasonable" and "nondiscriminatory," the statute will be subject to rational basis and survive if the state can identify "important regulatory interests" to justify it. *See id.* If the burden lies somewhere in between,

> courts will "weigh[ ] the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Green Party V,* 767 F.3d at 546.
>
> *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015).

Here, the burden on Petitioner's First Amendment and Fourteenth Amendment rights is severe as it is a lifetime bar to Petitioner's candidacy, necessitating strict scrutiny, and the statute cannot survive strict scrutiny because it does not even accomplish its stated policy goal of limiting any other candidate's time in office, except Petitioner—the one who already had three complete terms under his belt.[5]

In a recent Sixth Circuit case relied on by Petitioner, the Sixth Circuit applied the *Anderson-Burdick* doctrine and found "that Michigan's system for qualifying independent candidates violate[d] the First and Fourteenth Amendments of the

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[5] As Plaintiff argued in the lower courts, Defendant Council worded the statute to limit individuals to "the **greater of** three (3) **complete** terms or twelve (12) years." *Boike v. Green*, No. 365681, 2023 WL 3588168, at *1 (Mich. Ct. App. May 22, 2023). In other words, whereas Plaintiff was barred from running for any City of Warren office again as soon as the 2020 charter amendment passed, all of the members of Defendant Council who drafted the statute, and any other future office holder, could have resigned a day before their third term completed, and run again, and again, and so on. See *Boike, supra,* in which the Michigan Court of Appeals determined that Defendant Council's president and (at the time) Plaintiff's rival for the 2024 mayorship, Patrick Green, was not limited to three "terms or 12 years" under the 2020 charter amendment because he had resigned from one of his terms early.

Constitution" in regard to an individual candidate for attorney general. *Graveline v. Benson*, 992 F.3d 524, 546 (6th Cir. 2021). In *Graveline*, the individual potential candidate "attempted to get his name on Michigan's November 2018 general election ballot." The Sixth Circuit reiterated its precedent that "**[t]he hallmark of a severe burden is exclusion [] from the ballot.**" and struck down an entire Michigan "statutory scheme" because it "unconstitutionally burden[ed] Plaintiffs' First Amendment rights." *Id*. at 528, 543, 548 (6th Cir. 2021) (emphasis added). Therefore, Petitioner Fouts' exclusion form the ballot is a severe burden on his First Amendment and Fourteenth Amendment rights.

Because "the burden on [Petitioner's rights] is 'severe,' the statute [must] be subject[ed] to strict scrutiny and must be narrowly tailored and advance a compelling state interest." *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015), citing *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059. According to this case, relied on by the lower courts, the compelling interest served by term limits is to limit the time an individual politician may spend in a particular political office. "[W]hat are [term limits]? Term limits are the state's attempt to set qualifications for its officeholders. Indeed, when a state enacts term limits, it chooses a 'citizen legislature over a professional legislature.'" *Kowall v. Benson*, 18 F.4th 542, 547 (6th Cir. 2021), *cert. denied,* 143 S. Ct. 88, 214 L. Ed. 2d 15 (2022); quoting *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 918 (6th Cir. 1998). But the statute (charter provision) at issue here does not, on its face, accomplish that goal. That is because Defendant Council intentionally worded the statute to limit individuals to "the **greater of** three (3)

complete terms or twelve (12) years." *Boike v. Green*, No. 365681, 2023 WL 3588168, at *1 (Mich. Ct. App. May 22, 2023) (discussing the very same charter amendment at issue in this case). In other words, whereas Petitioner was barred from running for any City of Warren office again as soon as the 2020 charter amendment passed because he had already completed three full terms of office, **all of the members of Defendant Council who drafted the statute (or any current or future office-holders) could resign a day before their third term completed, and run again, and again, in perpetuity, defeating the supposed 'limit' on 'professional legislatures' that the term limits are meant to serve**.

That only Petitioner's ballot access was denied is not mere conjecture. The president of the Warren City Counsel and likely architect of the charter amendment is Patrick Green, who was also running against Petitioner as a candidate for mayor. In the *Boike* case*, supra,* the Michigan Court of Appeals determined that Patrick Green was not limited to three "terms or 12 years" under the plain wording of the 2020 charter amendment **because he had resigned from one of his terms early**, but would only be denied ballot access after he completed another ***full*** term. In other words, the charter amendment, when passed, could never guarantee that any office holder not take a fourth, fifth, sixth, etc. term, save one, Petitioner.[6] (As none of the politicians

[6] Accordingly, the charter amendment applies a lifetime term limit to Plaintiff, and no term limit to everyone else. "Lifetime term limits forever bar officials from serving more than a set number of terms, whereas consecutive term limits allow them to serve an indefinite number of terms so long as they periodically

holding the political offices to which the charter provision applied had served three complete terms at its passing, except Petitioner.) Therefore, Defendant Council's stated reasoning for the charter amendment of "equal term limits for all elected officials" is not served either. **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 14**.

The Circuit Court summarily dismissed the above argument, considering it too conjectural. "Fouts argues that, in effect, the term-limit amendment then only limits him from serving another term because he has already completed a full three terms in office. But the ***highly speculative*** scenario that Warren office holders would evade the term-limit amendment's restrictions by resigning early does not meet Fouts' burden…" **Circuit Court's 4/2/24 Opinion & Order Affirming, Appx. B, a, 33**. Yet, both lower courts relied on *Kowall v. Benson*, 18 F.4th 542, 546–47 (6th Cir. 2021) in ruling that all claims involving a term-limit statute are exempt from the *Anderson-Burdick* doctrine and subject instead to rational basis review. *Kowall*, in turn, relied on *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 924 (6th Cir. 1998), which holds:

> Contrary to the plaintiffs' assurances, consecutive term limits are not a viable alternative… Legislators might adjust their conduct, and bow to special interest groups, in the hopes of someday returning to office. *Id*. ***Moreover, some***

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leave office." *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 918 (6th Cir. 1998).

> ***incumbents could arrange for "caretakers" to hold their offices for a short period of time, and thereby repeatedly return to office after only short absences.*** *Id.* See also *Nevada Judges Ass'n v. Lau*, 112 Nev. 51, 910 P.2d 898, 902 (1996) (noting that consecutive term limits may not achieve the desired rate of turnover).

The above 'loophole' is far more speculative than the one Petitioner presents, which was actually used by his political rival and ratified by a state court. By failing to limit the time politicians can hold in the city's political offices, the provision fails to accomplish its stated goal, thus failing to meet strict scrutiny or even possess a rational basis.

2. The lower courts erred requiring review when they dismissed Petitioner's claim for violation of his Fourteenth Amendment due process rights after ruling that Petitioner had no fundamental rights which were infringed by Defendants' conduct and, therefore, the charter amendment could not impermissibly retroactively apply to him.

The lower courts erred in their analysis of Petitioner's Fourteenth Amendment due process claim in holding that Petitioner needed to show that anything higher than a 'constitutional right' was infringed by the charter provision's retroactive application to him. Petitioner does not and did not

need to meet such a high burden to succeed on his due process claim. "[W]e do not restrict the presumption against statutory retroactivity to cases involving 'vested rights.' " *Landgraf v. USI Film Prod.*, 511 U.S. 244, 275, 114 S. Ct. 1483, 1502, 128 L. Ed. 2d 229 (1994).

> See, *e.g., Miller v. Florida,* 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987) ("A law is [unconstitutionally] retrospective if it 'changes the legal consequences of acts completed before its effective date' ") (quoting *Weaver v. Graham,* 450 U.S. 24, 31, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)); *Union Pacific R. Co. v. Laramie Stock Yards Co.,* 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); *Sturges v. Carter,* 114 U.S. 511, 519, 5 S.Ct. 1014, 1018, 29 L.Ed. 240 (1885) (a[n unconstitutional] retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability"). See also Black's Law Dictionary 1184 (5th ed. 1979) (quoting Justice Story's definition from *Society*); 2 N. Singer, Sutherland on Statutory Construction § 41.01, p. 337 (5th rev. ed. 1993) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage.... They

> describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act").
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> *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269, 114 S. Ct. 1483, 1499, 128 L. Ed. 2d 229 (1994).

"The Due Process Clause ... protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application." *Sanders v. Allison Engine Co.*, 703 F.3d 930, 948 (6th Cir. 2012) (quoting *Landgraf v. USI Film Prods.,* 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). Accordingly, the Supreme Court has made clear that 'property rights' are not the only rights protected against retroactive application of new laws.

