IN THE
UNIVERSITY ELECTIONS COMMISSION

No. UEC-2016-W-026

IN RE PETITION OF YOUR MICHIGAN, Petitioner

Advisory Opinion

[March 16, 2016]

Appearances: SARAH BRENNER appeared by brief for Your Michigan. Student General Counsel JACOB PEARLMAN, Assistant Student General Counsel NICK LOUKIDES, and WILLIAM FROEHLICH, pro se, appeared by brief as amicus curiae.

Heard Before: REESE, Election Director, PODRYGULA, Backup Election Director, ANDREWS, BENNETT, BROWN, CELENTINO, COLELLA, REAVES, and ROSENTHAL, Commissioners

Opinion of the Commission

ELECTION DIRECTOR REESE (ex officio) delivers the opinion of the Commission with respect to parts I and II, and an opinion with respect to part III, which COMMISSIONERS ANDREWS, BROWN, and ROSENTHAL join in full, and which BACKUP ELECTION DIRECTOR PODRYGULA and COMMISSIONER COLELLA join except as to part III.

On March 12, 2016, Your Michigan—by and through counsel—filed a petition for an Advisory Opinion from this Commission pursuant to Rules 6.01(a)(1) and 6.03 of
the UEC Rules of Practice and Procedure. Specifically, Your Michigan wishes to know if, without running afoul of Art. VI, § (A)(7) and § (B)(7)(d) of the CSG Compiled Code, it may use email addresses that it collects from a petition which—in addition to asking students to indicate support for the subject of the petition—also asks them to consent to further emails from Your Michigan. Out of respect for the observance of religious services over the weekend, Your Michigan agreed to waive its right, under Rule 6.03(b), to receive a response to its petition within 36 hours. After due deliberation and for the reasons set forth below, the Commission GRANTS Your Michigan’s petition and concludes that such conduct can be carried out in a way that complies with the Code.

I.

Rule 6.03(a)(2) of the UEC Rules of Practice and Procedure requires that a party petitioning the Commission for an advisory opinion provide “sufficient factual information—whether hypothetical or otherwise—to allow the Commission to understand the context of the question” presented if that information is necessary for the Commission to understand the party’s query. Such information will almost always be necessary, because many of the inquiries the Code requires of the Commission are extremely fact-intensive. And it is necessary here: determining whether the gathering of emails constitutes harvesting under the Code requires analysis of (1) why the emails were collected and (2) how they were collected. See CSG Compiled Code, § (A)(7).
Your Michigan’s petition for an advisory opinion is scarce on facts, even of the hypothetical variety. It is silent as to the content of the petition itself, the platform by which the petition will be made available, and the wording of the question by which Your Michigan will seek students’ permission to include them on a campaign-related listserv. The Commission could feasibly deny this petition for this reason and it is surely on the outer bounds of what is permissible under Rule 6.03(a)(2).

Nonetheless, the Commission is motivated to grant the petition for two reasons. For one thing, the petition does provide sufficient facts for the Commission to obtain a general sense of what the petitioner wishes to know—even if we would prefer that more information be provided. And more importantly, the Commission is concerned that the failure to provide a standard by which parties can conduct themselves on this issue may lead to bigger problems down the road. We think it is unlikely that, if we decline to answer this petition today, Your Michigan would be deterred from engaging in the conduct that is the subject of this Opinion.

If Your Michigan proceeds with this conduct, its action would almost certainly lead to litigation that could (depending on the number of students who sign the petition and consent to be added to the listserv) result in the total disqualification of the party and all of its candidates. See CSG Compiled Code § (B)(7)(g)(v) (defining harvesting as an egregious violation of the Code, requiring the assessment of four or more demerits, if 400

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or more email addresses are harvested). In the face of that prospect, whatever standard the Commission articulates as to the meaning of “harvesting” in the petition context has the potential to lead to public disenchantment with the election process. If the standard exonerates the accused party, the Commission may be accused of gerrymandering its definition to avoid imposing punishment. But if the Commission’s standard results in the party’s conviction and ejection, it may be accused of bias against that party. By issuing an Advisory Opinion to clarify the standard it will apply to cases like the hypothetical one proposed now, when no party will be punished in any way, the Commission avoids any appearance of bias.

But the vagueness of Your Michigan’s petition does have consequences. Because the Commission does not know the details of what the party intends to do, it cannot—and therefore does not—say definitively whether Your Michigan’s planned conduct will be permissible under the Election Code. The Commission can only articulate the standard by which conduct like that proposed here will be evaluated. We turn to that question now.

