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Case No. 14-1873

DEBORAH S. HUNT, Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MATT ERARD,

Plaintiff-Appellant,

vs.

MICHIGAN SECRETARY OF STATE
RUTH JOHNSON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY BRIEF OF PLAINTIFF-APPELLANT

December 7, 2014

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ARGUMENT

I. THE SECRETARY HAS FAILED TO ASSERT ANY MERITORIOUS DEFENSE OF THE STATUTE'S DISCRIMINATION AGAINST VOTERS ALIGNED WITH 'NEW POITICAL PARTIES.'

As the Supreme Court has repeatedly observed, “[i]n our adversary system, . . . we follow the principle of party presentation. That is, we rely on the parties to frame the issues” because “our adversary system is designed around the premise that the parties . . . are responsible for advancing the facts and arguments entitling them to relief.” *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (brackets omitted). Particularly is this principle central to the review of constitutional challenges to State election regulations, for which “courts must weigh the burden on voters against the against the state’s asserted justifications” in order to “make the hard judgment that our adversary system demands.” *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 538 (6th Cir. 2014).

The Defendant-Appellee Secretary of State (“the Secretary”) begins her appellee brief by asserting that Plaintiff-Appellant’s (“Plaintiff”) “cast[ing of] this [case] as a novel case where the District Court did something never before been done by a United States court” is “simply not true.” (Cir. Doc. 25, Def.-Appellee’s Br. at 3) (citing Cir. Doc. 24, Pl.-Appellant’s Br. at 8). Certainly it would be the case that if this contention by Plaintiff were in fact ‘not true’, as the Secretary contends, its untruth would be quite ‘simple’ to show. Indeed, the Secretary would need only to

point to the existence of a single other United States court decision that has ever upheld a ballot access statute imposing the type of disparity between ‘new’ and ‘established’ parties challenged here—or one which, in any manner, conditions the opportunity for one “identifiable political group” to “associate in the electoral arena” (*Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983)) upon having to demonstrate a greater quantum of voter-support than that required of another political group with which it seeks to electorally compete.¹

In ostensibly recognizing the adverse status of all on-point authority to her position on this claim, the Secretary foremost relies on a hollow attempt to analogize Plaintiff’s claim of invidious and unjustified discrimination against the voting and associational rights of ‘new party’ adherents under Michigan’s scheme to the equal protection claim raised by the plaintiffs in *Jenness v. Fortson*, 403 U.S. 431 (1971) (challenging Georgia’s requirement that nonparty candidates qualify for the general-election ballot by petition while providing for party-

¹ As noted in Plaintiff’s principal brief, under statutes which require a greater support exhibition for automatic party ballot-access retention than that applied to the voter-signature threshold for party petition qualification, a party that fails to meet the automatic retention threshold simply loses its entitlement to sidestep the petition procedure. Thus, unlike the converse, statutes applying a higher threshold for automatic party retention do not consequently engender an unequal “availability of political opportunity” (*Anderson*, 460 U.S. at 793) between the voters aligned with any one particular party and those aligned with another.

candidates to qualify by winning a primary election).² *See id.* at 440-41 (“We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.”).

In stark contrast to the disparity at issue here, the leading reason for which the *Jenness* court found no inequitable burden to be imposed on candidates subject to the petition-based route was its recognition of the fact that any candidate whose general election ballot-qualification was conditioned upon winning a primary election would invariably need to receive primary-votes from a *much greater* number of voters than the number from whom a petition-qualifying candidate would need to obtain signatures. *See id.* 440. Accordingly, this Court has also applied the same reasoning in rejecting a Kentucky independent candidate’s equal protection claim of the same nature. *See Anderson v. Mills*, 664 F.2d 600, 607 (6th Cir. 1981) (explaining that the greater signature threshold required for an independent candidate’s general-election ballot-placement is more than offset by the “great number of electors” from whom the party candidate must receive votes in the primary); accord, e.g., *Duncan v. Husted*, No. 2:13-cv-01157, 2014 WL

² In contrast to the Secretary’s mischaracterization of this claim as being grounded solely on the Equal Protection Clause, Plaintiff’s claim charging invidious and unjustified discrimination against voters aligned with ‘new political parties’ has continuously been equally grounded on the First Amendment. *See* (Dist. Doc. 44, Am. Compl., Count 2, ¶¶ 186-87, Pg.-ID#’s 921-22).

1123538 at *5 (S.D. Ohio Mar. 20, 2014) (“Because the partisan candidate ‘must win the majority of votes in a party primary,’ whereas the independent must gather signatures, the . . . ‘different restrictions for their access to the ballot are permissible.’”) (quoting *Jolivette v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012)).

As the Supreme Court further summarily affirmed, via a district court decision directly comparing the nature of alleged disparity challenged in both *Jenness* and *Mills* with that of inequitable qualification thresholds favoring established parties as challenged in *Williams v. Rhodes*, 393 U.S. 23 (1968):

While we recognize that different logistics are involved in an independent’s attempt to run for office as compared with a member of a political party, nonetheless the party and the independent must receive equivalent electorate support. Thus, no substantial benefit is secured to the established parties by legislative action. Indeed, unlike the situation in *Williams v. Rhodes*, *supra*, it appears that all party candidates and independent candidates are placed on an equal footing.