"[F]or centuries our law has harbored a singular distrust of retroactive statutes." *E. Enterprises v. Apfel*, 524 U.S. 498, 547, 118 S. Ct. 2131, 2158, 141 L. Ed. 2d 451 (1998) (Justice Kennedy concurring in the judgment and dissenting in part). Here, the law which Petitioner challenges is the definition of a law which the courts should view with suspicion. In fact, prior to the Michigan Court of Appeals decision, a Macomb County Court judge ruled that the charter amendment could not be applied to preclude Petitioner from the mayoral election ballot, in part because of his strong suspicion of the motivations of the Defendants here in how they passed the amendment.

> The court stated that the failure to include the "terms served prior" language was especially troubling because the Council had included similar language in the 1998 proposal. The court then discussed retroactivity, and observed that the charter language reflected no clearly manifested intent for term limits to include prior terms served. Although Mayor Fouts did not have a vested interest, the Council's interpretation would attach a new disability with respect to past considerations, as it would prevent Mayor Fouts from running on the basis of his prior terms served.
>
> *Warren City Council v. Buffa*, No. 365488, 2023 WL 3046530, at *4 (Mich. Ct. App. Apr. 21, 2023).)

Precedent from this Honorable Court supports the Macomb County Circuit Court's suspicion that the charter amendment was passed to defeat a political opponent (Petitioner) from the legislators who proposed it (Defendant Council).

> **[Our] cases reflect our recognition that retroactive lawmaking is a particular concern for the courts because of the legislative "tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or**

> **individuals**." *Landgraf v. USI Film Products,* 511 U.S. 244, 266, 114 S.Ct. 1483, 1497–1498, 128 L.Ed.2d 229 (1994); see also *Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L.Rev. 692, 693 (1960) (**a retroactive law "may be passed with an exact knowledge of who will benefit from it**").

Id. at 548, 2159 (emphasis added).

Despite the fact that Petitioner extensively argued that by Defendants' counting against Petitioner his terms as mayor served prior to the enactment of the new term limits provision **they were unconstitutionally applying a legal disability to him retroactively**, the lower courts erroneously found that being precluded from running for public office was not a legal disability.[7] "[T]he

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[7] Petitioner also argued that he had a vested right which was violated, but the district court summarily dismissed it based on erroneous circular reasoning:

> Plaintiff maintains that he nevertheless has a vested right to run for office because he was "already legally certified to be on the ballot by the clerk Defendants." ECF No. 18, PageID.150. However, the Michigan Court of Appeals found that was an unauthorized act and ordered Plaintiff's name removed from the ballot. Michigan courts have long held unauthorized acts do not give rise to a vested right.

Court [is not] aware of any[cases] that recognizes the inability to be a candidate for elected office as a legal disability that entitles a person to due process." **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 17**. "Fouts' cited cases … merely refer to holding public office as a 'civil right' or refer to the loss of the right to possess a firearm … as a 'legal disability.' " **Circuit Court's 4/2/24 Opinion & Order Affirming, Appx. B, a, 36**.

Petitioner disputes that there is such a thing as a "mere" civil right. The ability to run for and hold public office is fundamental, and its loss *via* a felony conviction is universally and ubiquitously known as a 'legal disability." See *United States v. Barrett*, 504 F.2d 629, 633 (6th Cir. 1974), aff'd, 423 U.S. 212, 96 S. Ct. 498, 46 L. Ed. 2d 450 (1976), noting that the inability to vote or hold public office are "disabilities."

> Hence, if a "convicted felon" has his civil rights restored by operation of state law, with or without a certificate or order documenting the event, we must look to the whole of state law of the state of conviction to determine whether the "convicted felon" is entitled to vote, hold public office and serve on a jury and also

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> **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, PageID 16**.

In other words, Petitioner argued that keeping him off the ballot was unconstitutional, and the lower courts answered that it was constitutional because Petitioner was supposed to be kept off the ballot.

whether the "convicted felon" is entitled to exercise the privileges of shipping, transporting, possessing or receiving a firearm.

United States v. Cassidy, 899 F.2d 543, 549 (6th Cir. 1990).

We also held that a felon has not had his "civil rights" restored unless, pursuant to the law of the state of conviction, he possesses the right to vote, to serve on a jury and to seek and hold public office.

United States v. Breckenridge, 899 F.2d 540, 542 (6th Cir. 1990).

Our focus is particularly placed on the three civil rights considered key by the Sixth Circuit—the right to vote, hold public office, and serve on a jury.

Hampton v. United States, 191 F.3d 695, 699 (6th Cir. 1999).

In determining whether Walker's "civil rights" have been restored, precedent indicates that we should look to three civil rights in particular: "the rights to vote, to serve on a jury and to seek and hold public office."

Walker v. United States, 800 F.3d 720, 723 (6th Cir. 2015).

The loss of any of the 'three civil rights' discussed above is, indisputably, a legal disability. See also *United States v. Young*, 766 F.3d 621, 623 (6th Cir. 2014) ["He was unaware of this legal disability." Referring to his loss of the right to bear arms.]

3. The lower courts erred requiring review in dismissing Petitioner's claims for violation of his equal protection rights under the Fourteenth Amendment, because it was error to rule that Petitioner did not identify anyone similarly situated to him that was treated disparately, alternatively that Petitioner was not a class of one.

As explained in section I, above, the lower courts erred by not applying the *Anderson-Burdick* doctrine to Petitioner's Fourteenth Amendment equal protection claim. However, even under the traditional analysis which the lower courts engaged in, it committed error requiring reversal.

That is because the lower courts, in holding that "Plaintiff's Fourteenth Amendment equal protection claim fails," [**District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 19**] erroneously found that Petitioner was not similarly situated to the other elected officials to which the charter amendment applies.

> Petitioner contends that the Council discriminated against him by designing the 2020 amendment to bar his eligibility for re-election, while it does not bar any of the other Warren elected officials. To

> be 'similarly situated' for purposes of an equal-protection claim, the Plaintiff and the comparator must be alike 'in all ***relevant*** respects. The 2020 amendment applies only to the mayor's office and was intended to bring term limits for mayor in line with those for other elected officials. ***Plaintiff does not identify any other person in his position who has been allowed to be on the ballot. Because no other candidates for mayor, or any elected office in Warren, have served the maximum time in office***, Plaintiff cannot demonstrate that anyone "similarly situated" was treated differently.
>
> **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, PageID 18** (emphasis added)

First, the lower courts erred in holding that the Petitioner was not "alike" in all "relevant" aspects to the other office holders mentioned in the charter provision, as the provision makes no distinction between any of them. The charter amendment states, in pertinent part: "A person shall not be eligible to hold the office of ***mayor***, ***city council***, ***city clerk*** or ***city treasurer*** for more than the greater of three (3) complete terms or twelve (12) years in that office." Michigan Court of Appeals Opinion, 10-2, PageID 84-5 (emphasis added).

Second, the lower courts also plainly erred by concluding that the charter provision applied only to

the mayor (Petitioner), as the plain wording of the law in question applies to three other offices; the prior charter provision is not at issue in this matter.

Third, the lower courts erred in ruling that "Plaintiff d[id] not identify any other person in his position who has been allowed to be on the ballot[, b]ecause no other candidates for mayor, or any elected office in Warren, ha[s] served the maximum time in office [and so P]laintiff cannot demonstrate that anyone 'similarly situated' was treated differently." **District Court's 9/5/23 Opinion & Order Granting Motions to Dismiss, Appx. A, a, 18**. As was discussed above, Petitioner ***did*** identify an individual, who had served the "maximum time in office" but was allowed to be on the ballot. Plaintiff's rival for the 2024 mayorship, Patrick Green, was not limited to three "terms or 12 years" under the 2020 charter amendment because he had resigned from one of his terms early.

