No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATT ERARD,
Petitioner,

v.

RUTH JOHNSON, Secretary of State of Michigan,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State plausibly violates the Constitution by conditioning the opportunity for one political group to associate in the electoral arena upon it showing approximately double the quantum of electorate support required of another political group to exercise the same right for the same election-cycle.

2. Whether the Sixth Circuit erred in finding that Petitioner's challenges to Mich. Comp. Laws § 168.685 fail to state a plausible claim for relief.

PARTIES TO THE PROCEEDING

The parties to this proceeding are those named in the caption. Respondent is sued only in her official capacity as Michigan Secretary of State.

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The Court of Appeals' decision is reproduced in the Appendix at 1a-8a. The Court of Appeals' Order denying rehearing is reproduced in the Appendix at 9a. The District Court's decision dismissing Petitioner's Complaint is available at 2014 WL 1922771 and reproduced in the Appendix at 10a - 35a.[1] The District Court's order denying reconsideration is reproduced in the appendix at 36a - 40a.

JURISDICTION

The Sixth Circuit entered judgment on May 20, 2015 and denied rehearing on August 12, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const amend. XIV, § 1 provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] The District Court's preceding decision on Petitioner's motion for preliminary injunction is reported at 905 F. Supp. 2d 782. However, due to the timing of the irreparable injury at issue in that motion, that decision has not been directly challenged on appeal.

Mich. Comp. Laws § 168.685(1), (6) provide in pertinent part:

> (1) The name of a candidate of a new political party shall not be printed upon the official ballots of an election unless . . . the party files with the secretary of state, not later than 4 p.m. of the one hundred-tenth day before the general November election, . . . petitions bearing the signatures of registered and qualified electors equal to not less than *1% of the total number of votes cast* ***for all candidates*** *for governor at the last election in which a governor was elected*. . . . All signatures on the petitions shall be obtained not more than 180 days immediately before the date of filing.
>
> (6) If the principal candidate of a political party receives a vote equal to less than *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*, that political party shall not have the name of any candidate printed on the ballots at the next ensuing general November election, and a column shall not be provided on the ballots for that party. A disqualified party may again qualify and have the names of its candidates printed in a separate party column on each election ballot in the manner set forth in subsection (1) for the qualification of new parties. *The term "principal candidate" of a political party means the candidate who receives the greatest number of votes of all candidates of that political party for that election.*[2] [3]

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[2] (Emphasis added).

[3] The offices of Governor and Secretary of State are concurrently elected at each quadrennial midterm November

Mich. Comp. Laws § 168.560a correspondingly provides:

> A political party the principal candidate of which received at the last preceding general election a vote equal to or more than *1% of the total number of votes cast* ***for the successful candidate*** *for secretary of state at the last preceding election in which a secretary of state was elected* is qualified to have its name, party vignette, and candidates listed on the next general election ballot.[4]

Mich. Comp. Laws § 168.685(3), (8) provide in pertinent part:

> (3) The petitions shall be in substantially the following form:
>
> PETITION TO FORM NEW POLITICAL PARTY
>
> . . . .
>
> *Warning: A person who knowingly signs petitions to organize more than 1 new state political party*, signs a petition to organize a new state political party more than once, or signs a name other than his or her own is violating the provisions of the Michigan election law.[5]
>
> (8) *A person shall not knowingly sign a petition to organize more than 1 new state political party*,

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election. *See* Mich. Comp. Laws §§ 168.60; 168.76. Thus, the preceding election referred to by § 685(1) is always the same as that referred to by §§ 685(6) and 560a.

[4] (Emphasis added).

[5] Mich. Comp. Laws § 168.685(4) further provides that "the word 'warning' and the language contained in the warning shall be in 12-point boldface type"— in contrast to the 8-point type prescribed for the petition's main text under § 168.544c(1), as incorporated by reference.

> 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.[6] [7]

STATEMENT OF THE CASE

Petitioner brought suit under 42 U.S.C. § 1983 charging that Michigan's statutory scheme governing election ballot access for political parties and their candidates violates the First and Fourteenth Amendments and the Purity of Elections Clause of Mich. Const. art. II, § 4 by unjustifiably infringing, and discriminating against, the fundamental rights of voters seeking to vote for and associate with new political parties.[8] Respondent then moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Upon declining to adopt the magistrate judge's contrary recommendation as to the overall merit of Petitioner's First Amendment challenge, the District Court then granted Respondent's motion and entered judgment dismissing Petitioner's Complaint with prejudice. Petitioner then appealed to the Sixth Circuit, which thereupon affirmed the District Court's judgment.