Jackson v. Ogilvie, 325 F. Supp. 864, 869 (N.D. Ill. 1971), *summarily aff’d*, 403 U.S. 925 (1971) (emphasis added). Accordingly, if the reasoning applied in the courts’ rejection of the nature of equal protection claim reviewed in *Jenness* and its progeny bears any relevance here, then it is only in the sense of adding further support for the strength of Plaintiff’s challenge to the nature of the disparity at issue in this case.

In further groundlessly contending that ‘new parties’ and ‘established parties’ are not similarly situated, the Secretary’s “proposed approach to the Equal

Protection Clause would strip the clause of all meaning.” *Green Party of Mich. v. Land*, 541 F. Supp. 2d 912, 916 (E.D. Mich. 2008). While challenges made to differing signature requirements for independent general-election candidates and political party primary candidates are effectively “comparing apples to oranges”, *Mills, supra*, all parties are plainly similarly situated with respect to the “overall quantum of needed support” (*Norman v. Reed*, 502 US 279, 293 (1992)) for ballot placement in a general election.³

Not only has the Supreme Court recognized the similarly situated status among “different classes of voters [and] political parties,” made subject to “unequal treatment” (*Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982)) through a threshold-disparity of precisely the same nature and “character of the classification in question”⁴ here, *see Williams*, 393 U.S. at 24-26, 30-31 (1968), but has further found differing classes of parties similarly situated for purposes of challenging a support-threshold disparity that did not even arise between parties seeking to compete at the same electoral level. *See Ill. State Bd. of Elections*, 440 U.S. at 183, 186-87; *see also Gjersten v. Bd. of Election Comm’rs*, 791 F.2d 472,

³ Even apart from the fact that the comparison here is between the general election ballot-qualification requirements for political parties themselves, Michigan minor parties conduct all of their candidate nominations by convention or caucus, pursuant to MICH. COMP. LAWS § 168.532, without any minimum attendance requirements nor any form of requisite support showing for their individual candidate nominees. (Dist. Doc. 44, Am. Compl. ¶ 115, Pg.-ID#’s 963-64).

⁴ *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

476 n. 8 (7th Cir. 1986) (“This case is even stronger than [*Ill. State Bd. of Elections v. Socialist Workers Party*. In that case, the Supreme Court found a violation of equal protection when the state failed to justify the discrepancy in signature requirements between candidates seeking different offices at different levels of government. In this case, all of the candidates seek a position on the same [elected] committee.”).

Furthermore, the Secretary does not even contest that individual voters aligned with Plaintiff’s party are similarly situated to those voters aligned with a given established party—or, more generally, that “those voters whose political preferences lie outside the existing political parties” (*Anderson*, 460 U.S. at 794) are similarly situated to those voters whose political preferences do not. Here, as in *Williams*, 393 U.S. 23, the classification giving rise to such “unequal burdens on both the right to vote and the right to associate” (*id.* at 31) are directly imposed on the classes of voters themselves. Thus, by requiring that voters of one political persuasion must be twice as numerous as those of another political persuasion in order to exercise the same right to “to associate for the advancement of political beliefs” and “to cast their votes effectively” (*id.* at 30), Michigan’s scheme directly deprives Plaintiff and other such voters of their “constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”, *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012), and of

“equality among citizens in the exercise of their political rights.” *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969).

The Secretary also proposes an equally groundless analogy to the Supreme Court’s rejection of the plaintiff parties’ challenge to Texas requirement that new and non-automatically-requalifying parties must nominate candidates by convention, rather than by primary, in *Am. Party of Tex. v. White*, 415 U.S. 767 (1974). There, in reviewing the plaintiffs’ challenge, the Court observed that “[s]o long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, *without being invidiously treated*, may be required to establish their position in some other manner.” *Id.* at 782-83 (emphasis added). Accordingly, because those parties entitled to automatic ballot-retention and primary-based nominations had to poll votes in the preceding gubernatorial election from at least twice as many voters as the number from whom new parties had to cumulatively demonstrate support—(via any combination of petition signatures and/or counted attendees at party precinct conventions),⁵ the Court found that the State’s statutory scheme did “not create or

⁵ See *Am. Party of Tex.*, 415 U.S. at 772-74; *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1222 (4th Cir. 1995) (noting that in *Am. Party of Tex.*, “the Court upheld a complicated Texas ballot access scheme that, in much-simplified essence, permitted political parties to gain initial access to the ballot by securing the signatures of persons numbering 1% of the total votes cast in the prior gubernatorial election, but required such parties to poll at least 2% of the votes cast in the gubernatorial election to [automatically] retain their ballot access.”).

promote a substantial imbalance in the relative difficulty of each group to qualify for the ballot.” *Id.* at 783 n. 16.⁶