II.

A.

Section (B)(7)(d) of the Election Code prohibits candidates and parties “from harvesting student email addresses for campaign purposes.” The meaning of this
provision has come before this Commission before. In a previous case, this Commission articulated a definition of the word harvest:

[W]e therefore HOLD that “harvest” as used in the Election Code means the (A) unilateral gathering of emails (B) for the purpose of campaigning (C) in a manner that is either random or indiscriminate with regard to the reasonable likelihood that the owners of the gathered addresses would be supportive of the gatherer’s campaign.

*Email Harvesting Opinion, UEC-2015-W-007 & 009* (April 1, 2015). But the Assembly subsequently rejected this definition by amending the Compiled Code to provide a new, arguably broader, definition of “harvesting.”

The Compiled Code now defines *harvesting* as “the gathering of emails for campaign purposes that were not gathering [sic] during the campaign period, or were repurposed from other email group lists.” CSG Compiled Code, Art. VI § (a)(7). Under this new definition, a candidate or party harvests emails if he or she, for campaign purposes:

1. gathers emails into a listserv before the campaign period begins; or

2. repurposes emails, or a list of emails, that were collected for a non-campaign purposes, regardless of when they were collected.
For convenience, we will refer to the first of these options as “gathering out of time” liability. It requires candidates and parties to wait until the campaign period begins to compile listservs for campaigning purposes. We will refer to the second option as “prohibited source” liability. It forbids candidates and parties to collect emails for a non-campaign purpose and then use them for campaigning or to gather emails from a list that was compiled for non-campaigning purposes.

B.

Your Michigan wishes to create a petition about a specific plank of their platform and include an option for those signing the petition to elect to receive campaign-related emails from Your Michigan. In order to clarify the contours of the standard we articulate today, it is helpful to put some meat on these hypothetical bones. So, suppose that Your Michigan wishes to create a petition demanding that campus dining halls provide Zingerman’s for every meal. Suppose further that it also wants to ask those who elect to sign this petition\(^1\) if they would be interested in

\(^1\) In reality, whether or not the person providing their email address actually signs the petition—thereby expressing support for its content—probably does not affect the analysis below, so long as it is clear that the petition is campaign related and that the emails are going to be used to create a campaign-related listserv. We are, however, not sure why a student would ever bother to
receiving campaign-related emails from Your Michigan (e.g. information on other aspects of the party’s platform, lists of the party’s candidates, reminders to vote). Today’s petition asks whether the Election Code would consider this harvesting.

1.

To begin with, this conduct is clearly not harvesting under the “gathering out of time” liability prong of § (a)(7). So long as the petition is released within the campaign period, the emails that Your Michigan might collect from this petition obviously were not collected before the campaign period began. And this is true regardless of whether the emails were collected for a campaign-related purpose. “Gathering out of time” liability requires both that the emails be collected for a campaign purpose and that they were collected before the start of the campaign period. Accordingly, if this conduct is prohibited at all, it is prohibited under the “prohibited source” liability prong of § (a)(7).

2.

Analysis of the conduct proposed by Your Michigan is trickier under that prong of the Code’s definition of harvesting. Depending on the form of the petition submit his or her email through a petition he or she did not support.

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submitted to potential voters, whether the use of emails collected by Your Michigan through the petition could be considered “repurposing” would turn on (1) how clear it is to voters that the petition is being circulated for campaign purposes, and (2) how clear it is that the emails collected as part of that petition are going to be used to create a campaign listserv.

i.

First, it must be clear that the petition is campaign-related. The reason for this is simple: if the petition is motivated by a purpose other than campaigning, using the information it collects for campaign purposes is “repurposing.” An analogy helps to clarify why.

Imagine that you are invited to a party at a local American Cafe. Imagine further that the invitation advises you to prepare for dancing and drinking games. Finally, imagine that the invitation contains a list of potential invitees, one of which is your physics professor—a fact that you are willing to endure only because of your abiding love of the macarena. If you go to the party, and your professor uses that venue to give a lecture on thermodynamics, he has clearly repurposed the event. (And in all likelihood ruined it.) The same is true when a student signs a petition that appears to be about a particular issue, but is actually part of a CSG campaign.

