

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MATT ERARD,

Case No. 2:12-cv-13627

Plaintiff,

HON. STEPHEN J. MURPHY, III

v.

MAG. JUDGE MONA K. MAJZOUB

MICHIGAN SECRETARY OF STATE
RUTH JOHNSON, in her official capacity,

EXPEDITED RULING REQUESTED

Defendant.

**PLAINTIFF’S MOTION FOR RECONSIDERATION OF THE COURT’S
ORDER [72] GRANTING DEFENDANT’S MOTION TO DISMISS [46] OR,
IN THE ALTERNATIVE, FOR INJUNCTION PENDING APPEAL**

Pursuant to E.D. Mich. LR 7.1(h) and Fed. R. Civ. P. 59(e), Plaintiff respectfully moves the Court to reconsider its May 14, 2014 Order Granting Defendant’s Motion to Dismiss (ECF No. 72) and the Court’s corresponding Entry of Judgment (ECF No. 73) for the reasons outlined in Plaintiff’s supporting memorandum submitted with this motion.

In the alternative to granting such reconsideration, Plaintiff respectfully moves the Court, pursuant to Fed. R. Civ. P. 62(c), to enter an injunction pending appeal of the Court’s judgment: (1) requiring Defendant to include the names and party label of Plaintiff and his political party’s other certified 2014 General Election candidate nominees on the State’s 2014 General Election ballot and on Defend-

ant's corresponding 2014 Official Michigan General Candidate Listing and Michigan Voter Information Center sample ballots; and/or (2) barring Defendant from enabling or authorizing ballots to be printed for the State's 2014 General Election which do not include the names and party label of Plaintiff and his political party's other certified 2014 General Election candidate nominees.

In light of the limited period of time remaining ahead of the forthcoming general election and the required printing of absentee ballots by September 20, 2014,¹ Plaintiff also respectfully requests that the Court provide an expedited ruling on this motion so as to allow reasonably sufficient time for review of the issues and requested relief on appeal in the event that Plaintiff's request for reconsideration is denied.

RELIEF REQUESTED


WHEREFORE, Plaintiff respectfully prays that this Court:

1. (i) grant Plaintiff's Motion for Reconsideration and vacate the Court's May 14, 2014 Entry of Judgment and Order Granting Defendant's Motion to Dismiss;
– or, in the alternative –
(ii) enter an injunction pending appeal as specified above;
– and –
2. issue an expedited ruling on this motion.

¹ See Mich. Comp. Laws §§ 168.759a(5); 168.714(1).

Pursuant to LR 7.1a, Plaintiff left a telephone voicemail for Defendant's counsel of record in which he explained the nature and grounds of this motion for purposes of requesting Defendant's concurrence thereto, but has not yet received a response.

Respectfully submitted,

/s/ Matt Erard 

Matt Erard, Plaintiff, *pro se*
400 Bagley St. #939
Detroit, Michigan 48226
313.437.2865
mserard@gmail.com

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MATT ERARD,

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v.

MAG. JUDGE MONA K. MAJZOUB

MICHIGAN SECRETARY OF STATE
RUTH JOHNSON, in her official capacity,

EXPEDITED RULING REQUESTED

Defendant.

**BRIEF IN SUPPORT OF PLAINTIFF’S MOTION FOR
RECONSIDERATION OF THE COURT’S ORDER [72] GRANTING
DEFENDANT’S MOTION TO DISMISS [46] OR, IN THE ALTERNATIVE,
FOR INJUNCTION PENDING APPEAL**

STATEMENT OF FACTS

Plaintiff respectfully submits the following facts in supplement to those presented in his Amended Complaint (ECF No. 44):

1. On April 3, 2014, the Michigan Legislature enacted 2014 Public Act 94 (“P.A. 94”), which, in addition to amending the State’s statutory provisions governing the eligibility of petition circulators, adds seventy words of new text to the certificate of circulator statement required to be printed on the face of each new-party “organizing petition” sheet circulated under M.C.L. § 168.685; thus consequently barring the validity of any sheet which lacks such new language. *See* M.C.L. § 168.544c(6). The amendment’s provisions prescribing new required petition-language were not added to the

legislative bill enacted as P.A. 94 until the very same date on which the bill was enrolled by both State legislative chambers with immediate effect.¹

Although the new amendment further provides a retrospective exemption from the newly mandated petition-language for petitions circulated “for the 2014 General Election” that were preapproved as to form by the Board of State Canvassers “before the effective date of the 2014 amendatory act”, (M.C.L. § 168.544c(7)), not a single new-party organizing petition exists to which that exemption could apply.² Moreover, prior to the enactment of P.A. 94, no Michigan statutory provision governing any form of election petition had ever even prospectively (let alone retrospectively) required a petition’s preapproval as to form by the Board of State Canvassers as a condition for its statutory compliance or validity.³ Hence, by its operative effect, P.A. 94 has entirely constricted the permitted period for circulating a party organizing petition for the 2014

¹ See 2014 Mich. Legis. Serv. P.A. 94 (H.B. 5152) (WEST); Mich. Legislature Website, *House Bill 5152*, <http://legislature.mi.gov/?page=GetObject&objectname=2013-HB-5152>.

² See Bd. of State Canvassers, *Meeting Minutes* (Bd. minutes of 2012-Apr. 2014), http://michigan.gov/sos/0,4670,7-127-1633_41221_41222---,00.html. Upon having already received preapproval from the Board as to the form of its petition for the last general election of 2012, the only subsequently applicable change to Plaintiff’s party’s petition-form, prior to the enactment of P.A. 94, was replacing two numeric digits within the form’s listed election date. Hence, not only was there then no legal need for Plaintiff’s party to again reapply for the same such petition-form preapproval, but also no practical reason for it to do so.

³ A State-level officer-recall petition must be pre-submitted to the Board of State Canvassers pursuant to M.C.L. § 168.951a(2)-(3). However, such pre-submission of that form of petition is only required for the purpose of enabling the Board to determine the factuality and clarity of its listed reasons for the proposed recall. *Id.*

General Election to only the period between its enactment and the petition filing deadline; thereby also reducing the permitted time-length for circulating such a petition for this year's election by nearly half that prescribed by M.C.L. § 168.685(1).