Accordingly, Petitioner did identify an individual similarly situated to him who was being treated differently than him. "The Equal Protection Clause provides that 'all persons similarly situated should be treated alike.' " *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015) (quoting *Cutshall v. Sundquist,* 193 F.3d 466, 482 (6th Cir.1999); in turn quoting *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). "To succeed on equal protection, Plaintiff 'must show that [he] was treated 'disparately as compared to similarly situated persons and that such disparate treatment either **burdens a fundamental right… or has no rational basis**.' *Ctr. for Bio-Ethical Reform, Inc.*, 648 F.3d at 379 (citation omitted)." *Reform Am. v. City of Detroit,*

Michigan, 37 F.4th 1138, 1159 (6th Cir.), *cert. denied,* 143 S. Ct. 448, 214 L. Ed. 2d 255 (2022). Similarly:

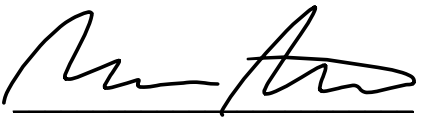
> The Supreme Court recognized the viability of class-of-one claims in *Village of Willowbrook v. Olech,* noting that the Equal Protection Clause's purpose "is to secure ***every*** person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (*per curiam*) (quotations omitted). In *Olech,* the Court laid out the basic requirements for a valid class-of-one claim: a Plaintiff must allege "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*
>
> ***
>
> As the Court explained in *Olech,* "**[w]hether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis.**" 528 U.S. at 564 n. *, 120 S.Ct. 1073.
>
> *Franks v. Rubitschun*, 312 F. App'x 764, 765–66 (6th Cir. 2009) (emphasis added).

Because nowhere in the lower court record did there appear any attempted justification of the charter's words "greater of three (3) ***complete*** terms," which **renders the statute forever incapable of limiting the time spent in office by every human being in existence except Petitioner James R. Fouts**, the lower courts erred in holding that Petitioner failed to show that his disparate treatment from those similarly situated was arbitrary and irrational. Stated another way, the rational basis of the charter amendment: the limitation on an individual's time in office, is wholly optional for everyone but Petitioner, as everyone else can resign the day before their third term completes, and be on future ballots in perpetuity. The "three complete terms" classification only served the purpose of barring the key architect of the charter provision, the president of the City Council, from having to run against Petitioner in the upcoming mayoral election. "[T]hose classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution." *Clements v. Fashing*, 457 U.S. 957, 967, 102 S. Ct. 2836, 2845, 73 L. Ed. 2d 508 (1982), citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955).

CONCLUSION

For the above reasons and more, the petition for certiorari should be granted.

Respectfully Submitted,



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APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES R. FOUTS,

Plaintiff,

vs. Case No. 23-11868
HON. GEORGE CARAM STEEH

THE WARREN CITY COUNCIL, THE WARREN CITY ELECTION COMMISSION, ANTHONY G. FORLINI in his official capacity as MACOMB COUNTY CLERK, and SONJA D. BUFFA in her official capacity as WARREN CITY CLERK.

Defendants.
_____/

OPINION AND ORDER GRANTING WARREN CITY COUNCIL'S AND MACOMB COUNTY CLERK'S MOTIONS TO DISMISS (ECF NOS. 10 and 12) AND DENYING PLAINTIFF'S MOTION FOR EXPEDITED REVIEW AS MOOT (ECF NO. 8)

Plaintiff James Fouts is the current mayor of the City of Warren (Warren), serving his fourth term in office. In 2020, the electorate of Warren adopted an

amendment to the Warren City Charter (Charter) that imposes a three-term limit on the office of mayor. This case arises out of plaintiff's desire to run for a fifth term as mayor in November 2023. Plaintiff alleges that defendants Warren City Council (Council), Warren City Election Commission, the Warren City Clerk, and the Macomb County Clerk, violated his constitutional rights by applying the Charter amendment's term limit retroactively to preclude him from appearing on the ballot for the August 8, 2023 primary. Plaintiff's lawsuit, brought under 42 U.S.C. § 1983, alleges a violation of his First Amendment rights of political speech, his Fifth Amendment[1] due process rights, and his Fourteenth Amendment right to equal application of the law. As a remedy, plaintiff requests that the Court order the results of the August 8, 2023 primary be decertified and that a special election be held prior to the general election that would include plaintiff as a candidate. Plaintiff also seeks money damages to compensate him for the constitutional, emotional, and economic damages he suffered because of defendants' unlawful conduct.

The matter is before the Court on three motions: the Warren City Council's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6) for lack of jurisdiction and failure to state a claim upon which relief may be granted, ECF No. 10; Macomb County Clerk Anthony Forlini's motion to dismiss, ECF No. 12; and plaintiff's motion to expedite review, ECF No.

[1] Because plaintiff's procedural due process claim is based on actions taken by state actors, it comes under the protection of the Fourteenth Amendment and will be analyzed as such. Scott v. Clay County, Tenn., 205 F.3d 867, 873 (6th Cir. 2000).

8. Defendants Warren City Election Commission and Warren City Clerk Sonja Buffa did not file a separate motion. In their Answer, they describe their participation in the case as procedural for purposes of expedient execution of any order that may be issued by the Court. Additionally, as they are named in their official capacities, they request that the Court find them immune from damages. ECF No. 23, PageID.208-09.

Upon a careful review of the written submissions, the Court deems it appropriate to render its decision without a hearing pursuant to Local Rule 7.1(f)(2). As set forth below, the Court finds that it has subject matter jurisdiction over plaintiff's complaint, but that plaintiff fails to state any claim upon which relief may be granted. Therefore, defendants' motions to dismiss are GRANTED and the motion to expedite review is DENIED as moot. The case will be dismissed in its entirety.

FACTUAL ALLEGATIONS

This case focuses on an eligibility requirement for mayoral candidates in Warren – specifically term limits. Term limits for certain elected offices were first introduced in Warren in 1998. The voters were asked to approve a resolution to amend the Charter to provide that the mayor, council members, clerk and treasurer could not hold office for the greater of three terms or 12 years in a particular office. The ballot proposal provided that the limitation began with the term resulting from the November 1995 election. The resolution passed and the Charter was amended.

In 2016, when plaintiff was serving his third term as mayor, the electorate of Warren again voted to amend the Charter. The proposal was to increase the term limit for the office of mayor from the greater of three terms or 12 years to the greater of five terms or 20 years. The ballot proposal specified that any years or terms served prior to the amendment would be counted. The measure passed and the Charter was amended.

Then in 2020, while plaintiff was in his fourth term, the Council proposed an amendment to the Charter to change the term limit for the office of mayor back so it would be the same as other city elected offices. The ballot proposal specified that "[a]ny terms or years served prior to this amendment are included." The amendment passed and the Charter now reads:

> A person shall not be eligible to hold the position of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.
>
> Warren City Charter, § 4.3(d).

Warren scheduled a primary election for August 8, 2023, to determine the candidates for mayor in the upcoming general election. Plaintiff sought to run for a fifth term as mayor, but the Council believed he was ineligible to run under the term limit provision in the Charter. Council brought a mandamus action against the Macomb County Clerk, the Warren City Clerk, and the Election Commission to require them

to exclude plaintiff from the 2023 primary ballot. The Macomb County Circuit Court found that it was unclear whether the term limit could be applied to plaintiff, and therefore determined he was eligible to run for re-election in 2023. *Warren City Council v. Buffa*, No. 2023-000611-AW, 2023 WL 3766706, at *1, 5 (Mich.Cir.Ct. Mar. 23, 2023).

On April 21, 2023, in a published opinion, the Michigan Court of Appeals reversed the Circuit Court and ordered that plaintiff's name be removed from the ballot. *Warren City Council v. Buffa*, No. 365488, 2023 WL 3046530, __ N.W.2d __ (Mich. Ct. App. Apr. 21, 2023). The basis of the Michigan Court of Appeals' decision is that the term limits in the 2020 Charter amendment are not ambiguous and provide that all prior terms are to be counted. The court found that because plaintiff had already served more than three complete terms, he was ineligible to run for re-election. *Id.* at * 5-6. On May 17, 2023, the Michigan Supreme Court denied defendants' application for leave to appeal. 989 N.W.2d 679 (Mich. 2023).

On August 2, 2023, six days prior to the primary election, plaintiff filed this lawsuit alleging that defendants are violating his federal constitutional rights by proposing the 2020 amendment and by applying the term limits to prevent him from running for another term as mayor.

STANDARD OF REVIEW

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction challenges the sufficiency of the pleading itself. *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014) (citing *United States v.*

Ritchie, 15 F.3d 592, 598 (6th Cir. 1994)). In determining whether "the plaintiff has alleged a basis for subject matter jurisdiction, . . . the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis." Id. "[T]he plaintiff bears the burden of proving that jurisdiction exists." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004).