The Secretary also cites *Washington v. Davis*, 426 U.S. 229, 248 (1976) for the proposition that Plaintiff’s claim of discrimination against new parties and their supporters is a disparate impact claim for which there must be proof of discriminatory intent. However, the Secretary ignores the fact that “[t]he challenged portions of the Election Code are deliberately structured to deny access to the ballot to certain members of the classification in which [Plaintiff is] placed by the law.” *Socialist Workers Party v. Chicago Bd. of Election Comm’rs*, 433 F. Supp. 11, 14 (N.D. Ill. 1977), *aff’d*, 566 F.2d 586 (7th Cir. 1977), *aff’d*, 440 U.S. 173 (1979). *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234 n. 13 (6th Cir. 2011) (directly “reject[ing] [the] argument [that] there can be no violation of the Equal Protection Clause [] without evidence of intentional discrimination” in the context of voting-rights cases, such as those challenging “‘invidious distinctions’ . . . limiting the ability of political parties to appear on the ballot.”)

⁶ Furthermore, even though the procedural alternative, for parties failing to satisfy the retention-vote threshold, required their demonstration of a comparatively lower, rather than greater, quantum of voter-support, the Court declared that “whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as *discriminations* against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further *compelling state interests*.” *Am. Party of Tex.*, 415 U.S. at 780 (emphasis added) (citing *Storer v. Brown*, 415 U.S. 724, 729-733 (1974)).

(citing *Williams*, 393 U.S. at 30); see also *id.* at 238 n. 16; *Obama for Am. v. Husted*, 697 F.3d 423, 433 n. 6 (6th Cir. 2012); *Ne. Ohio Coal.*, 696 F.3d at 592.

Accordingly, in the context of challenges made to “classification schemes that impose burdens on new or small political parties” implicating their “First Amendment interests in ensuring freedom of association”, such “traditional equal protection analysis” requirements do not apply. *Clements v. Fashing*, 457 U.S. 957, 964-65 (1982) (plurality opinion). See *Anderson*, 460 U.S. at 793-94 (“A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and — of particular importance — against those voters whose political preferences lie outside the existing political parties.”) (citing *Clements*, *supra*); *Ill. State Bd. of Elections*, 440 U.S. at 184 (“When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest.”).

The Secretary further states that Plaintiff’s discrimination claim is “premised on two incorrect assumptions. The first is that vote-signature ratio is always the same” and the “second is that unless the State requires the exact same number of petition signatures as the number of votes it requires, the burden is unequal and discriminatory.” (Cir. Doc. 25, Def.’s Appellee Br. at 33-34). With respect to the first such supposed assumption, Plaintiff has not stated that that the ratio is always

the exactly same. Rather Plaintiff has asserted the plain fact that it naturally follows under the State's two-party-dominated system in statewide elections "that the number of votes cast for the *successful candidate* for either one of the first two listed statewide offices on the ballot 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." (Cir. Doc. 24, Pl.'s Appellant Br. at 16). Accordingly, since the date of filing of Plaintiff's principal brief, this objectively accurate fact has once again been further manifested by the thresholds which have now been set forth to apply to both the State's 2016 and 2018 General Elections, based on the statutory formulas' application to the State's 2014 General Election results:⁷

Election Year	Vote Total for <u>all Candidates</u> for Governor	Vote Total for <u>Successful Candidate</u> for Secretary of State	Resulting Threshold for 'New Parties'	Resulting Threshold for 'Established Parties'
2014	3,156,531	1,649,047	31,566	16,491

⁷ See Mich. Dep't of State, *2014 Official Michigan General Election Results* (last modified Nov. 24, 2014), <http://miboecfr.nictusa.com/election/results/14GEN/> (follow hyperlinks for "Governor" and "Secretary of State"). For the chart displaying the relevant vote-totals cast in, and thresholds derived from, each of the six preceding gubernatorial/secretary of state elections held under the statutory formulas since the time of their disequilibrium by 1988 Public Act 116, see Cir. Doc. 24, Pl.'s Appellant Br. at 17-18. Additionally, with separate respect to Plaintiff's statutory claims and MICH. COMP. LAWS § 168.560a (see Cir. Doc. 24, Pl.'s Appellant Br. at 3 n. 4, 52), the 2014 General Election results also confirm that Plaintiff's party once again received more than twice the party-qualifying-threshold number of votes for its 'principal candidate' (Adam Adrianson). See Mich. Dep't of State, *supra* (follow hyperlink for "Trustee of Michigan State University").

The Secretary also fails to even propose, let alone substantiate, any basis for her supposition of constitutionally-relevant significance to either the fact that the precise ratio between the two formulas is not always exactly the same throughout every four year period, or to the fact that the threshold for ‘new parties,’ does not always equate to being *100% greater* than the threshold applied to ‘established parties.’ Plainly, what is relevant is that Michigan’s scheme operates at all times to maintain a substantial disparity that invidiously discriminates against the rights of voters based on their political affiliation—and is thus always *100%* unconstitutional. Similarly, as to the second supposed assumption, Plaintiff has not asserted that a State must require “the exact same number of petition signatures as the number of votes it requires.” (Cir. Doc. 25, Def.’s Appellee Br. at 33).