A. Factual Legal Background

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[6] (Emphasis added).

[7] Violation of Mich. Comp. Laws § 168.685(8) is a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to $500 or both. *See* Mich. Comp. Laws §§ 168.931(2); 168.934; *see also* Mich. Comp. Laws §§ 168.940-41 (setting forth the duty of any prosecutor or peace officer with knowledge of any violation of any provision of the Michigan Election Law act to institute criminal proceedings).

[8] Petitioner's Complaint additionally raised supplemental State law challenges to Respondent's applied construction of Mich. Comp. Laws § 168.685 in relation to the Socialist Party's ballot status recognition and its 2012 ballot-access petition-filing, as well as derivative claims centered on U.S. Const. art. I, § 4 and art. II, § 1.

1. Disequilibration of New Party Support Threshold. Throughout the five decades following Michigan's initial enactment of voter-support threshold requirements for political parties seeking access to the election ballot, Michigan equally calculated both the voter-signature threshold for new parties and the 'principal candidate' vote-threshold for established parties at 1% of the vote cast for the last *successful candidate* for Secretary of State. (Dist. Doc. 44, Am. Compl. at pp. 12-13 ¶ 19 n. 30, pp. 15-16 ¶ 24, Pg.-ID#'s 918-19, 921-22); *see infra* pp. 8-9. Under the subsequent amendment of 1988 Public Act 116, however, the Legislature changed the threshold formula for new parties to 1% of the vote cast for *all candidates* in the last election for Governor, while leaving the same preexisting threshold formula for established parties unchanged. *Id.*

Consequently, as shown in the following chart,[9] displaying the applicable election data for the period since the time of the 1988 amendment's enactment, voters favoring new parties must now demonstrate approximately twice the numerical strength as those favoring established parties in order to exercise the same right to associate in the electoral arena for the same cycle. *Id.* at 16 ¶ 25, Pg.-ID# 922.

Elec. Year	Vote Total for *All Candidates* for Governor	Vote Total for *Successful Candidate* for Secretary of State	Resulting Voter-Support Threshold for New Parties	Resulting Voter-Support Threshold for Established Parties
2014	3,156,531	1,649,047	31,566	16,491
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

[9] The contents and official source citations for this chart are provided in (Dist. Docs. 74, 76-1, Pet'r's Br. Supp. Mot. Recons. at 6 & n. 5, Pg.-ID#'s 1737, 1809); (Cir. Doc. 24, Appellant Br. at 17-18 & n. 14); (Cir. Doc. 26, Appellant Reply Br. at 10 & n. 7). Petitioner's appellant reply brief adds the data and source citation for the 2014 November election, which had not yet been conducted on the filing date of Petitioner's principal appellant brief.

1994	3,089,077	1,416,865	30,891	14,169
1990	2,564,563	1,511,095	25,646	15,111

2. Party-Capacity Limit Eliminated. The purported basis for raising the voter-support threshold requirement for new parties at the time of the 1988 amendment's enactment was the need to deter any future reoccurrence of the "1976 situation," in which the limited party-capacity of the State's mechanical-lever voting machines (as still used by 27 Michigan counties in 1987-88) had been thought to be at risk of being exceeded. *Id.* at 16-17 ¶¶ 26-27 & nn. 36-38, Pg.-ID#'s 922-23. However, in accordance with 52 U.S.C. § 20902, Michigan has since completed a uniform statewide transition to the exclusive use of optical scan ballots and tabulators in all election precincts, which do not similarly entail any party-capacity limit. *Id.* ¶ 28 & n. 39.

3. 2002 Amendment Redefining "Principal Candidate." Fourteen years after the 1988 amendment's disequilibrating threshold-increase for new parties, Michigan's Legislature enacted 2002 Public Act 399, which amended Mich. Comp. Laws § 168.685(6) by changing the definition of an established party's "principal candidate" from "the candidate whose name shall appear nearest the top of the party column" (i.e. the highest-office candidate) to "the candidate who receives the greatest number of votes of all candidates of that political party for that election." *Id.* at 20 ¶ 34, Pg.-ID# 926. Accordingly, the 2002 amendment has since enabled an established party to automatically requalify for the ballot in each election cycle as long as *any one* of its candidates at the last general election (not necessarily the highest-office candidate as before) received at least 1% of the number of votes cast for the last *successful* Secretary of State candidate.