The inquiry as to whether or not a petition is clearly campaign-related should be conducted from the perspective of an objective, reasonable voter. This is
appropriate for two reasons. For one thing, plumbing the mind of candidates and parties is something the Code generally seeks to avoid. See CSG Compiled Code, Art. VI § (b)(7) (defining all rule violations as strict liability crimes rather than requiring proof of mens rea). In other words, the Code does not usually ask the Commission to determine what a candidate or party was thinking in order to decide whether or not they violated the Code. This provision should not be interpreted to do so either. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”). For another, the obvious point of prohibiting harvesting is to prevent voters from being added to campaign listservs they had no intent to join. That goal is frustrated if candidates and parties are able to trick them into joining a listserv by subterfuge and deception. Thus, the standard depends on how a reasonable voter would perceive the petition as a whole, including the content.

Whether a particular petition satisfies this requirement is highly fact-dependent and must be determined under the totality of the circumstances. But as with other totality of the circumstances tests, “[t]he outer boundaries of this standard are easy to delineate.” *The Make Michigan Party v. The ForUM Party*, UEC-2014-W-040 (March 28, 2014). For instance, Your Michigan’s hypothetical Zingerman’s petition would probably fulfill this requirement if it was relatively short, clearly stated
that advocacy for all-Zingerman’s meals at University
dining halls was part of Your Michigan’s platform, and
clearly stated that the party was issuing the petition to
determine how much support that portion of its platform
had amongst the student body. On the other hand, if—
without mentioning the ongoing election or Your
Michigan—the petition consisted of 60 questions
exploring students’ thoughts about the current dining hall
fare, how much they enjoy Zingerman’s sandwiches, and
which sandwiches they prefer and then suddenly asked
for their email address, it would probably not be
permissible.

ii.

Second, it must be clear not only that the petition is
motivated by an election-related purpose, but that the
emails are being collected so that the party or candidate
administering the petition can send participants
campaign-related emails, including emails that may not
relate to the subject-matter of the petition. For the same
reasons discussed in Part II.B.2.i above, whether or not
the prompt a party or candidate uses to collect emails is
clear enough on this point is a totality-of-the-
circumstances inquiry that must be conducted from the
perspective of an objective, reasonable voter. And, as
above, the outer boundaries of this standard are easy to
define. A question that merely asks if a petition
participant is interested in learning more about Your
Michigan probably will not suffice. A question that asks
for the participant’s email and advises them that it will be
used to send campaign-related emails, including reminders to vote and information about Your Michigan that does not relate to serving Zingerman’s at campus dining halls, is likely acceptable.

C.

We acknowledge, of course, that there will be hard cases under the standard we have set out in this Opinion. But that is true of all totality-of-the-circumstances tests.

We also acknowledge that Your Michigan will still have to determine for itself whether the conduct it is considering satisfies this test. It was Your Michigan’s decision, however, to submit only the vaguest outlines of its proposed course of action. Accordingly, Your Michigan cannot complain when it receives only an articulation of the standard by which the Commission will evaluate its conduct in return.

III.

Backup Election Director PODRYGULA agrees with the foregoing analysis. But he would go further by affirmatively immunizing candidates and parties from liability if they include in their petitions his suggested disclaimers. He bases those disclaimers on the CAN-SPAM Act.

We cannot join him on this front. This provision of the Code is new. Moreover, the sort of conduct suggested by the petition in this case is novel in the CSG Election
context. Finally, we do not yet know exactly what form the petition Your Michigan is considering will take or what the interface through which students will participate will look like. For these reasons, we think that it is unwise to lay down bright-line rules at this stage regarding what forms of organization and disclosure are sufficient to make the campaign-related nature of a petition clear to a reasonable voter.
Concurring Opinion

BACKUP ELECTION DIRECTOR PODRYGULA, with whom COMMISSIONER COLELLA joins, concurring.

The debate regarding the benefits and drawbacks of rules compared to standards is lengthy and storied, See, e.g., Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985), but judicial precedent suggests that bright-line rules are preferable when important rights are implicated, see, e.g., Miranda v. Arizona, 384 U.S. 436 (1966). Electioneering and voting are such rights, which is why I write to urge adoption of a bright-line rule regarding “prohibited source” liability. Bright-line rules with safe-harbors provide clarity regarding proscribed action to all parties (candidates, campaign organizations, and judges alike) and may reduce the amount and duration of litigation.

The majority establishes a two-part standard for determining whether repurposing has occurred: “(1) how clear it is to voters that the petition is being circulated for campaign purposes, and (2) how clear it is that the emails collected as part of that petition are going to be used to create a campaign listserv.” Ante, at 8. I largely agree that this should form the broad framework under which email gathering is regulated; it adheres to the successful informed consent concept set-out by the CAN-SPAM Act of 2003, 117 Stat. 2699 (2003) (codified at 15 U.S.C. ch. 103 (2012)), the first national standard regulating the transmission of commercial emails. However, I would add
the following safe-harbor, which, if followed, would indemnify those who seek to utilize the power of electronic communications to electioneer:

1. The initial communication containing or linking to the petition must clearly and conspicuously state that it is an electioneering communication.