Certainly the latter can exceed the former, as reflected under numerous States’ ballot access statutory schemes. But in directly providing for “one group [to] be granted greater voting strength than another”, the form of disparity imposed under Michigan’s scheme “is hostile to the one [person], one vote basis of our representative government.” *Moore*, 394 U.S. at 819.

The Secretary also attempts to distinguish Plaintiff’s citation to the three-judge court’s finding in *Baird v. Davoren*, 346 F. Supp. 515 (D. Mass 1972) that a State statutory scheme’s application of a petition-signature threshold for new parties that far exceeded the retention-vote threshold for established minor parties lacked even

a rational basis. (Cir. Doc. 24, Pl.'s Appellant Br. at 28-29) (citing *id.* at 517-18, 520). Although the Secretary is correct that the *Baird* court found that the standard for established minor parties had its legislative origin in "an attempt to mitigate standards of general application for the benefit of certain parties in existence at the time of the general electoral reform" (346 F. Supp. at 520) (as did also the enactment of the 2002 Public Act 399 amendment to Michigan's scheme, *see* (Dist. Doc. 44, Am. Compl. ¶¶ 38, 182, Pg.-ID#'s 928, 990)), the Secretary ignores the fact that the *Baird* court immediately followed that observation by declaring: "Beyond this, the court is unable to find any rational basis for the distinction between [established] minor parties and [new] parties. The reasons suggested by the defendants and the intervenor Socialist Labor Party are wholly unpersuasive." 346 F. Supp. at 520 (emphasis added).

The Secretary also proposes that "[t]he guiding principle in determining whether ballot-access burdens are invidiously discriminatory is whether candidates or new parties have been able to successfully overcome the hurdles imposed by those restrictions." (Cir. Doc. 25, Def.'s Appellee Br. at 36). Not only does the Secretary fail to provide any support for such a notion, but it is also squarely contradicted by Supreme Court precedent. Indeed, the Ohio scheme found to unjustifiably discriminate against independent Presidential candidates in *Anderson*, 460 U.S. 780, had been successfully satisfied by five other independent

Presidential candidates in the very same election for which the plaintiffs brought their action, as was typical of Presidential elections held under that scheme. *See id.* at 809 (Rehnquist, J. dissenting). Comparatively, not a single candidate of any ‘new’ (i.e. not automatically-requalifying party) has appeared on the Michigan ballot with its label in any election held within the 21st Century; thus making Michigan one of only three States in the nation in which every election held throughout that ongoing period has been 100% “monopolized by the existing political parties.” *Anderson*, 460 U.S. at 794; *see* (Dist. Doc. 76-1, Pl.’s Corrected Br. Supp. Mot. Recons. or Inj. Pending Appeal at iii-iv & n. 5, Pg.-ID#’s 1801-02).

In proposing the above-referenced “guiding principle”, the Secretary alludes to the pre-*Anderson* ‘reasonably diligent candidate standard’ of *Storer*, 415 U.S. at 742. Such reliance on the *Storer* Court’s standard, however, would certainly not help the Secretary’s position. Rather, in congruence with *Williams*, 393 U.S. at 24-26, the *Storer* Court equated the “showing of support through a petition requirement” that could be required of “a reasonably diligent independent candidate” with “the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election.” *Id.* at 742-43 (emphasis added). Accordingly, the *Storer* Court then vacated and remanded the district court decision, which had upheld California’s challenged independent

petition signature requirements, due in part to the district court's failure to make such a comparative assessment. *Id.* at 743, 746.⁸

II. THE SECRETARY HAS FAILED TO ASSERT ANY MERITORIOUS DEFENSE OF THE STATUTE'S PETITION-LANGUAGE REQUIREMENTS OR CORRESPONDING RESTRICTION OF § 685(8).

In parroting the District Court's inaccurate, and otherwise erroneous, suggestion that Plaintiff waived his charge of facial invalidity to the petition-language requirements of MICH. COMP. LAWS §§ 168.685(3)(4) and corresponding restriction of § 168.685(8), the Secretary entirely ignores Plaintiff's cited objection made to that conclusion within his objections memorandum. *See* (Cir. Doc. 24, Pl.'s Appellant Br. at 46 n. 37 (citing Dist. Doc. 59, Pl.'s Obj. to Report and Recommendation ("R&R") at 5 n. 5, Pg.-ID# 1560). The Secretary likewise entirely ignores Plaintiff's citation to controlling Circuit precedent clearly showing that Plaintiff did not need to object to that finding in light of the fact that the R&R assessed Plaintiff's challenge to such requirements as a subcomponent of Plaintiff's holistically assessed "First Amendment challenge", for which the R&R not only recommended the denial of the Secretary's motion to dismiss, but specifically found that Plaintiff "has adequately pled that § 168.685(3) [imposes] a substantial hurdle"—and that "the Secretary has not explained how the mandatory