2. Upon sending proper notice to Defendant and Defendant's Bureau of Elections pursuant to M.C.L. § 168.686b on April 26, 2014, Plaintiff's party held its 2014 State nominating convention in Lansing, Michigan on May 10, 2014, at which it nominated Plaintiff for 13th district Representative in Congress, Jason Schalte of Holland for United States Senator, Jamie Jesse-Williams of Traverse City for 104th district State Representative, Dwain Reynolds, III of Middleville for State Board of Education, and Adam Adrianson of Portage for Michigan State University Board of Trustees in the November 4, 2014 General Election. Accordingly, on the following business day of May 12, 2014, Plaintiff's party's State Chairperson and Secretary certified the convention nomination of each of those candidates to Defendant via facsimile and certified mail, accompanied with each named candidate's signed Certificate of Acceptance of Nomination and notarized Affidavit of Identity, pursuant to M.C.L. §§ 168.686 and 168.686a(4).

3. Michigan is presently one of only three States in the nation that has not had a single candidate of any 'new' (i.e. not automatically re-qualified)⁴ political party appear on the ballot with his or her party label in any election held within the 21st

⁴ This statement does not include Mississippi, which grants automatic ballot access to any party that timely registers its party name, state executive committee officers, and officer-selection procedures. *See* Miss. Code Ann. §§ 23-15-1053; -1059-61.

Century.⁵ Ergo, Michigan is among the only three States in which all partisan elections held within that ongoing period have been 100 percent “monopolized by the existing parties.” *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

STANDARD OF REVIEW

A. Reconsideration

Eastern District of Michigan Local Rule 7.1(h)(3) instructs that “[g]enerally, and without restricting the court’s discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication.” *Id.* Thus, the movant must show “a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled” and that “correcting the defect will result in a different disposition of the case.” *Id.*

Additionally, “[a]lthough captioned as addressing motions ‘to Alter or Amend Judgment,’ Fed.R.Civ.P. 59(e) may be used as a vehicle for seeking reconsideration of any prior ruling of the court” based on “a clear error of law”. *United States v. Johnson*, No. 08-cv-14474, 2012 WL 6652959 at *1 (E.D. Mich. Dec. 21, 2012) (citing *Intera*

⁵ Plaintiff has confirmed the exclusive status of Michigan, Idaho, and Oklahoma as the only three such States (excluding Mississippi, as noted *supra* note 4) with foremost nationally-recognized ballot-access expert Richard Winger, whose affidavits and testimony have been relied on by the Sixth Circuit in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006) and dozens of other federal courts adjudicating ballot access cases. *See* 2012 WL 4011863 (Court Filed Expert Resume). Plaintiff correspondingly intends to submit a supporting expert affidavit from Mr. Winger, regarding the above-referenced point and others pertinent to Plaintiff’s claims, if and when Plaintiff may be permitted the opportunity to present evidence in this case.

Corp. v. Henderson, 428 F.3d 605, 620 (6th Cir. 2005)); accord *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir. 2001). “The language ‘alter or amend’” under Fed. R. Civ. P. 59(e) “means a substantive change of mind by the court.” *Carigon v. Berghuis*, No. 00-75567, 2006 WL 1555970 (E.D. Mich. June 2, 2006) (citing *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983)).

B. Injunction Pending Appeal

“Four factors govern the issuance of injunctions pending appeal” pursuant to Fed.

R. Civ. P. 62(c):

(1) the likelihood that the party seeking the injunction will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent an injunction; (3) the prospect that others will be harmed if the court grants the injunction; and (4) the public interest in granting the injunction.

Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers, No. 3:12-cv-00682, 2013 WL 5278236 at *1 (W.D. Ky. Sept. 18, 2013). “The four factors ‘are not prerequisites that must be met, but are interrelated considerations that must be balanced together.’” *Id.* (quoting *Serv. Emps. Int’l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012)). Accordingly, the “strength of the likelihood of success on the merits that movants must demonstrate is ‘inversely proportional to the amount of irreparable harm that will be suffered’ if the injunction does not issue.” *Id.* at *2 (quoting *Baker v. Adams Cnty.*, 310 F.3d 927, 928 (6th Cir. 2002)).

However, when the “remaining three factors strongly favor granting . . . an injunction pending appeal”, a movant “need not demonstrate that it is more likely than not

that [he/she] will succeed on appeal.” *Id.* Rather, the Court may issue such an interim injunction under Rule 62(c) “even though its own approach may be contrary to the movant’s view of the merits.” *A & B Steel Shearing & Processing, Inc. v. United States*, 174 F.R.D. 65, 70 (E.D. Mich. 1997); *see also id.* (citing *Dayton Christian Sch. v. Ohio Civil Rights Comm’n*, 604 F. Supp. 101, 103 (S.D. Ohio 1984)).

Correspondingly, “[a]nytime a court must engage in the delicate balancing required by First Amendment jurisprudence, the case raises serious legal issues.” 604 F. Supp. at 104. Hence, particularly when “the Sixth Circuit has not ruled on the precise questions presented” by the case, and the movant has “made a strong showing on the other three factors, the Court may properly grant the requested injunction” under Rule 62(c), (*id.*), even if “the Court remains convinced that its [] decision dismissing th[e] case . . . was correct and that the decision will survive the rigors of appellate review.” *A & B Steel, supra*.

ARGUMENT

I. THE COURT FULLY BASED ITS REJECTION OF PLAINTIFF’S CLAIM OF INDIVIDIOUS DISCRIMINATION AGAINST ‘NEW PARTIES’ ON (1) A CRITICAL MISUNDERSTANDING OF THE RELEVANT STATUTORY TERMS, AND (2) A HYPOTHETICAL STATE-INTEREST THEORY THAT IS BOTH FACTUALLY NEGATED AND INVALID AS A MATTER OF LAW.