2. The form that the organization/candidate utilizes to obtain the email address must clearly and conspicuously state that it is an electioneering communication.

3. An email address can only be collected by receiving affirmative consent from a student.
   a. The sign-up area on the form collecting the email address must clearly and conspicuously state:
      i. By [“inputting your Uniqname” or “checking the box”] you agree to receive electioneering communications from [name of party/candidate].
   b. Affirmative consent can be obtained only by either:
      i. The student entering their Uniqname into an input box near the sign-up area containing the
affirmative consent disclaimer in 3(a)(i); or

ii. The student checking an opt-in box that is near the sign-up area containing the affirmative consent disclaimer in 3(a)(i).

4. Subsequent communications sent to email addresses obtained through the above process must contain:

   a. A clear and conspicuous indicator that the message is an electioneering communication;
   b. the name and contact information of the sending organization/candidate; and
   c. an option to unsubscribe from the list and not receive future messages.
Dissenting Opinion

COMMISSIONER CELENTINO, with whom COMMISSIONERS BENNETT and REAVES join, dissenting.

This petition embodies one of the most concerning aspects of the advisory-opinion power: it invites this Commission to pontificate on hypothetical scenarios that lack a basis in fact and that may never occur. The predictable result of this Commission’s decision to engage with Your Michigan’s highly abstract petition is an opinion that flounders in generalities and is unlikely to fully address the specific activity in which Your Michigan plans to engage. The Commission should instead deny this petition because of Your Michigan’s failure to describe its proposed activity with sufficient particularity.

I.

As the majority properly admits:

Your Michigan’s petition for an advisory opinion is scarce on facts, even of the hypothetical variety. It is silent as to the content of the petition itself, the platform by which the petition will be made available, and the wording of the question by which Your Michigan will seek students’ permission to include them on a campaign-related listserv. The Commission could feasibly deny this petition for this reason . . . .

Ante, at 3.
The majority dismisses the absence of these critical specifics by asserting that the petition “does provide sufficient facts for the Commission to obtain a general sense of what the petitioner wishes to know.” Id. (emphasis added). And, through herculean efforts, it cobbles together a loose standard accompanied by a hypothetical example involving Zingerman’s sandwiches, which it can only hope addresses the question that it has a “general sense” Your Michigan was asking.

Because the majority’s proposed standard is at once too vague and too narrow, I suspect that its attempt to provide useful guidance will prove illusory.¹ But the more fundamental problem with the Commission’s decision to issue an advisory opinion here is intrinsic to the advisory-opinion power, not just its application in this case.

II.

As I noted in the Third Party Spending Opinion, “[t]he fact that the majority must invent and then consider

¹ I will not comment on the standard that I would be inclined to support. Indeed, I think it unwise to suggest that my mind is made up as to the appropriate standard at this juncture, since we have not had the benefit of considering a concrete factual scenario or hearing from interested parties in a meaningful way. What I think now may well change once more facts are brought to light. Most of the input that we have received from parties and the Student General Counsel are of minimal consequence, since the abstract nature of the petition prohibits meaningful comment.
three hypothetical scenarios in order to create a reasoned response to LINPAC’s petition demonstrates one of the problems of addressing hypothetical questions: we don’t know what the actual case or controversy would look like.” *Third Party Spending Opinion*, No. UEC-2016-W-002, at 35–36.

So too here: while, for the purposes of this opinion, a majority has coalesced around a combination of aspirational generalities and hypothetical examples, it is apparent to me that this coalition is very tenuous. Backup Election Director PODRYGULA’s concurrence represents only the tip of the iceberg in terms of the differences of opinion that exist on this Commission (but are not reflected in its advisory opinion) as to the proper standard. And this majority was only able to form when there were no concrete facts on the table. I have little doubt that, when faced with a true case or controversy, several Commissioners who are now part of the majority would be inclined to distinguish away the standard that we articulate today.

And this makes sense. It is impossible to predict the future and there are many possible iterations of petition-based email collection. Some of these will fall comfortably within what the majority articulates; others will not. But cases on the margins will abound, particularly when the language used in the standard is vague.