⁸ The Secretary's brief later falsely asserts that the *Storer* Court "upheld" the petition requirements challenged in that case. (Cir. Doc. 25, Def.'s-Appellee Br. at 40). In fact, the Court did no such thing. *See* 415 U.S. at 746.

petition language . . . is narrowly tailored to avoid ballot clutter or voter confusion.” (Dist. Doc. 55, R&R at 48, 56, Pg.-ID#’s 1452, 1459). *See* (Cir. Doc. 24, Pl.’s Appellant Br. at 46-47 n. 37) (quoting and citing *Van Winkle v. United States*, 645 F.3d 365, 371 (6th Cir. 2011); *Turpin v. Kassulke*, 26 F.3d 1392, 1400 (6th Cir. 1994)); (Dist. Doc. 55, R&R, at 46-48, 55-57, Pg.-ID#’s 1450-52, 1459-61).

Unlike the *McLaughlin* court’s decision (on which the R&R based its distinction between facial and as-applied validity in this context, *see* 65 F.3d at 1226-27; Doc. 55, R&R at 46, Pg.-ID# 1450), as issued for an appeal from a summary judgment order, the relevant question here is not whether the unjustified burden imposed by such petition language is so obvious as to obviate the need for supporting evidence, but rather only whether it is plausible. Accordingly, for reasons such as this, the Supreme Court has recognized the impropriety of applying the facial/as-applied distinction to dispose of claims at the pleading stage. “[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.” *Citizens United v.*

FEC, 558 U.S. 310, 331 (2010). “The distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.” *Id.*⁹

The Secretary further contends that the statute’s criminal prohibition of any voter from “signing a petition to organize more than 1 new political party” (MICH. COMP. LAWS § 168.685(3), (8)) applies to only to a single election-cycle. However, “[t]his proffered construction reads language into the statute that is simply not there.” *Libertarian Party of Ky. v. Ehler*, 776 F. Supp. 1200, 1207 (E.D. Ky. 1991). The statute states that “[a] person shall not knowingly sign a petition to organize more than 1 new state political party, sign a petition to organize a new state political party more than once, or sign a name other than his or her own on the petition” (MICH. COMP. LAWS § 168.685(8) (emphasis added)), and correspondingly requires each new-party petition-sheet to display a “warning,” stating the same prohibition, in extra-large and boldface type. *Id.* § 168.685(3), (4). “The statute says no more and no less than that.” *Ehler, supra.*¹⁰

Furthermore, the Secretary’s current construction cannot serve to assure potential signers that they will not risk criminal prosecution for signing such a

⁹ See also *Citizens United*, 558 U.S. at 330 (“[E]ven if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from . . . addressing the facial validity of § 441b in this case.”).

¹⁰ See, e.g., *Lesner v. Liquid Disposal, Inc.*, 643 NW 2d 553, 556 (Mich. 2002) (“[O]ur duty is to apply the language of the statute as enacted, without addition, subtraction, or modification.”); *Johnson v. OFD, Inc.*, 807 NW.2d 719, 727 (Mich. Ct. App. 2011) (“We cannot read into a statute language that was not placed there by the Legislature.”).

petition if they have ever signed the petition of any other party in the past or if they may ever choose to sign the petition of another party in the future. *See* MICH. COMP. LAWS § 168.931(2) (“A person who violates a provision of this act for which a penalty is not otherwise specifically provided in this act, is guilty of a misdemeanor.”); *id.* § 168.934 (prescribing general misdemeanor penalty). In fact, under the terms of the statute, any prosecutor or law enforcement officer in the State, who literally construes such a statutory prohibition as worded, is affirmatively mandated to institute criminal proceedings against an offending petition-signer. *Id.* §§ 168.940-41. *See also United Food & Commercial Workers Union v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998).

Additionally, “[e]ven if we assume that the appellee[is] . . . correct and the [restriction] does not mean what it clearly says, the important thing is what the voter thinks. It is not enough to say what some court might interpret the provision to mean; it is the voter’s rights which are being affected, not someone from the judiciary.” *Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1310 (4th Cir. 1989); *see McLaughlin*, 65 F.3d at 1227 (“[W]hat [i]s important [i]s how voters would interpret the petition language, not what the legislature intended”); *Libertarian Party of Tenn. v. Goins*, 793 F. Supp. 2d, 1064, 1085 (M.D. Tenn. 2010); *Libertarian Party of Nev. v. Swackhamer*, 638 F. Supp. 565, 568 (D. Nev. 1986).