The court bases its rejection of Plaintiff’s claim of discrimination against ‘new political parties’ and their candidates, relative to ‘established political parties’ and their candidates, on two grounds. The first ground is that it construes the relevant

difference between the statutory formula for measuring the ballot access of ‘new parties’ and the formula for measuring ballot access of ‘established parties’ in each election to be that the former is based on the last vote cast for Governor, while the latter is based on the last vote cast for Secretary of State. (ECF No. 72, Ord. Granting Def.’s Mot. Dismiss at *13).

Consequently, the Court construes that the present disparity between the quantum of voter-support required to be shown by each of those two classes of political parties stems from the occurrence of more voters having cast votes in the last race for Governor than in the last race for Secretary of State. *Id.* Accordingly, the Court construes that the presently applicable disparity has not been demonstrated to be endemic to the statute itself, but rather may change from year to year. *Id.*

The second ground on which the Court relies for its conclusion reached on this claim is that “voting for a party's candidate may be a stronger indicator of voter support than the act of signing a petition to have a party appear on the ballot.” *Id.* at *14. Hence, the Court infers that “the Michigan legislature might reasonably conclude that voting for a party's candidate demonstrates higher support than signing a petition because voting requires choosing one candidate over all others whereas signing a petition leaves the signer free to vote for another party's candidate.” *Id.*

A. The Court Misapprehended the Relevant Distinction between the Two Statutory Formulas underlying the Facial Disparity facing Challenge.

The statutory basis for Michigan’s subjection of ‘new political parties’ and their candidates to the requirement of demonstrating more than twice the quantum of voter support as the State’s ‘established political parties’ seeking access to the ballot for the same election cycle is the direct disparity between the thresholds used to measure qualification between them. While the voter-support threshold prescribed to measure ballot access for ‘new parties’ in each general election cycle is “1% of the total number of votes cast for *all candidates* for governor at the last election in which a governor was elected”, M.C.L. § 168.685(1) (emphasis added), the threshold prescribed to measure ballot access for ‘established parties’ in each election cycle is “1% of the total number of votes cast for the *successful candidate* for the office of secretary of state at the last preceding general November election in which a secretary of state was elected”. M.C.L. § 168.685(6) (emphasis added); accord M.C.L. § 168.560a. See (ECF No. 44, Am. Compl. ¶¶ 23-24, 34).

Despite accurately quoting the two formulas in the opening ‘Statutory Background’ section of its decision, see Ord. Granting Def.’s Mot. Dismiss at *2, *3, the Court contrastingly grounds its analysis of Plaintiff’s claim of discrimination against ‘new parties’ upon the erroneous premise that “Michigan law requires new parties to collect petition signatures equal to 1% of the votes cast for governor and established parties to receive votes equal to 1% of the votes cast for secretary of

state.” *Id.* at *13. Consequently, the Court deduces that “[b]ecause the relative number of votes cast for the two offices may change from year to year, new parties do not necessarily have to meet a higher numerical threshold than established parties” under the statutory terms. *Id.* Accordingly, the Court concludes that it cannot, from only the last election results for those two offices, “assign a precise ratio to the relative voter support new and established parties must show.” *Id.*¹

Rather than being the source of the present disparity, the fact that the threshold formulas for ‘new parties’ and ‘established parties’ are differentially pegged to the last election results in the races for Governor and Secretary of State, respectively, has only a minutely contributing impact on the disparity’s magnitude. *See Mich. Dep’t of State, 2010 Official Michigan General Election Results*, (last updated Mar. 7, 2011), <http://miboecfr.nictusa.com/election/results/10GEN/> (showing that only 1.7% more votes were cast in the last race for Governor than in the last race for Secretary of State). Correspondingly, if the threshold formula for measuring ‘established party’ retention were calculated at 1% of the last vote cast for Secretary of State, then it would equate to 98% of the present threshold applied to ‘new

¹ The Court also states that “[t]he 2010 election results show that the governor received substantially more votes than the secretary of state”, (Ord. Granting Def.’s Mot. Dismiss at *13), which would seem to connote a comparison between the vote total cast for the *successful* candidate for Governor and the vote total cast for the *successful* candidate for Secretary of State. However, whether comparing the vote totals cast within the last held races for those two offices, or comparing the vote totals cast for the successful candidate within each; both such comparisons are equally inapposite to the actual statutory terms underlying the threshold disparity.

parties,’ rather than to 48% of that total. *Id.*

In so far as Michigan continues to have a two-party-dominated system in statewide elections (as the Michigan Election Law expressly envisions in the context of races for Secretary of State, *see* M.C.L. § 168.16), it naturally follows that the number of votes cast for the *successful candidate* for either one of the first two listed statewide offices on the ballot² will generally be in the range of around one-half the number cast for *all candidates* for the other one of those two offices, and vice-versa. Accordingly, while Plaintiff’s Amended Complaint notes that the ‘established party’ threshold has yet to ever reach as high as 21,000 votes, *see* (Am. Compl. ¶ 64), and extensively cites Defendant’s ‘minor party performance’ chart (listing the voter-signature threshold for each election since 1956);³ the following table further shows the relevant vote totals cast in, and thresholds derived from, each of the six Gubernatorial/Secretary of State elections held amid both of the two current voter-support formulas for measuring party access to the ballot.⁴

² *See* M.C.L. § 168.697 (requiring the office of Secretary of State to directly follow the office of Governor on the ballot); §§ 168.60, 168.76 (prescribing for those two offices to be elected at the general election of every fourth year following 1966).