If you’re on the Commission, the majority’s standard is easy to like; but, if you’re a party in these elections, it’s
even easier to litigate. If I were running against Your Michigan, I would start drafting my complaint now. Is Your Michigan’s petition “relatively short,” ante, at 10, or is it too long? Is its goal “clearly stated,” id., or is it hard to discern? Would a “reasonable voter . . . perceive the petition as a whole, including the content” to be about a party issue, a non-campaign issue, or solely the collection of petition-supporters’ emails? What result if the petition contains 20 questions “exploring students’ thoughts about the current dining hall fare,” rather than “60 questions?” Id. That’s all just from one paragraph of the majority’s standard; don’t worry, there’s plenty more to work with. And it would be irresponsible for an opposing party’s appointed counsel not to litigate these issues when Your Michigan sends out its petition.

III.

Of course, the “greatest vice,” Third Party Spending Opinion, at 34 (CELENTINO, dissenting), of advisory opinions is that they prompt questions on hypothetical issues that would otherwise never arise.

The majority thinks it “unlikely that, if we decline to answer this petition today, Your Michigan would be deterred from engaging in the conduct that is the subject

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2 The Student General Counsel, and some members of this Commission, have suggested that there should be a distinction drawn based on which one of these is the case. That’s a whole additional can of worms.
of this Opinion.” *Ante*, at 3. On what basis does the majority base this assertion? It does not say.

But I can articulate several reasons to believe that the opposite is true. First, the Student General Counsel asserted as much before this Commission. As an undergraduate who regularly attends CSG meetings, who is much more familiar with party leadership, and who has a thumb on the pulse of this year’s elections, this Commission should give that opinion weight.

Second, in the absence of an enabling advisory opinion, Your Michigan would have to weigh the perceived benefit of its petition-based email collection idea against the likelihood of disqualification 3 from CSG elections

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3 The Code provides that “[v]iolations of the Proper Use of Email Privileges clause (Article VI § B(7)d)” shall constitute “Minor Infractions,” “Major Infractions,” or “Egregious Infractions,” depending on whether the email group involves “under 100 recipients,” “100-399 recipients,” or “400 or more recipients,” respectively. CSG Compiled Code, Art. VI §§ B(7)(e)(vi), (f)(iv), (g)(v). The Code directs this Commission to assess demerits for each category of infraction as outlined in § B(7). Moreover, “[i]f any party receives 10 or more demerits, the party, including all candidates affiliated with said party, shall be automatically removed from the election.” §B(6)(d). A party who engages in the petition-based email collection that is suggested in Your Michigan’s petition may well bet the entire election cycle on this Commission’s interpretation of § A(7). I trust that all parties’ appointed
altogether if this Commission determines that it has violated the Code. Such high stakes should counsel restraint. And restraint is a good thing. A system that encourages parties to scour the Election Code for technicalities, exploit them, and then litigate them before this Commission, rather than to spend their time and energy advancing substantive party platforms to voters subverts democracy. And the policymaking decisions that go into setting the Election Code’s boundaries should fall to the Assembly, not this Commission. Our message to parties should be: if you want to be sure petition-based email collection is allowed, propose an amendment to the Election Code.

Finally, we have seen concrete evidence before that the advisory-opinion power can be abused. John Lin, the “founder” of LINPAC, filed a joke advisory-opinion petition that spawned a 43-page morass of opinions from counsel who are reading this opinion will convey those stakes to their clients.

4 As mentioned, I believe Your Michigan should still tarry before going ahead with its petition-based email collection, even in the wake of this advisory opinion. However, I suspect that the party will view our opinion as having blessed its actions, whether or not that turns out to be true.

5 Or, in the case of advisory opinions: scour the Code for technicalities, litigate them before this Commission, and then exploit them.
this Commission. As the Michigan Daily reported, “Lin said his petition was influenced by Stephen Colbert’s Colbert Super PAC. ‘I don’t intend on actually going through on any of it,’ Lin said. ‘I just wanted to point out that there’s a hole someone should look into fixing.” Jackie Charniga, CSG Hears Petition on Legality of Student Super PAC, Michigan Daily (Nov. 9, 2015, 1:56AM), http://www.michigandaily.com/section/news/petition-filed-student-superpacs-csg-elections. But, regardless of whether petitioners consider their questions frivolous, the petitions we address can undoubtedly manufacture election issues that would not otherwise have existed. Indeed, we have already received a second request for an advisory opinion involving independent expenditures. In Re Petition of NewMich, UEC-2016-W-027 (March 16, 2016).