The Secretary also attempts to contest the plausibility of Plaintiff's additional claim that the State's mandated petition-language requiring voters to 'form' and 'organize' a new party invalidly suggests an affiliative connotation well beyond mere desire for the opportunity to vote for one or more of a party's candidates—especially in the context of a highlighted "Warning" declaration and in a State which lacks any system of party voter registration. (Dist. Doc. 44, Am. Compl. ¶¶ 176-77). Notwithstanding the contrasting averments in Plaintiff's pleading, the Secretary asserts that "as the District Court held, the petition language is not the obstacle to the Socialist Party obtaining signatures" and that instead "the obstacle is voters' fear of associating with the Party." (Cir. Doc. 25, Def.'s Appellee Br. at 25). Regardless of whether the Secretary is willing or able to conceive of the type of greatly heightening impact that such a mandated disclosure of political affiliation may have on a politically radical group's generation of public support, such a concept has not been lost on the Supreme Court.

'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, *particularly where a group espouses dissident beliefs.*' The right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State that is compelling,' and then only if there is a 'substantial relation between the information sought and an overriding and compelling state interest.'

Brown v. Socialist Workers Party 74' Campaign Comm. (Ohio), 459 U.S. 87, 91-92 (1982) (internal citations and brackets omitted) (emphasis added); *Libertarian Party of Tenn.*, 793 F. Supp. 2d at 1082-83 (quoting *id.*). Accordingly, just as such

affiliative language “says far more than just a desire to see the Party on the ballot”, *Swackhamer*, 638 F. Supp. at 568, “[t]he preservation of unorthodox political affiliations in public records substantially increases the potential for harassment”. *Brown*, 459 U.S. at 97 n. 14; *see also Hechler*, 890 F.2d at 1309; *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 417 (2d Cir. 1982).

Finally, in particular light of the fact that the Secretary has not even attempted to propose any state interests underlying the statute’s current petition-language requirements, Plaintiff’s challenge to those requirements would still be sufficient to survive dismissal under Fed. R. Civ. P. 12(b)(6) even if it gave rise to no more than the plausible inference that such a requirement has *any hampering impact* on his party’s petitioning efforts in even the slightest degree. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S.181, 191 (2008).

III. THE SECRETARY HAS FAILED TO PROVIDE ANY SUPPORT FOR HER CONTENTION THAT THE CHALLENGED INJURY TO PLAINTIFFS’ RIGHTS IS NOT SEVERE.

In contending that Plaintiff’s claims should be subject to ‘less exacting review,’ the Secretary thereby proposes that Plaintiff’s claims should invoke no closer a level of scrutiny than the intermediate level applied in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); notwithstanding that the Court’s determination of the applicable review level in that case was based specifically on the fact that Minnesota’s scheme had not “excluded a particular group of citizens,

or a political party, from participation in the election process” nor in any way operated to “directly limit the [plaintiff political] party’s access to the ballot.” *Id.* at 361-62.¹¹ Accordingly, rather than even addressing the question of what criteria should go into determining whether a State election law restriction is severe (much less addressing this Court’s identified “key factor” for that test of “the importance of the associational right burdened”¹²), the Secretary’s brief relies fully on decontextualized citations to a handful of cases upholding ballot access statutes against constitutional challenges.

Even apart from the distinguishable nature of the Secretary’s cited individual cases themselves, the Secretary’s argument entirely is grounded on an absolute conflation between the question of whether the burden imposed by a ballot access statute is severe and whether its petition requirements are facially unconstitutional. As this Court recently noted with respect to the question of whether the Secretary’s two chiefly relied-upon cases (*Jenness*, 403 U.S. 431 and *Am. Party of Tex.*, 415 U.S. 767) have since been abrogated by *Anderson*, 460 U.S. 780 and *Burdick v. Takushi*, 504 U.S. 428 (1992): “We understand *Anderson* and *Burdick* to clarify the proper analysis a court should use in evaluating an election-law claim, without

¹¹ Since ‘less exacting review’ would be a higher scrutiny level than the rational basis standard applied by the District Court (*see* Dist. Doc. 72, Order Granting Def.’s Mot Dismiss at *21-22, Pg. ID#’s 1719-20), it is unclear, though doubtful, whether the Secretary is intending to partly concede that the scrutiny tier chosen by the District Court was erroneous.

¹² *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006).

calling into question the Supreme Court's determination that petition-signature requirements of up to 5% are not *necessarily* facially invalid." *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 546 n. 2 (6th Cir. 2014) (emphasis added). As Plaintiff has repeatedly clarified in response to the Secretary's mischaracterizations throughout the proceedings of this case, Plaintiff has not ever contended that the new party petition-signature percentage-requirement prescribed by MICH. COMP. LAWS § 168.685(1), standing alone, is facially unconstitutional.¹³ However, whether Michigan's scheme imposes a severe burden is a wholly separate question. *See* (Cir. Doc. 24, Pl.'s Appellant Br. at 30-36, 38).