³ *See* (Am. Compl. notes 30-32, 34, 37, 49, 52, 73, 79, 86, 177-78, 185-86) (citing Mich. Dep’t of State, *Performance of Minor Parties in Michigan General Elections 1900–2012* (last updated Apr. 2013), http://michigan.gov/documents/sos/Minor_Party_Chart_11-2010_339172_7.pdf

⁴ Prior to the amendment of 1988 Public Act 116, the statute’s ‘new party’ support threshold formula was calculated equally with the statute’s ‘established party’ support threshold formula of 1% of the number of votes cast for the *successful candi-*

Election Year ⁵	Vote Total Cast for <u>all Candidates</u> for Governor	Vote Total Cast for <u>Successful Candidate</u> for Secretary of State	Resulting Threshold for 'New Parties'	Resulting Threshold for 'Established Parties'
2010	3,226,088	1,608,270	32,261	16,083
2006	3,801,256	2,089,864	38,013	20,899
2002	3,177,565	1,703,261	31,776	17,033
1998	3,027,104	2,055,432	30,272	20,555
1994	3,089,077	1,416,865	30,891	14,169
1990	2,564,563	1,511,095	25,646	15,111

Although not directly discerned by Plaintiff at first blush, it appears that the Report and Recommendation (“R&R”) (ECF No. 55) on Defendant’s Motion to Dismiss reflected the same misapprehension of the relevant difference between the two formulas. Hence, the R&R similarly postulates that the threshold for ‘established parties’ is “one percent of the votes cast for the secretary of state in the prior secretary-of-state election”, *id.* *4, and therefore that the disparity between the two thresholds derives from “the considerably higher number of votes cast for Michigan’s governor [] than [for] secretary of state.” *Id.* at *5; *see also id.* at *3 (construing that the current ‘established party’ threshold of 16,083 votes cast for any one of a party’s candidates in the last general election is based on “1,608,300

date in the last preceding election for Secretary of State (which an ‘established party’ could then satisfy *only* through the vote-total received by its *highest-office* candidate in each held general election, rather than through the vote-total received by *any one* of its general election nominees – as now permitted since the amendment of 2002 Public Act 399). (Am. Compl. ¶¶ 24, 34).

⁵ For the 1998-2010 general election results, *see* Mich. Dep’t of State, *Previous Election Information*, http://michigan.gov/sos/0,4670,7-127-1633_8722--,00.html. For the 1994 and 1990 general election results, *see* LEGISLATIVE SERV. BUREAU, THE MICHIGAN MANUAL 1995-1996, 868-70 (1995); *id.*, THE MICHIGAN MANUAL 1991-1992, 879-81 (1991).

votes cast for secretary of state during the November 2010 election”); *but see* Mich. Dep’t of State, *2010 Official Michigan General Election Results*, *supra*.

Due to the nature of the R&R’s underpinning theory for rejecting the basis for Plaintiff’s claim of discrimination against ‘new parties,’ however, the R&R’s erroneous premise as to relevant language and distinction between the statutory formulas does not appear to have been material to its conclusion on that claim. Rather, the R&R predicates its assessment of that claim on the notion that both: (1) the State’s minor established parties’ entitlement to ballot access still emanates from their petition-based demonstrations of support fourteen or more years ago in the past, *see generally id.* at *59-69, and that (2) the State’s two major ‘established parties’ (both having never conducted any petition) qualify for the general election by means of nominating candidates through the primary election. *See id.* at *2-3. By contrast, this Court’s Order correctly recognizes that a party’s ballot access is based only on its support shown for the contemporaneous election cycle and that the two major ‘established parties’ requalify for the ballot through the same statutory mechanism as their minor ‘established party’ counterparts. *See* Ord. Granting Def.’s Mot. Dismiss at *2-3 & n. 2, *13-14.

Hence, in having centrally grounded its evaluation of Plaintiff’s discrimination claim upon the premise that both statutory formulas apply the same percentage-measure to the last election vote cast for the two respective offices, and having

therefore found insufficient demonstration of the statute to be facially discriminatory in nature; such an error was critical to the Court’s evaluation here. Consequently, the fact that the Court “did not recognize the difference between . . . the statutory provision[s]. . . . was a palpable defect that misled the Court, and correcting the defect will result in a different disposition of this case. Accordingly, reconsideration is warranted.” *Jimenez v. Allstate Indem. Co.*, 765 F. Supp. 2d 986, 996 (E.D. Mich. 2011) (citing E.D. Mich. LR 7.1(h)(3)). Indeed, “such defects are precisely what motions to reconsider are designed to remedy.” *Id.* at 997.

B. Qualitative Distinctions between Petition-based and Vote-based Thresholds of Support are Not Cognizable.

In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Supreme Court reviewed a Washington statute under which any candidate, regardless of party affiliation, had to receive at least 1% of the vote in the ‘blanket primary-election’⁶ for that office in order to appear on the ballot in the ensuing general election. Notwithstanding the fact that “voter turnout at primary elections is generally *lower* than the turnout at general elections,” and therefore that the primary elections provide for a smaller “pool of potential supporters from which Party candidates can secure 1% of the vote”; the Supreme Court directly rejected the proposition that

⁶ Under a ‘blanket primary,’ a voter may vote for one candidate for each office irrespective of party lines. Hence, “the voter may vote for a Socialist Workers’ candidate for one office, a Republican for another, a Democrat for a third and so forth through the primary election ballot.” Brief of Appellant, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (No. 85-656), 1986 WL 727452.

“requiring primary votes to qualify for a position on the general election ballot is qualitatively more restrictive than requiring signatures on a nominating petition.”

Id. at 197-98 (emphasis added). Accordingly, the Court held that “[b]ecause Washington provides a ‘blanket primary,’ minor party candidates can campaign among the entire pool of registered voters. Effort and resources that would otherwise be directed at securing petition signatures can instead be channeled into campaigns to ‘get the vote out,’ foster candidate name recognition, and educate the electorate.” *Id.* at 197.