Once a Court is satisfied that it has jurisdiction to hear the merits of a case, Rule 12(b)(6) allows the Court to make an assessment as to whether the plaintiff has stated a claim upon which relief may be granted. Under the Supreme Court's articulation of the Rule 12(b)(6) standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007), the Court must construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims. A'[N]aked assertion[s]' devoid of 'further factual enhancement'" are insufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557, 570). To survive a Rule 12(b)(6) motion to dismiss, plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *D=Ambrosio v. Marino*, 747 F.3d 378, 383 (6th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555) (other citations omitted). Even though the complaint need not contain "detailed" factual allegations, its "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *New Albany Tractor, Inc. v. Louisville*

Tractor, Inc., 650 F.3d 1046, 1051 (6th Cir. 2011) (citing *Twombly*, 550 U.S. at 555).

LAW AND ANALYSIS

I. Subject Matter Jurisdiction

Subject matter jurisdiction is a threshold issue that the Court must address and resolve prior to reaching the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); see also Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"). The moving defendants argue that the Court lacks subject matter jurisdiction over plaintiff's case under 28 U.S.C. § 1257(a) and the *Rooker-Feldman* doctrine. This statute, as interpreted, provides an exception to federal jurisdiction in "limited circumstances" where there is a challenged state judgment involved in the federal action, and an effort to overturn the judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 287 & n.2, 293 (2005).

The exception to jurisdiction has been described as applying to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 291. Defendants contend that the source of plaintiff's alleged injury is the Michigan Court of Appeals' decision, and that federal district courts do not have jurisdiction to resolve an appeal of a state court's final judgment. 28 U.S.C. § 1257(a); *Hohenberg v. Shelby County, Tenn.*,

68 F.4th 336, 338 (6th Cir. 2023) (citing *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 & n.16 (1983).

The Court finds that the constitutional injuries alleged by plaintiff are not a challenge to the prior state judgment. The state court interpreted the 2020 amendment to determine whether terms served prior to its enactment were intended to be counted toward term limits. The court resolved that issue in favor of counting all prior terms, thereby concluding that plaintiff was ineligible to run for a fifth term. *Buffa*, 2023 WL 3046530 at * 5-6. The federal complaint asserts that defendants' application of the 2020 amendment's term limits as to him, violates his constitutional rights. Plaintiff's federal lawsuit does not ask, or require, the Court to "review and reject' the state court's judgment. For the reasons discussed further below, the Court finds that it has subject matter jurisdiction over plaintiff's complaint.

In determining whether the exception to subject matter jurisdiction applies, it is often helpful to look at the source of the injury alleged. Generally speaking, "[i]f the source of the injury is that state court decision, then the Rooker-Feldman doctrine would prevent the district court from asserting jurisdiction. If there is some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim." *McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006).

Plaintiff describes the source of his injury as two actions taken by Council. The first is when it proposed the 2020 amendment that would render a person ineligible to hold the office of mayor after

serving more than the greater of three complete terms or twelve years in that office. Plaintiff alleges that counting terms that began before the amendment was enacted violates his constitutional rights. The second source of plaintiff's alleged injury is Council's efforts to enforce the term limits retroactively against him. While the state court construed the same Charter provision at issue in this case, it did so only to interpret whether prior terms were intended to be counted. And although plaintiff is not shy in opining that the state court got the issue wrong, the decision itself is not the source of plaintiff's alleged injury.

It can also be helpful to look at the remedy sought by plaintiff. See *Hohenberg*, 68 F.4th at 340 (where the relief ordered was the appointment of receivers, the ordered sale of property and holding claimants in contempt, the court held that "[d]amages would not amount to 'review and rejection' of any of the judgments binding the claimants."). Plaintiff's request for a declaration that counting his terms which commenced prior to the enactment of the 2020 amendment is a violation of his First and Fourteenth Amendment rights, and for an award of money damages, does not require "review and rejection" of the state court judgment. Again, the correctness of the prior judgment is not relevant to whether counting plaintiff's prior terms is a violation of his constitutional rights. Plaintiff also requests that if he prevails, this Court should order a special primary election with his name on the ballot. This is a remedy which would seem to conflict with the state court order that his name not appear on the ballot. The Sixth Circuit has addressed such situations by pointing out that Section 1257(a) "applies only when a state-court

loser seeks 'review and rejection' of a specific prior judgment, not when his victory would undermine a judgment's legal underpinnings." *Id.*, 68 F.4th at 341 (citing *Exxon*, 544 U.S. at 284).

The bottom line is that plaintiff is not asking this court to review the state court judgment because it was wrongly decided. His claim is that the term limits, as applied to exclude him from being a candidate for mayor, violate his federal constitutional rights and he seeks redress for those violations. The Court finds that it has subject matter jurisdiction over plaintiff's complaint.

II. Issue Preclusion

Defendants next maintain that plaintiff is precluded from relitigating whether he should be included as a candidate for mayor because that issue was already determined by the Michigan Court of Appeals. The elements of collateral estoppel, or issue preclusion, are: "(1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment,' (2) the parties or privies "'must have had a full [and fair] opportunity to litigate the issue,'" and (3) "'there must be mutuality of estoppel.'" *Mecosta County Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co.*, 509 Mich. 276, 283 (2022) (citing *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 682-684 (2004)).

As to the first element, defendants contend that the question of whether the 2020 mayoral term limit amendment applies to plaintiff's prior terms was litigated and answered in the state case and was essential to that court's judgment. However, the state

court was not asked, and did not address, the issue before this court – whether counting plaintiff's prior terms to determine his eligibility as a candidate for mayor violates his constitutional rights. The issues this Court is being asked to decide were not determined by the state court, so this is not a situation where collateral estoppel applies.

Additionally, the second element requires that the parties or their privies had a full and fair opportunity to litigate the issue in the prior court. Plaintiff was not a party in the state court action, but defendants assert that he was in privity to Clerk Buffa because their interests in placing plaintiff on the ballot were identical. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." Adair v. State, 470 Mich. 105, 122 (2004). In state court, Buffa was advocating as to the proper interpretation of the 2020 amendment so she could execute her ministerial duties as Clerk. Plaintiff's constitutional claims were not represented by any parties in the prior action. The Court finds that collateral estoppel does not apply to preclude plaintiff from stating a claim upon which relief can be granted in this Court.

Satisfied that it has jurisdiction, the Court turns its consideration to defendants' motion to dismiss plaintiff's three constitutional counts for failure to state a claim for relief.

III. Count I – First Amendment

Plaintiff's First Amendment claim asserts that his rights to free speech and association are being

violated because the term limits in the 2020 amendment to the Charter are being applied to him retroactively to keep him off the ballot for mayor. The Court finds that there is no fundamental right to run for office, and Warren has a rational basis for imposing term limits for the office of mayor. For the reasons more fully explained below, defendants' motion to dismiss the First Amendment claim will be granted.

Term limits are part of a state's power "to prescribe qualifications for its officeholders," rather than a "regulatory procedure relating to the election process." *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 924 (6th Cir. 1998). Along with a state's right to impose neutral candidacy qualifications such as age or residence, term limits are another available tool. *Id*. at 932-24; see also, *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991). The Sixth Circuit addressed term limits in Michigan in a challenge brought by state legislators. Distinguishing restrictions to voter access, the court stated that term limits restrict eligibility for office, and since candidates have no constitutional right to run for office, found they are constitutionally permissible:

> This [term limit] qualification gives us no reason to apply heightened scrutiny, because candidates do not have a fundamental right to run for office. *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) ('Far from recognizing candidacy as a fundamental right, we have held that the existence of barriers to a candidate's

> access to the ballot does not of itself compel close scrutiny.' (cleaned up)); *Zielasko v. Ohio*, 873 F.2d 957, 959 (6th Cir. 1989) ('Running for office is not a fundamental right.' (cleaned up)). Without such a fundamental right at issue, we revert to the baseline: rational basis.
>
> *Kowall v. Benson*, 18 F.4th 542, 547–48 (6th Cir. 2021).

Plaintiff contends he is not challenging the constitutionality of term limits in general, but only as applied retroactively to himself. He argues that his First Amendment rights are implicated because "[h]is right to support a candidate of his choice – including himself – cannot be arbitrarily restricted." ECF No. 18, PageID.148 (citing *Mogk v. City of Detroit*, 335 F.Supp. 698, 700 (E.D. Mich. 1971). In *Mogk*, the federal district court reviewed a challenge to the three-year residency requirement for candidates for the City of Detroit Charter Commission. The court determined that the requirement did not pass either the rational basis test or the more strenuous and fact-intensive compelling state interest test applied in ballot-access cases. *Id*. at 700-701. After *Mogk* was decided, the Supreme Court has made clear that candidate qualification cases are not subject to the same First Amendment protections as voter qualification cases. "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'"

Clements v. Fashing, 457 U.S. 957, 963 (1982). Therefore, rational basis review applies to plaintiff's First Amendment challenge.