As applied conjointly with Michigan's election of candidates to eight partisan statewide education

board (hereinafter "S.E.B.") seats at every general election, the 2002 amendment has since qualitatively reduced the retention-vote threshold test for established parties to a nullity. Due to both limited voter-concern with the electoral outcome of such S.E.B. races and the opportunity for voters to choose two candidates running in each, voters are exponentially more prone to vote for minor party candidates in such races than in those conducted for other statewide-elected offices. *Id.* at 21-22 ¶¶ 36-37 & nn. 47-48, Pg.-ID#'s 927-28. Consequently, the 2002 amendment has made it effectively impossible for any established party to ever risk failing to satisfy the requalification vote-threshold as long as it nominates at least one S.E.B. candidate every two years. [10] *Id.*

4. 1939 Public Act 262. Upon having previously afforded ballot access to any political party that timely certified its party name and vignette,[11] the Michigan Legislature's 1939 Public Act 262 enactment, which originally established petition-signature and candidate-vote requirements for new and established parties, provided that "the continuance of those parties qualified as of the effective date of this act shall be governed by the percentage of votes cast at the election of November

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[10] Indeed, not only has no party ever received a vote-total falling below the requalification threshold for its *highest-vote-receiving* S.E.B. candidate (i.e. 'principal candidate') in any of the seven general elections held since the 2002 amendment's enactment, but no candidate has ever received a vote total below that threshold in *even a single one* of the races held for *any of the 54* S.E.B. seats elected since that time. (Dist. Doc. 44, Am. Compl. at 21 ¶ 37, Pg.-ID# 927); Mich. Dep't of State, *2014 Official Michigan General Election Results* (last updated Dec. 18, 2014), http://miboecfr.nictusa.com/election/results/14GEN/ (follow hyperlinks for State Board of Education, University of Michigan Regent, Michigan State University Trustee, and Wayne State University Governor).

[11] *See* Comp. Laws Mich. § 3061 (1929) (photocopied at Dist. Doc. 75-2, Pg.-ID# 1761).

8, 1938." Comp. Laws Mich. § 177.4 (1948) (photocopied at Dist. Doc. 75-1, Pg.-ID# 1760).[12]

Accordingly, two of Michigan's established political parties, namely the Democratic and Republican Parties of Michigan, have *never* completed any party qualification petition nor ever been made subject to any minimum voter-support threshold demonstration formula other than 1% of the vote cast for the last *successful candidate* for Secretary of State.[13]

5. Mandatory Petition Language. As a result of Michigan's mandatory petition language concerning the signer's intent to "form" and "organize" the political party named on the petition, Petitioner and other ballot-access petition-circulators for his Party have routinely encountered voters who decline to sign their Party's petitions expressly for fear of adverse personal repercussions from publically registering themselves as politically-radical group-organizers. *Id.* at 50-51 ¶ 99 & n. 122, Pg.-ID#'s 956-57. Moreover, since Michigan has no system of party-registration for voters, those voters signing new party "organizing petitions" are the only segment of

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[12] 1939 Public Act 262 was enacted as an amendment to section 4 of the Michigan Election Law of 1925 Public Act 351, as initially codified under Comp. Laws Mich. § 3061, and later re-numbered as § 177.4. Subsequently, the 1925 Michigan Election Law was concurrently repealed and replaced by the current Michigan Election Law of 1954 Public Act 116 (*see* Mich. Comp. Laws § 168.991), which then accordingly replaced section 177.4 with Mich. Comp. Laws § 168.685.

[13] For Petitioner's District Court discussion of this legislative history in relation to the Democratic and Republican Parties, see (Dist. Doc. 59, Pet'r's Obj. Mag. Judge's Report and Recommendation to Grant in Part and Deny in Part Resp't's Mot. Dismiss at 14, Pg.-ID# 1569); (Dist. Doc. 66, Pet'r's Reply Def.'s Resp. Pet'r's Obj. Mag. Judge's Report and Recommendation at 4, Pg.-ID# 1673); (Dist. Docs. 74, 76-1, Pet'r's Br. Supp. Mot. Recons. at 23, Pg.-ID#'s 1754, 1826); *see also* (Dist. Doc. 44, Am. Compl. at 12-13 ¶ 19 n. 30, Pg.-ID#'s 918-19).

the electorate required to publically declare a party affiliation. *Id.* at 82 ¶ 176, Pg.-ID# 988.