The Supreme Court similarly addressed such a comparison in a case involving precisely the same form of statutory threshold discrimination under challenge in the case at bar. There, notwithstanding even the fact that petition signatures could be collected from qualified electors who were unregistered to vote, or that such signatures needed not all even be collected from the same election cycle, the Supreme Court unequivocally declared that, whereas the statute “requires a new party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election”, the State’s established parties “face substantially smaller burdens because they are allowed to retain their positions on the ballot simply by obtaining 10% of the votes in the last gubernatorial election and need not obtain any signature petitions.” *Williams v. Rhodes*, 393 U.S. 23, 24-26 (1968) (emphasis added). Accordingly, the Court explained that by im-

parting the “established parties a decided advantage over any new parties struggling for existence” such disparate statutory standards “place substantially unequal burdens on both the right to vote and the right to associate.” *Id.* at 31.⁷

Even assuming *arguendo* that “voting for a party’s candidate may be a stronger indicator of voter support than the act of signing a petition to have a party appear on the ballot”, Ord. Granting Def.’s Mot. Dismiss at *14, any such greater subjective support that it might convey beyond merely indicating such a voter’s desire to have that voting option would not be a valid basis for distinction. Rather, “[b]ecause every vote counts the same, whether cast enthusiastically or even grudgingly, the relevant question for purposes of ballot access can only be whether members of the public want to have the opportunity to vote for a candidate of a particular party.” *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1226-27 (4th Cir. 1995) (emphasis added) (internal citation omitted). “[T]he state has no legitimate interest in limiting ballot access to parties which show a substantial modicum of *enthusiastic* support.” *Id.* at 1226 (emphasis in original); *see also Hall v. Austin*, 495 F. Supp. 782, 790 n. 12 (E.D. Mich. 1980). ““The inquiry is whether the challenged restriction *unfairly or unnecessarily* burdens the availability of political op-

⁷ *See also Storer v. Brown*, 415 U.S. 724, 743 (1974) (vacating and remanding a district court decision upholding California’s independent-candidate petition requirements, in part because the district court had not “considered [] the relationship between the showing of support through a petition requirement and the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election.”) (emphasis added).

portunity.”” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588 (6th Cir. 2006) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983)) (emphasis added).

Moreover, given that Michigan’s election statute, in contrast to those of “nearly all states” permits no means by which “a party can achieve limited recognition as a political party for a specific general election” by means of qualifying an individual candidate, (FEC, *Campaign Guide for Political Party Committees* at 127 (Aug. 2013), available: <http://fec.gov/pdf/partygui.pdf>), such a form of justification for the disparity would result in a classic ‘Catch-22.’⁸ Indeed, even if the number of voters *actively* supporting a given ‘new party’ far *exceeds* the number who voted for a given established party’s highest-vote-receiving candidate, but still falls short of 32,000+ in total, such voters have no legally recognizable means of conveying that their subjective level of support for their favored party is equal to or greater than that of the smaller number of voters deemed to support the ‘established party.’⁹

⁸ See MERRIAM-WEBSTER ONLINE (last visited May 22, 2014), <http://merriam-webster.com/dictionary/catch-22> (defining a ‘catch-22’ as “a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule <the show-business catch-22—no work unless you have an agent, no agent unless you’ve worked — Mary Murphy>”).

⁹ Correspondingly, while “a law severely burdens voting rights if the burdened voters have few alternate means of access to the ballot” for their preferred political candidates, *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (citing *Burdick v. Takushi*, 504 U.S. 428, 436-37 (1992)), “courts quite

Accordingly, such “an exclusive policy” inherently precludes a ‘new party’ from having “a chance to prove itself” through any form of comparable measure, *McLaughlin*, 65 F.3d at 1222, while at the same time fundamentally denying “the rights of the voters to equality in the exercise of their political rights.” *Socialist Workers Party v. Hare*, 304 F. Supp. 534, 536 (E.D. Mich. 1969) (emphasis omitted). And any such infringement of citizen’s “constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”, *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012), is “‘especially difficult for the State to justify’” where it “‘limits political participation by an identifiable political group whose members share a particular viewpoint[and] associational preference’” or otherwise “burdens [] voters based on the content of protected expression, [such as] party affiliation”. *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921, 922 (6th Cir. 1998) (quoting *Anderson*, 460 U.S. at 793) (alterations and emphasis added); see *Libertarian Party of Ohio*, 462 F.3d at 588.

Moreover, under “the ‘purity of elections’ clause of the Michigan Constitution, which vests the Legislature with constitutional authority to enact election laws”, *Sessa v. State Treasurer*, 117 Mich. App. 46, 323 N.W.2d 586, 589 (Mich. Ct. App. 1982), the Legislature is proscribed from even exercising such authority to

properly have more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot.” *Anderson*, 460 U.S. at 793 n. 15 (emphasis in original) (internal quotation marks omitted).

advance any state interests which are “inconsistent with the goal of ‘equality of treatment’ of parties and their candidates seeking access to the general election ballot” or to enact “any law . . . which adversely affects” that mandatory “goal”. *Socialist Workers Party v. Sec’y of State*, 412 Mich. 571, 317 N.W.2d 1, 10, 12 (Mich. 1982).¹⁰

Furthermore, even if such a hypothetical justification for the statutory disparity were not otherwise invalid as a matter of law, the question of whether “voting for a party’s candidate may be a stronger indicator of voter support than the act of signing a petition to have a party appear on the ballot” (Ord. Granting Def.’s Mot. Dismiss at *14) would be a question of fact, which Defendant would bear the burden to prove, and to which Plaintiff would be entitled to refute with contrary evidence. *See e.g. Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992) (“Once a plaintiff has identified [a ballot access burden’s] interference with the exercise of her First Amendment rights, the burden is on the state” to justify its “discriminatory classification.”) (citing *Anderson*, 460 U.S. at 789).

Correspondingly, regardless of whether Michigan’s Legislature might have concluded that voting for a party’s candidate demonstrates higher support, any supposed “state interests asserted in support of the classification”, *Ill. State Bd. of*

¹⁰ *See also Socialist Workers Party*, 317 N.W.2d at 11 (quoting *Elliott v Sec’y of State*, 295 Mich. 245, 294 N.W. 171 (1940)) (extending the judicially construed application of the “constitutional mandate touching the . . . the purity of elections” to “election officials” within the State’s executive branch).

Elections v. Socialist Workers Party, stemming from that conclusion must fail on their own terms if such a conclusion is demonstrably false. Here, not only can it be factually proven that the retention-vote test does not provide a greater indicator of voter-support for a given party, but also that such a vote-test's satisfaction does not even dependently rely upon any actual support at all.