If Your Michigan wants to run the risk of disqualification, they should go forward with petition-based email collection. If that risk is too great, they should use the democratic process to change the Code for the next election cycle. But through this Commission’s willingness to pass on hypothetical questions, we deprive the Assembly of its ability to address the issue in the first instance. And when we announce a capacious standard in the absence of a sufficient factual predicate, we also run the substantial risk that our opinion will provide little useful guidance.
IV.

The Student General Counsel also suggested that Your Michigan’s decision to speak in generalities is intentional—designed in part to prevent other parties from copying its original idea of petition-based email collection. Hopefully, Your Michigan will be unsurprised to learn that proceedings before this Commission are public and that our opinions will be made available to all, including other parties. I only hope that, in an attempt to keep other parties from gleaning its precise strategy, Your Michigan did not omit details from the petition that could have swayed this Commission’s opinion. Even in the wake of this advisory opinion, any party who acquires emails in the manner alluded to in Your Michigan’s petition still gambles the party: they will still likely endure proceedings before this Commission to determine whether their methods complied with the majority’s standard. If Your Michigan left out details from its petition that would distinguish its ultimate plan from what the majority thought it was offering guidance on, the party may well find itself outside the scope of our advisory opinion and subject to demerits.

And that brings me to the broad “fairness” justification offered in support of using the advisory opinion power here. As the majority notes:

If Your Michigan proceeds with this conduct, its action would almost certainly lead to litigation that could . . . result in the total disqualification of
the party and all of its candidates. . . . In the face of that prospect, whatever standard the Commission articulates as to the meaning of ‘harvesting’ in this context has the potential to lead to public disenchantment with the election process. If the standard exonerates the accused party, the Commission may be accused of gerrymandering its definition to avoid imposing punishment. But if the Commission’s standard results in the party’s conviction and ejection, it may be accused of bias against that party.

Ante, at 3–4.

This is all true: we’re damned either way. But it fails to consider one more consideration: the reliance interests of Your Michigan. It is almost certainly true that Your Michigan will be sued if it collects emails via petition. And, as the majority admits, we do not know the specifics of how Your Michigan intends to implement its email collection—the petition it submitted was too vague. But since we have responded to Your Michigan’s request for an advisory opinion, Your Michigan could reasonably interpret our opinion as endorsing their proposed method. Depending on what that method is, this interpretation may well be a mistake, particularly since the majority goes to such lengths to articulate a sufficiently generalized standard, but it would not be an unreasonable one. And, in my mind, providing guidance to Your
Michigan that may turn out to be no guidance at all, is worse than letting the Code speak for itself on the issue.

V.

As Election Director Reese, the author of today’s majority opinion, has pointed out previously:

Over the past few years, CSG election results have been held up by litigation between parties and candidates. In at least one presidential election, the result of the democratic process was overturned by this Commission when it disqualified the Presidential and Vice Presidential ticket. Even though the Commission’s decision in that case was correct, it shook the confidence of the electorate. The contentious litigation that has developed in subsequent elections has had a similar effect.


The majority would solve the problem of excessive litigation—and the perceived untethering of university elections from the democratic process that results—

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6 I reiterate again that the Commission—even if we only count those in the majority here—remained deeply divided on the proper resolution of various factual scenarios that we considered during deliberations. I therefore doubt that this majority will hold once concrete facts start coming into play.
through active use of advisory opinions and its amassing scores of “clarifying” precedent and guidance.

But this approach is misguided. The more common sense solution is for this Commission to simply interpret the text of the Code as written, hew closely to its plain meaning, and, most importantly, adopt a mood of judicial restraint that places the onus of developing comprehensive election rules squarely on the Assembly, rather than on this Commission.

If we were to take my approach, I predict that Election Director REESE’s admirable desire for less ex post elections litigation would be fulfilled. When interpreting the Code becomes less of a legalistic endeavor and more of an exercise in common sense, the vexatious litigation that has plagued university elections of late will end. And perhaps, the precocious parties who have thus far devoted such time and effort appearing before this Commission will turn those energies towards the Assembly, and instead suggest constructive ways to improve the Election Code itself.

My dissent stands for the unremarkable proposition that this Commission should exercise interpretive restraint, confident that, in doing so, we will help ensure that the need for elections-related policymaking will be filled through democratic processes in the Assembly. And it is only through this attitude of restraint—and not through the creation of expansive and, quite frankly, capricious precedents—that university elections will once
again be decided with finality by the ballots of Michigan students, rather than by the votes of this Commission.

I respectfully dissent.