6. Temporally Unlimited Party Commitment. Furthermore, under the literal language of Mich. Comp. Laws § 168.685(8) and corresponding "Warning" statement prescribed by § 168.685(3), a voter is prohibited from signing a new-party petition if that voter has ever before in his or her lifetime signed an organizing petition for any other political party. Thus, both the statutory terms and mandatory warning displayed on the petition present voters with at least the appearance that their choice to sign the petition entails a permanent or indefinitely lasting commitment to the political party listed. *Id.* at 50 ¶ 98 & nn.120-21, Pg.-ID# 956, 82 ¶ 176, Pg.-ID# 988.

7. Michigan and Kansas Schemes Stand Alone. Michigan and Kansas are the only two States in the nation whose election regulations require a new party seeking to qualify for the ballot to exhibit a *greater* quantum of voter-support than that required from an established party seeking to automatically requalify for the ballot for the same election cycle. *Id.* at 23 ¶ 39, Pg.-ID# 929.

8. Michigan and Texas Schemes Stand Alone. Michigan provides no means for a party to qualify for the ballot at the local or district level nor any means to qualify an individual party candidate for a single office. *Id.* at 28 ¶ 50, Pg.-ID# 934, 64 ¶ 128, Pg.-ID# 970. Among the sole two other States which both provide no means other than a statewide party-qualification petition by which a party can field a candidate on the ballot with its label in any electoral race, and require a number of signatures as high as that required under Michigan's scheme; only the State of Texas similarly limits the time window in

which all petition-signatures must be obtained. *Id.* at 65 ¶ 130, Pg.-ID# 971.[14]

9. Michigan, Idaho, and Oklahoma Schemes Stand Alone. Michigan, Idaho, and Oklahoma are the only three States in the nation that have not had a single candidate of any 'new' (i.e. not automatically re-qualified) political party appear on the ballot with his or her party label in any election held within the 21st Century.[15] Ergo, Michigan is among the only three States in which all partisan elections held throughout that ongoing period have been 100 percent "monopolized by the existing parties."[16]

10. Tenuous Connection to Number of Election Candidates. Due to the fact that no Michigan minor party *ever* nominates candidates for more than a small fraction of the number of offices elected in any general election, there is no strongly corresponding relationship between the number of ballot-qualified parties and the number of candidates listed on the election ballot. Among all single-winner-elected State and federal offices on the ballot in each of the State's past four general elections, the average total number of candidates listed per office has ranged from 2.3 to 2.8. *Id.* at 70 ¶ 143 & n. 179, Pg.-ID# 976.[17]

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[14] Oklahoma's party ballot access regulatory statute, as referenced in paragraph 130 of Petitioner's Amended Complaint, has since been amended to reduce that State's signature requirement well below the number required under Michigan's scheme. *See* 2015 Okla. Sess. Law Serv. Ch. 311 (H.B. 2181) (West) (amending 26 Okla. St. Ann. § 1-108(2)).

[15] *See* (Dist. Docs. 74, 76-1, Pet'r's Br. Supp. Mot. Recons. at iii-iv & n. 5, Pg.-ID#'s 1729-30, 1801-02); (Cir. Doc. 7-1, Appellant's Mot. Inj. Pending Appeal at 13-14). This statement does not include Mississippi, which does not require any showing of voter-support for party ballot access.

[16] *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

[17] For the 2014 General Election candidate listing, see Mich. Dep't of State, *2014 Official Michigan General Candidate Listing* (last updated Oct.15, 2015), http://miboecfr.nictusa.com/election/candlist/14GEN/14GEN_CL.HTM.