As applied conjointly with the amendment of 2002 Public Act 399 (enabling a party to satisfy the retention threshold through the vote received by *any* of its candidates, rather than only its highest-office candidate as before) – and with the opportunity for each party to field eight candidates for statewide educational board seats at every general election (for which voters are vastly more prone to vote for minor party candidates than for other partisan offices due to far less concern with the outcome of those races),¹¹ it is effectively impossible for any party to ever have even a single one of its statewide educational board (hereinafter “S.E.B.”) nominees receive a vote total below the party retention threshold, much less for any party to ever fail at having at least one of such candidates successfully do so. (Am. Compl. ¶¶ 36-37 & note 48). Additionally, votes cast for party candidates in S.E.B. races do not even “require[] choosing one candidate over all others”, (Ord. Grant-

¹¹ To illustrate the scope of such a difference in votes for minor party candidates running for S.E.B. seats, the average State vote total received for the ballot-listed Presidential ticket of a minor established party in the 2012 General Election was 14,388 (i.e. only 89% of the *requelification threshold*). By contrast, the average vote total received for a ballot-listed candidate of a minor established party for an S.E.B. seat was: 100,622 (i.e. 625% of the *requelification threshold*).

ing Def.’s Mot. Dismiss at *14), as each voter may cast votes for two candidates running for each of the four boards, who may be of differing parties, whereupon both the first and second place candidates for each board win election to office. (Am. Compl. ¶ 36 note 47).

Further, as most starkly exemplified by the vote totals of S.E.B. candidates appearing on the long-organizationally-defunct Natural Law Party ballot line over the past decade, for whom there has consistently been no campaigning conducted nor even public information provided by either any party or by such name-lending candidates themselves, there simply is no necessary “burden of convincing an individual to cast their ballot for a party's candidate” (Ord. Granting Def.’s Mot. Dismiss at *14) involved in satisfying the State’s requalification threshold. While such effort at voter-outreach is certainly of great importance to a party’s higher ambitions, it is never of any determinative impact on a party’s ability to widely surpass the State’s party requalification threshold through any (and every) one of its S.E.B. nominees in each held general election.

C. The Court Erred in Failing to Construe the First Amendment Grounded Nature of Plaintiff’s Claim of Discrimination Against ‘New Parties’

In solely construing Plaintiff’s claim of discrimination against ‘new parties’ as an equal protection claim, the Court did not assess the heart of Plaintiff’s claim regarding inequitable burdens on the right to vote and the right to associate, as

grounded equally on the First Amendment. *See* (ECF 59 Pl.’s Obj. to R&R at 15-26) (specifically outlining the First Amendment and voting rights jurisprudence most centrally underlying Plaintiff’s discrimination claim). Correspondingly, this Court’s Order provides no acknowledgement to any relevance of the Supreme Court’s foundational decision for the applicably invoked ‘fundamental rights strand of equal protection analysis’ in *Williams*, 393 U.S. 23.

Despite the identical nature of statutory discrimination under challenge in this case, however, this Court never acknowledges the *Williams* Court’s still unabatedly controlling command that “only a compelling state interest” can applicably be weighed against this nature of “unequal burdens on minority groups where [associational and voting] rights of this kind are at stake.” *Id.* at 31.¹² Nor does the Court apply the *Williams* Court’s more broadly prescribed framework for reviewing ballot access classifications under the Equal Protection Clause—providing that the reviewing court “must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are dis-

¹² *See e.g. Green Party of N.Y. v. N.Y. State Bd. of Elections*, 389 F.3d 411, 419-20 (2d Cir. 2004) (observing that while “the [Supreme] Court has refused to subject all election regulations to strict scrutiny. . . .the Supreme Court has said that if state law grants ‘established parties a decided advantage over any new parties struggling for existence and thus places substantially unequal burdens on both the right to vote and the right to associate’ the Constitution has been violated, absent a showing of a compelling state interest.”) (quoting and citing *Williams*, 393 U.S. at 31).

advantaged by the classification.” *Id.* at 30.¹³

By contrast, this Court Order takes the view that *Williams* is only applicable to schemes that unfairly advantage the two major parties by excluding all minor parties from the ballot. Ord. Granting Def.’s Mot. Dismiss at *15. But while the Democratic and Republican parties did constitute the only two ‘established parties’ at the time of the decision, the Ohio statute under review did not apply such ‘major’ and ‘minor’ party status distinctions. Thus, in the majority of States where such distinctions between major/minor and established/new party classifications are applicable to a State’s scheme, courts relying on *Williams* have nearly always identified such analysis to be based on the latter two categories. And federal appellate courts have similarly continued to rely on the relevant conclusions and evaluation framework of *Williams* in recent years (including the full bench of the Third Circuit sitting en banc) when reviewing election statutes inequitably favoring ‘established parties’ which do not involve burdens of a similarly severe nature to those at issue in the instant case. *E.g. Reform Party*, 174 F.3d at 310, 313-14 (en banc); *Green Party of N.Y.*, 389 F.3d at 419-20.

Furthermore, the additional factors considered in the *Williams* Court’s final

¹³ *Accord Ill. State Bd. of Elections v. Socialist Workers Party*, 440 US 173, 183 (1979); *Reform Party v. Allegheny Cnty. Bd. of Elections*, 174 F.3d 305, 313 (3d Cir. 1999) (en banc); *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 702 (8th Cir. 2011); *Green Party of Tenn. v. Hargett*, No. 3:13-cv-1128, 2014 WL 1007291 (M.D. Tenn. Mar. 14, 2014).

conclusion, beyond the direct statutory discrimination favoring ‘established parties,’ do not in any way affect the Court’s binding conclusion on the question of relevance.¹⁴ *See id.* at 31. Indeed, as subsequently clarified by the four-Justice concurrence in *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 451 (1974) (Powell, J., joined by Burger, C.J., Blackmun, J., and Rehnquist, J., concurring) the established principle that “a discriminatory preference for established parties under a State’s electoral system can be justified only by a ‘compelling state interest’” was an independent *holding* of the *Williams* Court’s decision. *Id.*

The difference between the applicable standards at issue in this case and the comparative burdens between the petition and primary-election procedures in *Jenness v. Fortson*, 403 U.S. 431 (1971) is wholly inapposite under Sixth Circuit precedent. “[The] candidates in th[o]se two categories”, involved in *Jenness*, “are not similarly situated; one is a candidate for general election, and the other seeks ballot placement for a primary election.” *Miller v. Lorain Cnty. Bd. of Elections*, 141 F.3d 252, 258 (6th Cir. 1998) (quoting *Anderson v. Mills*, 664 F.2d 600, 607 (6th Cir. 1981)); accord *Jolivet v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012).