Addressing the argument that candidates have the right to vote for themselves, as the candidate of their choice, the Sixth Circuit held: "Just as candidates have no fundamental right to run for office, voters have no fundamental right to 'vote for a specific candidate or even a particular class of candidates.'" *Kowal*, 18 F.4th at 549. In the absence of a fundamental right, "their voter claims fail on rational-basis review …" Id.

Plaintiff's final argument is that there is no rational basis for changing his term limit from three terms to five terms, and then back to three terms. However, in resolving to submit a ballot question to the voters in 2020 to amend the Charter to limit the mayor's term, the Council noted "that a governmental system with a balanced distribution of power would be served best by equal term limits for all elected officials." See, *Buffa*, 2023 WL 3046530, at *2. The 2020 amendment did just that, applying the same "greater of three (3) complete terms or twelve (12) years in that office" eligibility requirement to candidates for the office of mayor, city council, city clerk and city treasurer.

To the extent that plaintiff argues the Council misapplied state law in counting the terms he served prior to passage of the 2020 amendment, the Michigan Court of Appeals and the Michigan Supreme Court have issued a final judgment on that issue. As discussed in Section I above, this Court does not have subject matter jurisdiction to review a challenge to a final state court judgment under 28 U.S.C. § 1257(a).

The Court finds that the term limits at issue, as applied to plaintiff, are rationally related to their stated goal of achieving a balanced distribution of power among elected officials. Therefore, plaintiff fails to state a claim for which relief can be granted under the First Amendment.

IV. Count II – Fourteenth Amendment Due Process

Plaintiff's due process argument is that counting his terms served prior to the 2020 amendment to determine him ineligible to run for mayor, denies plaintiff of a vested property interest without due process of law. However, because there is no vested property interest in being a candidate for political office, the Court grants defendants' motion to dismiss this claim.

To assert a procedural due process claim, a plaintiff must show that he was deprived "of a protected property interest without 'adequate predeprivation procedural rights.'" *Sterling Hotels, LLC v. McKay*, 71 F.4th 463, 467 (6th Cir. 2023) (citing *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 900 (6th Cir. 2019)). To qualify as a protected property interest, a person must have "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Hasanaj v. Detroit Pub. Sch. Cmty. Dist.*, 35 F.4th 437, 447 (6th Cir. 2022).

"The U.S. Constitution does not create property interests. To warrant protection, the state law must create a legitimate entitlement to a benefit or a justifiable expectation of receiving it." *Williams v. City of Detroit, Michigan*, 54 F.4th 895, 899 (6th Cir. 2022) (citation omitted). To receive protection under the Due

Process Clause, "a property interest must be a vested right." *Detroit v. Walker*, 445 Mich. 682, 698–699 (1994). This requires something "more than a mere expectation based on an anticipated continuance of the present laws." *Gillette Commercial Operations North Am. & Subsidiaries v. Dep't of Treasury*, 312 Mich. App. 394, 878 N.W.2d 891, 909 (2015).

Unfortunately for plaintiff, neither Michigan nor federal law recognizes a vested property interest in being a candidate or in holding public office. See, *People v. Smith*, 502 Mich. 624, 638 (Mich. 2018) ("the law has long been clear that there is no property interest in holding public office."); *Taylor v. Beckham*, 178 U.S. 548, 576 (1900); *Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972); *Houchens v. Beshear*, 850 F. App'x 340, 343 (6th Cir. 2021). Plaintiff maintains that he nevertheless has a vested right to run for office because he was "already legally certified to be on the ballot by the clerk Defendants." ECF No. 18, PageID.150. However, the Michigan Court of Appeals found that was an unauthorized act and ordered plaintiff's name removed from the ballot. Michigan courts have long held unauthorized acts do not give rise to a vested right. See, *e.g., Fass v. City of Highland Park*, 326 Mich. 19, 31 (1949) ("Such acts being unauthorized and in express contravention of ordinance provisions of the city, plaintiffs acquired no vested right to use their property for a purpose forbidden by law.").

Plaintiff next asserts that counting his terms served before the 2020 amendment was enacted attaches a new "legal disability" to him because it prevents him from running based on his prior terms

served. Complaint, ¶ 75 ("Plaintiff's disqualification from both the candidacy and the office of the Mayor of the City of Warren indisputably constitutes a legal disability."); Complaint ¶ 93 ("Plaintiff has a right under the Fifth Amendment of the United States constitution to not suffer retroactive legal disabilities arising out of past considerations."). This argument does not save plaintiff's due process claim. First, the Michigan Court of Appeals held that the term limit provision applied to plaintiff prospectively, as opposed to retrospectively. *Buffa*, 2023 WL 3046530, at *11 ("Additionally, a prospective application of the charter is applied here, and its reliance on antecedent events does not run afoul of the general rule against retroactivity."). Second, plaintiff does not cite any case law, nor is the Court aware of any, that recognizes the inability to be a candidate for elected office as a legal disability that entitles a person to due process.

Without a vested property interest at stake, there can be no procedural due process violation. Plaintiff's due process claim fails as a matter of law.

V. Count III – Fourteenth Amendment Equal Application of the Laws

Plaintiff's final constitutional claim is that he is being denied equal application of the laws in violation of the Fourteenth Amendment's Equal Protection Clause. Because plaintiff cannot show that the term limits are applied to him differently than they are applied to others who are similarly situated, he fails to state a claim for which relief can be granted.

The Fourteenth Amendment's guarantee of the "equal protection of the laws" bars governmental

discrimination that either (1) burdens a fundamental right, (2) targets a suspect class, or (3) intentionally treats one differently from others similarly situated with no rational basis for the difference. *Green Genie, Inc. v. City of Detroit, Michigan*, 63 F.4th 521, 527 (6th Cir. 2023). There is not a fundamental right to run for public office, and plaintiff has not alleged that proposal 2020 targets a suspect class. Therefore, to prevail on his allegation of government discrimination, plaintiff must show that (1) the City "intentionally treated" him "differently from others similarly situated" and (2) "there is no rational basis for the difference in treatment." *Id.* at 527 (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Plaintiff contends that the Council discriminated against him by designing the 2020 amendment to bar his eligibility for re-election, while it does not bar any of the other Warren elected officials. "To be 'similarly
situated' for purposes of an equal-protection claim, the plaintiff and the comparator must be alike 'in all relevant respects.'" *Reform Am. v. City of Detroit, Michigan*, 37 F.4th 1138, 1152 (6th Cir.), cert. denied, 143 S. Ct. 448 (2022) (citation omitted). The 2020 amendment applies only to the mayor's office and was intended to bring term limits for mayor in line with those for other elected officials. Plaintiff does not identify any other person in his position who has been allowed to be on the ballot. Because no other candidates for mayor, or any elected office in Warren, have served the maximum time in office, plaintiff cannot demonstrate that anyone "similarly situated" was treated differently.

Plaintiff, who is currently serving his fourth term as mayor, is not similarly situated to other candidates who have not already served at least three completed terms in office. In addition, the term limits provision at issue is rationally related to legitimate governmental interests. For these reasons, plaintiff's Fourteenth Amendment equal protection claim fails.

VI. Count IV – Declaratory Judgment

Plaintiff's fourth count alleges a claim for declaratory judgment. However, plaintiff fails to demonstrate an "actual injury traceable to the defendant[s] [that is] likely to be redressed by a favorable judicial decision[]", therefore he is not entitled to declaratory judgment as a remedy. See, *Keene Group Inc. v. City of Cincinnati, Ohio*, 998 F.3d 306, 310 (6th Cir. 2021) (construing count for declaratory judgment as a requested remedy and dismissing that count after finding no constitutional violations occurred). Count IV will therefore be dismissed.

VII. Purcell Doctrine and Laches

Having concluded that plaintiff fails to state any claim for which relief can be granted, the Court need not address defendants' argument that plaintiff's lawsuit is untimely and that his request for injunctive relief is barred by the Purcell principle and/or laches.

VIII. Qualified Immunity of Clerks

Defendant clerks assert qualified immunity as to plaintiff's claims for monetary damages. "Qualified immunity is an affirmative defense" to a §1983 claim. *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994). Because the Court finds that plaintiff has failed to state a constitutional claim for which relief may be granted, and that the case shall be dismissed, there is no claim to which the affirmative defense of qualified immunity can be asserted.