Since Plaintiff's principal brief has already thoroughly refuted the notion that the Georgia scheme upheld in *Jenness*, 403 U.S. 431 was more stringent than Michigan's scheme, to which the Secretary has failed to provide any direct response, Plaintiff will not repeat that analysis here. *See* (Cir. Doc. 24, Pl.'s Appellant Br. at 27-28 n. 24, 35 n. 31). Additionally, while *Am. Party of Tex.*, 415 U.S. 767 pre-dates the burden-severity test for determining the application of strict scrutiny, as set forth by *Norman*, 502 U.S. at 288-89 and *Burdick*, 504 U.S. at 434, the *Am. Party* Court not only expressly applied a "compelling state interest"

¹³ In contrast to the signature *percentage* formula, the Supreme Court's *American Party of Tex.* decision does appear to suggest the possibility that the current 31,566 *number* of valid-signatures required might facially exceed the outer boundaries of what the State can constitutionally require. *See* 415 U.S. at 783. However, none of Plaintiff's claims in any way hinge upon that question.

standard, 415 U.S. at 780 & n. 11, but further found that “1% of the vote for governor at the last general election and in this instance 22,000 signatures—falls within the outer boundaries of support the State may require before according political parties ballot position. *Id.* at 783 (i.e. one-third fewer signatures than Michigan’s scheme—with a much larger State population).

The Secretary’s reliance on *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) is equally unavailing. There, in upholding the State of Washington’s requirement that each party candidate obtain 1% of the vote in the State’s ‘blanket primary’ in order to advance to the general election, the Court found that by having “virtually guarantee[d] [all] the parties” access to the blanket-primary ballot, on which each candidate could applicably receive votes from the entire electorate, the State thereby afforded all parties “candidate access to a statewide ballot.” *Id.* at 199. *See, e.g., New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1574 n. 15 (11th Cir. 1991) (distinguishing the unique circumstances of the holding in *Munro*).

As to the court of appeals cases cited by the Secretary (all of which likewise applied *nondiscriminatory* threshold-requirements), neither *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004) nor *Nader 2000 Primary Comm., Inc. v. Bartlett*, 230 F.3d 1353 (4th Cir. 2000) (unpublished) upheld the statutes at issue, contrary to the Secretary’s assertions, but rather merely affirmed orders denying motions for preliminary injunctions. Moreover, *Miller v. Lorain Cnty. Bd. of Elections*, 141

F.3d 252 (6th Cir. 1998) did not even involve any party petition requirement, and the quote that the Secretary cites to it appears nowhere in that decision. And the statutes reviewed in *Swanson v. Worley*, 490 F.3d 894, 897 (11th Cir. 2007)¹⁴ and *Rogers v. Corbett*, 468 F.3d 188, 191 (3d Cir. 2006) both permitted minor parties to qualify individual candidates on the ballot with their party labels.

Notwithstanding the absence of a single new party candidate on any election-ballot in Michigan since the year 2000, the Secretary contends that Michigan's burden is not severe because other parties have qualified for Michigan's ballot. This Court has already flatly rejected such a proposition. *See Blackwell*, 462 F.3d at 592 (“[T]he fact that an election procedure can be met does not mean the burden imposed is not severe.”); *accord, e.g., Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993). Furthermore, in stark contrast to Michigan's scheme, the Ohio scheme struck down in *Blackwell* had had at least two new parties successfully qualify for the ballot per election in three out of the four general elections held directly prior to that case's filing. *See* 462 F.3d at 608 (Griffin, J. dissenting).

IV. DEFENDANT HAS FAILED TO ASSERT ANY COUNTERVAILING INTERESTS IN DEFENSE OF THE BURDENS UNDER CHALLENGE.

¹⁴ *See also Swanson*, 490 F.3d at 907 (observing the “two material ways” that the statutory scheme there, unlike that here, was distinguishable from *Anderson*, 460 U.S. at 795 and 793-94); *id.* at 910 (also observing that scheme's affordance of “unlimited time to gather signatures”).

While continuing to refrain from even attempting to proffer the existence of any State interests behind either the statute's disparity between its voter-support thresholds for 'new' and 'established' parties or the challenged petition-language and restriction of § 168.685(8), it appears that the Secretary has now dropped the prior generally purported defense-interests of 'protecting the integrity of the electoral process' and 'avoiding the clogging of the State's election machinery' as grounds for justifying the State's scheme. Yet despite having thereby discarded the assertion of all but the single alleged interest of avoiding ballot-crowding-induced voter-confusion, for balancing against the challenged burdens, the Secretary makes no attempt to respond to Plaintiff's detailed refutation of that interest's relevance and weight in his Appellant Brief. *See* (Cir. Doc. 24, Pl.'s Appellant Brief at 41-43). *See Ohio State Conference*, 768 F.3d at 545 (noting that "[o]nce a court has determined that a law burdens voters, under *Anderson-Burdick*" the "state must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth.").