Thus, rather than “comparing apples to oranges”, as with the *Jenness* case plain-

¹⁴ *See also Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001) (recognizing that, in addition to “declar[ing] Ohio’s ballot-access scheme . . . unconstitutional because it was so restrictive,” the Supreme Court’s decision in *Williams* set forth the principle that “the First Amendment rights of voters and political parties are protected from unequal regulatory burdens under the Equal Protection Clause of the Fourteenth Amendment.”).

tiffs, (*Miller, supra*), Plaintiff here, in every conceivable respect, compares only apples to apples.

Moreover, Plaintiff does not simply base his claim upon differing burdens between the two differing party classes, but also upon the fact that voters of one political persuasion must prove themselves to be twice as numerous as those of another political persuasion in order to exercise the same right to cast their votes effectively. Contrastingly, a candidate who needed to win a primary election in Georgia would generally need to win votes from a much *greater* number of voters than the number from whom an independent or ‘political body’ candidate would need to collect petition signatures. *See Mills*, 664 F.2d at 607 (citing *Jenness*, 403 U.S. 431).

Accordingly, in drawing on “[t]he core First Amendment principles originally expounded in *Williams* and refined in *Anderson*”, *Patriot Party v. Allegheny Cnty. Dep’t of Elections*, 95 F.3d 253, 262 (3d Cir. 1996), *aff’d, en banc*, *Reform Party*, 174 F.3d 305, the essence of Plaintiff’s claim is that the Michigan statute’s extreme facial disparity in measuring the numerical sufficiency among voters favoring ‘new parties’ and those favoring ‘established parties,’ as the condition for respectively allocating their rights to “‘to associate for the advancement of political beliefs’” and “‘to cast their votes effectively’”, *Libertarian Party of Ohio*, 462 F.3d at 585 (quoting *Williams*, 393 U.S. at 30), constitutes “‘by its very nature’” the

quintessence of a statutory “burden that falls unequally on new or small political parties” and thus “discriminates against those candidates — and of particular importance — against those voters whose political preferences lie outside the existing political parties.” *Libertarian Party of Ohio*, 462 F.3d at 588 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983)).

D. The Existence of a Rational Basis for Requiring a Demonstrated Measure of Support Does Not Equate to a Rational Basis for Applying such a Measure Disparately

At the conclusion of section B, subsection 1 of the Court’s opinion addressing Plaintiff’s claim of discrimination against ‘new parties,’ the Court observes that Plaintiff “argues that the Secretary fails to justify its election law under even rational basis review.” Ord. Granting Def.’s Mot. Dismiss at *16. The Court then cites three interests related to “requiring new parties to demonstrate some measure of voter support” and thereupon cites two cases involving petition requirements which the Court premises to be “far more stringent.” *Id.* (comparing *Jenness*, 403 U.S. 431 and *Libertarian Party of Fla. v. Fla.*, 710 F.2d 790 (11th Cir. 1983)).¹⁵

¹⁵ In contrast to the Court’s construction, the Georgia scheme upheld in *Jenness* was far less burdensome than Michigan’s scheme because it applied its petition signature threshold formula to only the electoral jurisdiction for the office sought. Hence, that scheme enabled a ‘political body’ to field one or more individual candidates on the ballot with its party label in any chosen area where it holds strongest support. Consequently, Georgia’s scheme would not operate to *entirely* “exclude” plaintiff’s party “from participation in the election process.” *Libertarian Party of Ohio*, 462 F.3d at 587 (brackets and citation omitted). Furthermore, not only were

Plaintiff has not, however, challenged the notion that States may require political parties to demonstrate a measure of support. Rather Plaintiff has charged that the statute's gross disparity between the support measures applied to 'new' and 'established' parties fails rational basis. *See* (ECF No. 59, Pl.'s Obj. to R&R at 27-30). Hence, notwithstanding the strict scrutiny standard for the disparity at issue mandated by *Williams*, 393 U.S. at 31, and equivalently arising from the discriminatory character of the restriction and nature of the rights burdened under the *Anderson-Burdick* standard, Defendant has failed to even identify how "the criterion for differing treatment [] bear[s] [any] relevance to the object of the legislation." *Bullock v. Carter*, 405 US 134, 145 (1972).

"Although the [State] has identified . . . legitimate state interests, the [State] has not demonstrated how these interests are served by the unequal burden imposed here." *Reform Party*, 174 F.3d at 315(en banc). "Here, the state has failed to assert an interest to which the discriminatory classification [applied to minor parties]. . .is necessary, or even especially relevant. The state identifies interests that courts have found compelling in other cases, but fails to explain the relationship between these

Jenness and Libertarian Party of Fla. "decided before the Supreme Court crystallized its current standard of inquiry in cases such as *Burdick*, 504 U.S. at 434", *Pérez-Guzman v. Gracia*, 346 F.3d 229, 241 (1st Cir. 2003) (distinguishing *Jenness*), but the Eleventh Circuit has affirmed that neither of those two decisions are applicable to ballot access challenges involving candidates for federal office. *See Bergland v. Harris*, 767 F.2d 1551, 1554-55 (11th Cir. 1985); *accord Green Party of Ga. v. Ga.*, 551 Fed. Appx. 982, 983-84 (11th Cir. 2014).

interests and the classification in question.” *Fulani*, 973 F.2d at 1544. And, unsurprisingly, the conclusion reached was exactly that within the only other federal judicial decision, apart from *Williams v. Rhodes*, to review a statute directly subjecting ‘new parties’ seeking ballot access to the requirement of demonstrating support from a greater number of voters than required for ‘established parties’ seeking ballot retention. *See Baird v. Davoren*, 346 F. Supp. 515, 520 (D. Mass. 1972) (declaring that “the court is unable to find any rational basis for the distinction between [established] minor parties and [new] parties.”).