CONCLUSION

Now, therefore, for the reasons stated in this opinion and order,

IT IS HEREBY ORDERED that Warren City Council's motion to dismiss (ECF No. 10) is GRANTED.

IT IS HEREBY FURTHER ORDERED that Anthony Forlini's motion to dismiss (ECF No. 12) is GRANTED.

IT IS HEREBY FURTHER ORDERED that James Fout's motion for expedited review (ECF No. 8) is DENIED as moot.

IT IS HEREBY FURTHER ORDERED that plaintiff's complaint shall be DISMISSED in its entirety.

It is so ordered.

Dated: September 5, 2023

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

APPENDIX B

RECOMMENDED FOR PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0072p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES R. FOUTS, *Plaintiff-Appellant,* *v.* WARREN CITY COUNCIL; SONJA BUFFA; ANTHONY FORLINI; CITY OF WARREN ELECTION COMMISSION, *Defendants-Appellees.*	No. 23-1826

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:23-cv-11868—George Caram Steeh III, District Judge.

Decided and Filed: April 2, 2024

Before: CLAY, McKEAGUE, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Nabih H. Ayad, AYAD LAW, PLLC, Detroit, Michigan, for Appellant. Mary Massaron, PLUNKETT COONEY, Bloomfield Hills, Michigan, for Appellee Warren City Council. Mary Michaels, CITY OF WARREN, Warren, Michigan, for Appellees Sonja Buffa and City of Warren Election Commission. Frank Krycia, MACOMB COUNTY, Mount Clemens, Michigan, for Appellee Anthony Forlini.

OPINION

CLAY, Circuit Judge. Plaintiff James R. Fouts, the former mayor of Warren, Michigan, appeals the district court's dismissal of his complaint against Defendants Warren City Council, Warren City Election Commission, Anthony G. Forlini, in his capacity as the Macomb County Clerk, and Sonja D. Buffa, in her capacity as the Warren City Clerk. Fouts brought claims under 42 U.S.C. § 1983, alleging that Defendants violated his First, Fifth, and Fourteenth Amendment rights by retroactively applying a new term-limit provision to bar him from running for a fifth term as Warren's mayor. For the reasons set forth below, we AFFIRM the district court's dismissal of Fouts' complaint.

I. BACKGROUND

At the time of his complaint, Fouts was serving his fourth term as mayor of Warren, Michigan, having been in office since 2007. In 2020, Warren voters passed an amendment to Warren's city charter that shortened the existing term limits for mayor and brought mayoral term limits in line with term limits for other City offices. Specifically, the amended charter provides that "[a] person shall not be eligible to hold the position of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office." Warren City Charter, § 4.3(d). Despite the new charter amendment, Fouts initiated the process of placing his name on the ballot to run for a fifth term as mayor in the 2023 election.

In February 2023, the Warren City Council ("City Council") filed a complaint in Michigan's circuit court, seeking to compel Buffa and the Warren City Election Commission ("Election Commission") to remove Fouts' name from the 2023 mayoral ballot. See *Warren City Council v. Buffa*, No. 2023-000611-AW, 2023 WL 3766706, at *1 (Mich. Cir. Ct. Mar. 23, 2023) rev'd No. 365488, 2023 WL 3046530, at *11 (Mich. Ct. App. Apr. 21, 2023). The Michigan trial court held that Fouts could run for mayor of Warren in 2023. Warren City Council, 2023 WL 3766706, at *5–6. It found that the charter amendment did not clearly intend to include Fouts' prior terms as mayor in assessing whether the new three-term limit barred him from office. *Id*. The Michigan Court of Appeals reversed, ordering Buffa and the Election Commission to

disqualify Fouts from the 2023 mayoral race. See *Warren City Council*, 2023 WL 3046530, at *11. The Court of Appeals found that the plain language of the charter amendment meant that Fouts' prior terms counted in calculating whether he had exceeded the new three-term limit. *Id.* at *5. The Michigan Supreme Court declined to hear the case. *Warren City Council v. Buffa*, 989 N.W.2d 679 (Mich. 2023) (mem.).

In August 2023, Fouts filed the instant case in federal court. He brought claims under 42 U.S.C. § 1983, alleging that Defendants violated his First Amendment rights to free expression and association, his Fifth Amendment right to due process of law,[2] and his Fourteenth Amendment right to equal protection under the law. He sought declaratory relief and monetary damages, and requested that the district court decertify the results of the 2023 mayoral primary election and order a special election that would include Fouts on the 2023 ballot. The City Council and Forlini each moved to dismiss Fouts' complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[3] The district court found that it had subject matter jurisdiction over Fouts' complaint, but dismissed the complaint in

[2] Although Fouts' complaint alleges a violation of his Fifth Amendment right to due process, as the district court properly noted, he only alleges unlawful actions by the state of Michigan, bringing his claims under the protections of the Fourteenth, rather than the Fifth, Amendment. See *Scott v. Clay County*, 205 F.3d 867, 873 n.8 (6th Cir. 2000). Accordingly, we analyze his due process challenge under the Fourteenth Amendment.

[3] Defendants Buffa and the Election Commission filed an answer in which they described their role in this litigation as "merely procedural in nature for purposes of expedient execution of a Court order." Answer, R. 23, Page ID #208.

its entirety because it failed to state a claim upon which relief could be granted.

Specifically, the district court rejected Defendants' arguments that Fouts' complaint amounted to an attempt to overturn the state court's judgment, which, if true, would deprive the district court of subject matter jurisdiction. See 28 U.S.C. § 1257; *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923); *D. C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983). The so-called Rooker-Feldman doctrine only applies in the "limited circumstances" when "state-court losers" bring actions in federal court "complaining of injuries caused by state-court judgments" and "inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 291 (2005). In this case, the district court correctly found that Fouts' constitutional challenge to the purportedly retroactive application of the term-limit amendment did not require it to review and reject the state court judgment. Although Fouts' complaint, at points, took issue with the Michigan Court of Appeals' decision, as the district court correctly noted, the ultimate source of Fouts' injury in this federal action was not the state court judgment, but Defendants' initial proposal of the term-limit amendment and subsequent application of the term-limit amendment to include Fouts' prior terms as mayor. Because this constitutional challenge would not require a review or a rejection of the state court's judgment interpreting the term-limit amendment, the district court correctly applied the *Rooker-Feldman* doctrine and found that it did not bar jurisdiction over Fouts' claims.

Fouts timely appealed the district court's judgment, and asked this Court for expedited review of this appeal. We entered an order on October 4, 2023, denying Fouts' request for expedited review because Fouts had unreasonably delayed filing his federal lawsuit and because he was unlikely to succeed on the merits of his appeal. We now fully consider the merits of Fouts' appeal, having the benefit of full briefing from the parties. Defendants urge us to uphold the district court's dismissal of Fouts' complaint on the merits, and alternatively argue that we should affirm the district court's dismissal of Fouts' complaint based on the principle "that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020).

II. DISCUSSION

A. Standard of Review

We review *de novo* the district court's dismissal of a complaint for its failure to state a claim. *Majestic Bldg. Maint., Inc. v. Huntington Bancshares Inc.*, 864 F.3d 455, 458 (6th Cir. 2017). We accept all of the complaint's factual allegations as true and determine whether these facts sufficiently state a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

B. Analysis

1. Mootness

Because Fouts requests relief tied in part to the 2023 Warren mayoral race—an election that has come and gone—we first consider whether his appeal is moot. Although no party raised this question, we must assure ourselves of our own jurisdiction to hear a case, and, accordingly, may raise the question of mootness sua sponte. *Berger v. Cuyahoga Cnty. Bar Ass'n*, 983 F.2d 718, 721 (6th Cir. 1993). A case may become moot at any stage of litigation "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Graveline v. Benson*, 992 F.3d 524, 533 (6th Cir. 2021) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

In this case, even if Fouts' prospective relief has been mooted by the occurrence of the 2023 mayoral election, Fouts' request for monetary damages ensures our jurisdiction. A request for monetary damages may continue to present a live controversy, even when a plaintiff's claim for prospective relief is mooted. See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir. 2005) ("[T]he existence of a damages claim ensures that this dispute is a live one and one over which Article III gives us continuing authority.").