Instead the Secretary relies on the disingenuous notion that "[u]nmanageable ballot lengths are particularly problematic under Michigan's consolidated elections regime", which she bases solely on the occurrence of two-page ballots having been used in some local jurisdictions in the 2012 General Election. Contrary to the

Secretary's false attribution of that occurrence to a supposedly "increasing number of offices [being] elected at each election", the use of two-page ballots within portions of six of the State's 83 counties that year was entirely due to the presence of six statewide ballot proposals, combined with large numbers of local ballot proposals in those jurisdictions. By contrast, due to the highly space-efficient and flexible layout of the ballot's candidate-voting section under Michigan's office-block ballot-format,¹⁵ it would take a vastly greater proliferation of candidates than Michigan would ever realistically risk confronting in order for mere candidate-numbers to be an actual contributing factor to a ballot's page-length.¹⁶

¹⁵ See also *Protect Marriage Ill. v. Orr*, 463 F. 3d 604, 608 (7th Cir. 2006) ("[T]he primary purpose of the ballot is to list candidates rather than questions, each of which takes up more space on the ballot than the name[and] party affiliation . . . of a candidate."). It should also be noted that while MICH. COMP. LAWS § 168.685 still refers to a "party column", party candidates are not divided into separate columns under the office-block ballot-format now uniformly used throughout the State.

¹⁶ Since the dawn of government-printed ballots in the 1890s, no State that has required as few as 5,000 signatures for the statewide ballot-qualification of a new political party or independent candidate has ever had more than nine candidates listed on the ballot for a single office—and only twice ever in history have there even been nine. See Richard Winger, *How Many Parties Ought to be on the Ballot?: An Analysis of Nader v. Keith*, 5 ELECTION L.J. 170, 183 (2006); *Green Party of Ark. v. Daniels*, 445 F. Supp. 2d 1056, 1060 (E.D. Ark. 2006); *Green Party of Tenn. v. Hargett*, 953 F. Supp. 816, 830 (M.D. Tenn. 2013), *vacated*, 767 F.3d 533 (6th Cir. 2014). Among all single-winner-elected federal, statewide and state legislative offices on Michigan's ballot in each of the State's last four general elections, the average number of candidates listed per office has ranged from 2.3 to 2.8. (Doc. 44, Am. Compl. ¶ 143 & n. 179, Pg.-ID# 976); Mich. Dep't of State, *2014 Official Michigan General Candidate Listing* (last modified Oct. 14, 2014), http://miboecfr.nictusa.com/election/candlist/14GEN/14GEN_CL.HTM.

V. THE SECRETARY MISCONSTRUED THE RELEVANCE OF THIS COURT'S RECENT DECISION IN *GREEN PARTY OF TENN. v. HARGETT*.

Although the Secretary appears to have surmised there having been a mistaken assumption by Plaintiff as to the *Hargett* district court's holding preceding this Court's recent remand in *Hargett*, 767 F.3d 533, Plaintiff's Appellant Brief's discussion of this Court's remand in that case was not based on any misunderstanding of the fact that district court had ruled for the plaintiffs. Rather Plaintiff noted that this Court's issuance of such a remand for the purpose of having the parties "supplement the existing record with further evidence" (*id.* at 554), inherently makes clear that the *Hargett* plaintiffs had, in this Court's view, at least stated a claim for relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n. 8 (2007). Accordingly, given that the provisions imposed by Tennessee's party ballot access scheme are plainly much less stringent than those imposed by the Michigan scheme challenged here, it surely cannot consistently be found that Plaintiff's Complaint contrastingly fails to state a claim for relief, even when putting aside the instant case's additional implication of equal protection.

The Secretary also fails to recognize that the undetermined factor underlying this Court's remand in *Hargett* was not whether Tennessee's ballot access scheme created an insurmountable obstacle to the ability of any minor party to obtain access, but rather whether it actually injured, rather than merely inconvenienced,

the *plaintiffs'* ability to exercise their fundamental rights. *See Hargett*, 767 F.3d at 545 (“[B]ecause the signature requirement ‘standing alone, is not unconstitutional on its face, we must consider its *actual effects on the plaintiffs specifically*.”); *id.* at 547, 549 (“To answer this question, we evaluate the effects of the signature requirement on the plaintiff political parties [T]he record lacks the factual information we need to determine whether it actually imposes a severe burden on the plaintiffs.”).

PRAYER FOR RELIEF

WHEREFORE, based on the foregoing and the arguments presented in Plaintiff’s principal appellant brief, Plaintiff respectfully prays that this Court reverse the District Court’s Order dismissing Plaintiff’s Amended Complaint and grant any other relief that this Court may deem appropriate.

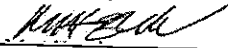
Respectfully submitted,

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December 7, 2014

CERTIFICATE OF SERVICE

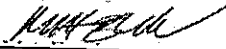
I hereby certify that on December 7, 2014, I served a copy of this corrected appellate brief document on the Defendant-Appellee by placing it in an envelope with proper postage fully prepaid, addressed to the Defendant-Appellee's counsel of record at her last known business address, and depositing that envelope and its contents in the United States mail.

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CERTIFICATE OF COMPLIANCE WITH FED R. APP. P. 32(A)(7)(B)(i)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief is in compliance with Fed. R. App. P. 32(A)(7)(B)(i) in that the number of words of the brief, not including the Table of Contents, Index of Citations, Certificate of Service, and Certificate of Compliance, is 6,938 words, and thus fewer than the 7,000 words permitted by Fed. R. App. P. 32(a)(7)(B)(i).

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