Similarly, while the Supreme Court’s decisions in *Norman v. Reed*, 502 U.S. 279 (1992) and *Ill. State Bd. of Elections*, 440 U.S. 173 (1979) both applied strict scrutiny upon the basis of the nature of the right burdened (i.e. local party ballot access), both such decisions further made clear that the disparity under challenge would similarly fail rational basis. Accordingly, just as with the disparity at issue in those two cases, it is self-evident that the Michigan “Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by” a support demonstration threshold of 16,083 voters. 440 U.S. at 186. And Defendant “has advanced no reason, much less a compelling one” (*id.*) why the “overall quantum of needed support” (502 U.S. at 293) deemed sufficient for an ‘established party’ is not deemed similarly sufficient for a ‘new party’ seeking to compete in the same election cycle. *See also Gjersten v. Bd. of Election Comm’rs*,

791 F.2d 472, 476 n. 8, 478 (7th Cir. 1986).

E. Plaintiff Did Not Fail to Substantiate the Fact that the Democratic and Republican Parties have Never Completed any Party Ballot Access Petition.

The Court determines that it “will not consider the objection” asserted by Plaintiff in regard to the fact that “when Michigan instituted the two-route system now in place it never required established parties [then holding recognition] to circulate a petition.” Ord. Granting Def.’s Mot. Dismiss at *16. The Court based that determination on the fact that Plaintiff did not allege “this fact in his complaint nor identif[y] supporting records of which the Court can take judicial notice.” *Id.* Consequently, the Court finds that it “cannot say [w]hether th[at fact] is true or not.” *Id.*

However, Plaintiff did quote and cite both the 1939 amending act and applicable Compiled Laws of Michigan (“CLM”) section creating Michigan’s petition and vote thresholds for party ballot access, as then applied. (ECF No. 55, Pl.’s Obj. to R&R at 14); (ECF No. 44, Am. Compl. ¶ 19 note 30); *see also id.* ¶ 154 note 185. Likewise, Plaintiff quoted and cited that amending act’s predecessor, along with the former applicable section from the preceding CLM edition. (ECF No. 66, Pl.’s Reply Def.’s Resp. Pl.’s Obj. R&R at 4 note 4). Furthermore, Plaintiff has now attached photocopies of the relevant statutory sections within the 1948 CLM and 1929 CLM as Exhibits A and B, respectively.

II. PLAINTIFF DID OBJECT TO THE MAGISTRATE’S CONCLUSION THAT THE CHALLENGED PETITION LANGUAGE IS NOT FACIALLY INVALID.

In accordance with Plaintiff’s discussion of the separate petition-declaration language on which the Magistrate Judge based her conclusion that the challenged petition-language was not facially invalid, (ECF No. 55, R&R at *46), Plaintiff did correspondingly object to that conclusion. *See* (ECF No. 59, Pl.’s Obj. to R&R at 5 note 5). The Court’s construction that there is nothing plausibly impermissible about compelling petition signers to sign up as ‘formers’ and ‘organizers’ of such a party is wholly inconsistent with the great weight of precedent on questions relating to both petition language and compelled disclosures more broadly. *See* (ECF No. 64, Pl.’s Resp. Def.’s Obj. to R&R at 15-18); *McLaughlin*, 65 F.3d 1215, 1226-27; *Hall*, 495 F. Supp. 782, 790 n. 12. Additionally, the Court does not consider the exacerbating impact from the fact that Michigan does not have any form of party registration. Furthermore, the Court does not assess the additional basis for Plaintiff’s charge of facial unconstitutionality to the petition warning language of M.C.L. § 168.685(3).and the corresponding provision of § 168.685(8). *See* (Am. Compl. ¶ 98 and notes 120-21, ¶ 190).

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully prays that this Court:

1. (i) grant Plaintiff’s Motion for Reconsideration and vacate the Court’s May 14,

2014 Entry of Judgment and Order Granting Defendant's Motion to Dismiss;

– or, in the alternative –

(ii) enter an injunction pending appeal as specified above;

– and –

2. issue an expedited ruling on this motion.

Respectfully submitted,

s/ Matt Erard 

Matt Erard

Plaintiff, *pro se*

400 Bagley St. #939

Detroit, Michigan 48226

313.437.2865

mserard@gmail.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MATT ERARD,

Case No. 2:12-cv-13627

Plaintiff,

HON. STEPHEN J. MURPHY, III

v.

MAG. JUDGE MONA K. MAJZOUB

MICHIGAN SECRETARY OF STATE
RUTH JOHNSON, in her official capacity,

EXPEDITED RULING REQUESTED

Defendant.

**TABLE OF EXHIBITS TO PLAINTIFF’S MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR INJUNCTION PENDING APPEAL¹⁶**

Comp. Laws Mich. 1948 § 177.4Ex. A

Comp. Laws Mich. 1929 § 3061Ex. B

Green Party of Ga. v. Ga.,
551 Fed. Appx. 982 (11th Cir. 2014)Ex. C

Green Party of Tenn. v. Hargett,
--- F.Supp.2d ---, No. 3:13-cv-1128, 2014 WL 1007291
(M.D. Tenn. Mar. 14, 2014)Ex. D

Richard Winger, *U.S. District Court Upholds Michigan Ballot
Access for Newly-Qualifying Parties*, BALLOT ACCESS NEWS
(blog ed.) (May 21, 2014)
<http://ballot-access.org/2014/05/u-s-district-court-upholds-michigan->.....Ex. E

Richard Winger, *Michigan Socialist Party Wins Partial Procedural
Victory*, BALLOT ACCESS NEWS (print ed.) (Feb. 1, 2014), available:
<http://ballot-access.org/2014/02/february-2014-ballot->Ex. F

¹⁶ All exhibits listed in this table are attached to ECF No. 75.