Given our jurisdiction based on Fouts' request for monetary damages, we need not decide whether his requests for prospective relief are moot. We note, however, that his claim for injunctive relief—which requested that he be permitted to run as a candidate in the 2023 Warren mayoral election—is likely mooted by the occurrence of that election. See *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005). Nevertheless, Fouts' request for declaratory relief

likely remains live by virtue of an exception to mootness for disputes capable of repetition yet evading review. "This exception applies when '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id*. (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)). Election disputes readily meet the first prong of this test as, generally, "litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election." *Id*. The second prong is satisfied if the controversy is "capable of repetition" not whether "a recurrence of the dispute [is] more probable than not." *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988) (emphasis in original). In this case, Fouts seeks a declaratory judgment that Defendants' decision to apply the term-limit amendment to include his prior terms served as Warren mayor violates his constitutional rights. Although the 2023 Warren mayoral election has passed, and although Fouts has not explicitly indicated in his complaint that he seeks to run for a fifth term as mayor in a future election, such an explicit statement is not necessary to show that it is "reasonable to expect that he will do so." *Lawrence*, 430 F.3d at 371. Because the term-limit amendment remains valid and applicable to Fouts, and because it is reasonable to believe that he will seek to run for a fifth term in the future if permitted, Fouts' request for declaratory relief likely continues to present a live case or controversy over which we have jurisdiction.

2. First Amendment

Fouts first argues that Defendants violated his First Amendment rights to free expression and association by applying the charter amendment to him retroactively and preventing him from running for a fifth term as mayor. A potential candidate for office may bring a challenge to a state term-limit law under the First Amendment, which is made applicable to the states through the Fourteenth Amendment. See *Kowall v. Benson*, 18 F.4th 542, 546–47 (6th Cir. 2021).

Fouts argues that we must apply the sliding-scale framework described in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), to evaluate his First and Fourteenth Amendment claim. The Anderson-Burdick framework is typically the appropriate test "[w]hen deciding whether state election laws violate a plaintiff's associational rights and the right to vote effectively under the First and Fourteenth Amendments." *Graveline*, 992 F.3d at 534. A court using this sliding scale approach applies varying levels of scrutiny to state election laws depending on the severity of the burden on an individual's constitutional rights. See *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015).

However, we have held that the *Anderson-Burdick* framework is "inapposite" when a plaintiff brings a challenge to a term-limit law. *Kowall*, 18 F.4th at 547. This is because term-limit laws define a candidate's eligibility for office, whereas "prototypical ballot-access or freedom-of-association case[s]" challenge laws that "keep[] eligible candidates off the ballot" or otherwise limit voters from casting their

votes for eligible candidates. *Id*. These cases are subjected to *Anderson-Burdick*'s sliding scale framework because they burden fundamental rights, such as the right of eligible voters to cast their votes effectively. See *Anderson*, 460 U.S. at 787. By contrast, term-limit laws, which only restrict the class of individuals eligible to run for office, do not burden a fundamental right because there is no fundamental right to run for office. See *Kowall*, 18 F.4th at 547; see also *Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'") (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Accordingly, challenges to term-limit laws receive rational basis review. See *Kowall*, 18 F.4th at 548.

Fouts argues that his claim mirrors ballot-access challenges that receive heighted scrutiny because we have held that "[f]or ballot-access cases," the "hallmark of a severe burden is exclusion or virtual exclusion from the ballot." Graveline, 992 F.3d at 543 (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)). Because the term-limit amendment excludes Fouts from the ballot, he claims that a higher level of scrutiny applies to his challenge. This argument is foreclosed by our precedent. See *Kowall*, 18 F.4th at 547–48. Ballot-access cases address the constitutionality of barriers for otherwise qualified candidates to be placed on the ballot, such as candidate signature requirements or early filing deadlines that disproportionately impact minor political parties. See, *e.g., Graveline*, 992 F.3d at 536–37. By contrast, term-limit laws "operate

independently from ballot-access restrictions" because "they limit which individuals are eligible to hold office." *Kowall*, 18 F.4th at 547. However Fouts may phrase his argument, it does not change the fact that he has not challenged a law restricting his fundamental rights.

Fouts further argues that the Anderson-Burdick framework applies in this case because he brings an as-applied challenge to the charter amendment's purportedly retroactive application to him, which he claims creates a meaningful difference between his challenge and a facial challenge to a term-limit law applied prospectively. But bringing an as-applied challenge does not change the level of scrutiny applicable to the charter amendment because Fouts still cannot show that he has a fundamental right to run for office. See *Kowall*, 18 F.4th at 547. With no fundamental right allegedly impaired, we must resort to rational basis review. Id. at 548. Moreover, his challenge to the purportedly retroactive application of the term-limit provision also does not raise the level of applicable scrutiny. For the reasons discussed below, the application of the term-limit amendment to bar Fouts from a fifth term in office does not, in fact, constitute a retroactive application. But even if it did, while this could create a due process or other constitutional concern, retroactive application does not provide a basis for heightened scrutiny of his First Amendment claim. See *Lindenbaum v. Realgy, LLC*, 13 F.4th 524, 530 (6th Cir. 2021) (finding that the hypothetically retroactive application of a judicial decision to a party did not "create a First Amendment problem" because "the centuries-old rule that the government cannot subject someone to punishment

without fair notice is not tied to speech"). Instead, because the term-limit amendment does not burden Fouts' fundamental rights, review of his as-applied challenge is subject to rational basis review.

Fouts must thus show that the term-limit amendment, as applied to him, has no rational relationship to any legitimate government interest. See Kowall, 18 F.4th at 548. In general, under rational basis review, a defendant "has no obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'" *Club Italia Soccer & Sports Org. v. Charter Twp. of Shelby*, 470 F.3d 286, 298 (6th Cir. 2006), overruled on other grounds as recognized by *Davis v. Prison Health Servs.*, 679 F.3d 433, 442 n.3 (6th Cir. 2012) (quotation omitted). However, in this case, the City Council explicitly stated its legitimate interests in proposing the term-limit amendment. Specifically, in the resolution adopting the ballot proposal later submitted to Warren voters, it stated that "[a] governmental system with an equally balanced distribution of power and effective system of checks and balances would be best served by having equal term limits for all elected city offices." Warren City Council Resolution (June 30, 2020), https://library.municode.com/mi/warren/ordinances/code_of_ordinances?nodeId=1054927. This provides a rational basis for the term-limit amendment. See *Kowall*, 18 F.4th at 548.

A plaintiff may show that a government action lacks a rational basis by either negating "every conceivable basis which might support the

government action" or "by showing that the challenged action was motivated by animus or ill-will." *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 905 (6th Cir. 2019) (quoting *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty.*, 430 F.3d 783, 788 (6th Cir. 2005)). Fouts argues that the amendment lacks a rational basis because it only limits individuals from holding office who have served three "complete" terms, which he contends suggests that office holders could resign a day before the completion of their terms and run for an endless number of terms. Warren City Charter, § 4.3(d). Fouts argues that, in effect, the term-limit amendment then only limits him from serving another term because he has already completed a full three terms in office. But the highly speculative scenario that Warren office holders would evade the term-limit amendment's restrictions by resigning early does not meet Fouts' burden to negate "every conceivable basis which might support the government action." *Cahoo*, 912 F.3d at 905. In fact, it does not even negate the express basis for the Council's proposed ballot amendment; no matter how ineffective the term-limit amendment is, it would nevertheless still create "equal term limits for all elected city offices." Warren City Council Resolution (June 30, 2020). Moreover, we have found term-limit laws supported by other legitimate interests, such as a state's interest in structuring its own government, reducing political careerism, and checking special interests' impact on elections. *Kowall*, 18 F.4th at 548. None of these interests have any less force in this case because of Fouts' remote, hypothetical scenario.

Furthermore, Fouts has not sufficiently alleged that the term-limit language was motivated by any

"animus or ill-will" that could support a finding of irrationality. *Cahoo*, 912 F.3d at 905. Although Fouts alleged that City Council members drafted the term-limit amendment with a purported "loophole" to permit them to run for office in perpetuity, this allegation does not convey any animus or ill-will directed at Fouts himself. Compl., R. 1, Page ID #11. Because the term-limit amendment was supported by multiple legitimate interests, and because Fouts has not negated the rationality of the amendment in any way, he cannot succeed on his First and Fourteenth Amendment challenge.

3. Due Process

Fouts also argues that the purported retroactive application of the term-limit amendment to him violates the Fourteenth Amendment's Due Process Clause. Although "[t]he Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation," the term-limit amendment did not violate Fouts' due process rights because it does not operate retroactively and does not deprive him of any property or liberty interest protected by the Due Process Clause. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269 (citation omitted). Similarly, "a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" *Id.* at 269 n.24 (quoting *Cox v. Hart*, 260

U.S. 427, 435 (1922)). Instead, courts "must ask whether the new provision attaches new legal consequences to events completed before its enactment," that is, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 269–70, 280. Including Fouts' prior terms as mayor when calculating his eligibility under the term-limit amendment does not apply the amendment retroactively under this understanding of retroactivity. Certainly, applying the amendment in this way draws on past actions by Fouts—his prior terms—to assess the term-limit amendment's applicability to him. But it impairs no rights that Fouts had before enactment because Fouts never had a right to run for mayor of Warren. See *Kowall*, 18 F.4th at 547. And it imposes no new liabilities or duties on Fouts because it merely requires him to refrain from serving as mayor, rather than requiring any affirmative act on his part. Instead, the term-limit law only prospectively prohibits Fouts from running for a fifth term "because it draws upon antecedent facts for its operation." *Landgraf*, 511 U.S. at 269 n.24. Merely considering these prior terms does not make the amendment apply retroactively.

On appeal, Fouts argues that the new term-limit amendment imposes a legal disability on him based on his past conduct, which, if true, could make the amendment apply retroactively. See id. at 269. But Fouts' inability to run for a fifth term as mayor does not impose any new legal disability because, again, he has no legally cognizable right to run for mayor of Warren. None of Fouts' cited cases change

this conclusion. Instead, they all discuss the loss of certain liberties by felons after incarceration, and merely refer to holding public office as a "civil right" or refer to the loss of the right to possess a firearm or ammunition as a "legal disability." See, *e.g., Hampton v. United States*, 191 F.3d 695, 699 (6th Cir. 1999); *United States v. Young*, 766 F.3d 621, 623 (6th Cir. 2014). These cases are inapplicable to the question presented in this case because none of them suggest that Fouts' inability to run for office creates a legal disability. Because the term-limit amendment applies no new obligations to Fouts and deprives him of no existing rights based on his past conduct, it does not apply retroactively merely by using his past conduct to determine his current eligibility for office.

Further, even assuming that the amendment applied retroactively, this retroactive application does not violate due process. Although Fouts does not specify whether he brings a procedural or substantive due process challenge, under either formulation, he must show a deprivation of a property or liberty interest by government action—in this case, the purportedly retroactive application of the term-limit law to him. EJS Props., LLC v. City of Toledo, 698 F.3d 845, 855 (6th Cir. 2012). Property interests are not defined by the federal Constitution, but are instead created "by existing rules or understandings that stem from an independent source such as state law." *Puckett v. Lexington-Fayette Urb. Cnty. Gov't*, 833 F.3d 590, 605 (6th Cir. 2016) (quoting *Ziss Bros. Constr. Co., v. City of Independence*, 439 F. App'x. 467, 471 (6th Cir. 2011)). Longstanding Michigan and federal law confirm that there is no property interest in holding public office. See *Taylor v. Beckham*, 178

U.S. 548, 576 (1900) ("The view that public office is not property has been generally entertained in this country."); *People v. Smith*, 918 N.W.2d 718, 726 (Mich. 2018) ("[T]he law has long been clear that there is no property interest in holding public office."). Moreover, Fouts cites no authority for the proposition that he has a liberty interest in running for or holding public office. Given our prior holding that running for public office does not constitute a fundamental right under the Constitution, Fouts similarly has no liberty interest impacted by the term-limit amendment. See *Kowall*, 18 F.4th at 547.

On appeal, Fouts does not claim to have a property or liberty interest in holding public office, but, instead, claims that he does not need to make such a showing to succeed on his due process claim. But, in support, he only cites the Supreme Court's decision in *Landgraf*, which addressed the canon of statutory interpretation known as the presumption against retroactivity. 511 U.S. at 286. In *Landgraf*, the Supreme Court found that the presumption against retroactivity could conceivably apply to certain procedural rules because it was not limited to cases only involving a deprivation or impairment of "vested rights." *Id*. at 275 n.29. From this statement, Fouts takes the rule that he need not show a deprivation of a constitutionally protected interest to succeed on his due process challenge. Although the presumption against retroactivity discussed in Landgraf has its roots in the Due Process Clause, *Landgraf* only addressed a rule of statutory construction, not constitutional interpretation. See *id*. at 266. It did not alter the fundamental showing that a party must make to support a due process challenge:

a deprivation of a constitutionally protected interest. Because the term-limit law does not deprive Fouts of any property or liberty interest, even if it could be understood to apply retroactively, it does not violate the Due Process Clause.[4]

4. Equal Protection

Finally, Fouts claims that the term-limit law as applied to him violates the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause prohibits "governmental discrimination that either (1) burdens a fundamental right, (2) targets a suspect class, or (3) intentionally treats one differently from others similarly situated without any rational basis for the difference." *Green Genie, Inc. v. City of Detroit*, 63 F.4th 521, 527 (6th Cir. 2023). As stated, the term-limit amendment did not burden Fouts' fundamental rights. Nor does Fouts contend that it targeted a suspect class of citizens. Instead, he argues a "class of one" theory, requiring him to allege that he was "intentionally treated differently from

[4] On appeal, Fouts argues that the district court improperly failed to consider his argument that the term-limit amendment's purportedly retroactive application violated the federal Constitution. But the district court explicitly considered Fouts' due process challenge, and correctly rejected it because he did not show that he had a constitutionally protected interest in running for office. What Fouts appears to be contesting instead is the district court's refusal to review the Michigan state court's separate conclusion that the text of the term-limit law included Fouts' prior terms. But the district court did not err in concluding that it lacked authority to review any of Fouts' arguments that amounted to a disagreement with how the Michigan state court interpreted the term-limit amendment under Michigan law. Any review of such a claim would constitute an improper review of a state court judgment and violate the Rooker-Feldman doctrine. See Exxon Mobil Corp., 544 U.S. at 284.

others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

The first prong of a "class of one" theory requires proof of intentional discrimination, which, as we have recently clarified, a plaintiff may show through direct or circumstantial evidence. *Green Genie*, 63 F.4th at 527–28. "Direct evidence is evidence that proves the existence of a fact without requiring any inferences." *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004). Fouts does not argue that Defendants directly discriminated against him by passing the term-limit amendment, nor does his complaint allege evidence of direct discrimination. Instead, as stated, it contends that the term-limit amendment, in effect, only bars him from office as other city officials could exploit the purported "loophole" in the amendment by resigning from office before they finish a "complete" term. Compl., R. 1, Page ID #11. This allegation requires us to make too many inferences to glean the intent of City Council members to qualify as direct evidence.

Nor has Fouts alleged sufficient circumstantial evidence to show intentional discrimination. He argues that he has identified a similarly situated comparator who Defendants intentionally treated differently, which if true would satisfy the first prong of the "class of one" claim. Green Genie, 63 F.4th at 528. However, a comparator must be "similarly situated in all relevant respects." EJS Props., 698 F.3d at 865 (citation omitted). In this case, Fouts claims that a City Council member, Patrick Green, is a sufficiently similar comparator because the term-

limit amendment—which also applied to City Council members—applied differently to Green even though he also had served three terms as a Council member. But, as Fouts himself acknowledges, Green did not serve three "complete" terms on the City Council, but, instead, resigned early from his third term. See *Boike v. Green*, No. 365681, 2023 WL 3588168, at *1 (Mich. Ct. App. May 22, 2023) (per curiam). Because the term-limit amendment bars individuals from holding office only after the greater of three complete terms or twelve years, Green was permitted to serve for a fourth term on the City Council. *Id.* By contrast, the term-limit amendment would bar Fouts from running for a fifth term as he had already served more than three complete terms and for more than twelve years. Plainly, then, Fouts and Green are not similarly situated in one of the most relevant respects: whether they meet the criteria for the term-limit amendment to apply.

Furthermore, even if Fouts had sufficiently alleged that Defendants intentionally discriminated against him by proposing and enforcing the term-limit amendment to bar him from running for office, as stated, the term-limit amendment clearly passes rational basis review. Accordingly, Fouts has failed to state a claim under the Equal Protection Clause.

III. CONCLUSION

For the reasons set forth above, we AFFIRM the district court's dismissal of Fouts' complaint. Because we find that Fouts failed to allege a constitutional violation, we need not reach Defendants' alternative grounds for affirmance.

APPENDIX C

Sec. 4.3—Certain persons ineligible for city office.

(d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.

Sec. 4.4—Terms of office.

(d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

Warren, Michigan, City Charter §§ 4.3(d) and 4.4(d).