Accordingly, in the 2012 General Election, Michigan's minor established parties respectively abstained from fielding any candidate within an average of 88% of such election races.[18]

11. Deterrence of Frivolous Candidates. In all of U.S. history since the dawn of government-printed ballots in the 1890's, 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 for a single office—and only twice ever in U.S. history has such a number even reached nine.[19] [20]

B. Sixth Circuit Decision

In affirming the District Court's dismissal of Petitioner's challenge to the statute's voter-support threshold double-standard for new political parties, the Sixth Circuit characterized Petitioner's claim exclusively as an equal protection challenge to the statute's differing treatment between two classes of political parties. Consequently, it wholly disregarded that challenge's central implication of associational rights, political neutrality, and political equality among voters.

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[18] (Cir. Doc. 7-1 Appellant's Mot. Inj. Pending Appeal at 13 & n. 23).

[19] *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. 2d 816, 830 (M.D. Tenn. 2013), *vacated*, 767 F.3d 533 (6th Cir. 2014).

[20] *Cf. Lubin v. Panish*, 415 U.S. 709, 716 (1974) (suggesting that ballot overcrowding arises at the point of listing "a dozen or more aspirants" of general obscurity for a single office); *Williams v. Rhodes*, 393 U.S. 23, 47 (1968) (Harlan, J. concurring) (observing that "the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion.").

While fully ignoring this Court's directly contrary conclusion in *Williams v. Rhodes*, 393 U.S. 23, 24-26 (1968), the Sixth Circuit transposed an entirely context-severed partial-sentence fragment from *Jenness v. Fortson*, 403 U.S. 431 (1971), to conclude that "'it is not inherently more burdensome for a candidate to gather signatures' of an amount equal to 1% of those who voted in the last gubernatorial election than to win 1% of the votes cast for the winner in the last election for secretary of state." (App. at 5a) (brackets omitted) (quoting *id.* at 440).

The Sixth Circuit then declared that "[a]ll new parties seeking ballot access are subject to the same requirements, and parties that seek requalification through § 168.560a must first qualify under § 168.685(1)." *Id.*[21] In doing so, the court thereby relied on two distinct premises. The first is that the statute is not invidiously discriminatory because it applies equally to all members of the adversely targeted class. And the second is that the voter-support showing underlying an established party's requalification still emanates from that exhibited at the time of its presumed satisfaction of § 685(1) decades or generations prior.

The Sixth Circuit thereupon concluded that Petitioner "has not shown that Michigan's ballot-access classifications violate the Equal Protection Clause, so the district court properly dismissed this claim." *Id.* Accordingly, the court expressly cast Petitioner with the pleading-stage burden of establishing such disparate standards' conclusive,

[21] As outlined *supra* pp. 8-9, the court's presumption made in the latter clause of this statement is plainly contrary to fact, as two of Michigan's established parties have never satisfied § 685(1).

rather than merely plausible, constitutional violation. Moreover, in casting Petitioner's claim as a solely facial challenge, the court fully ignored Petitioner's allegations as to the substantive degree to which such disparate treatment imposes "[a] burden that falls unequally on new [] political parties," relative to "existing political parties,"[22] as applied conjointly with both 2002 Public Act 399 and Michigan's biennial S.E.B. races.[23]

As to the additional grounds of Petitioner's constitutional challenge, the Sixth Circuit perfunctorily rejected the notion of any plausibly deterrent impact resulting from the statute's required affiliational petition-language, notwithstanding Petitioner's Complaint's factual averments as to its regularly encountered as-applied effect.[24] Further, the court found that, regardless of whether a reasonable voter would read the statute's temporarily unlimited criminal restriction "to suggest that he may sign only one new-party petition in his lifetime," it is mere "speculation" to assume that criminal sanctions operate as a deterrent. *Id.* at 7a.[25]

Despite Petitioner's Appellant Brief's extensive discussion regarding the impact and legal relevance

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[22] *Anderson*, 460 U.S. at 793-94.

[23] *See* discussion, *supra* pp. 6-7; (Cir. Doc. 24, Appellant Br. at 23-26 & n. 23); (Dist. Doc. 44, Am. Compl. at 21-22 ¶¶ 36-37, Pg.-ID#'s 927-28), *see also id.* at p. 77 ¶ 163, p. 86 ¶ 187, Pg.-ID#'s 983, 992.

[24] *See* (Dist. Doc. 44, Am. Compl. at pp. 50-51 ¶ 99 & n. 122, pp. 81-82 ¶¶ 175-77, p. 87 ¶ 190, Pg.-ID#'s 956-57, 988, 993).

[25] Even beyond the plain error of such reasoning standing alone, the court overlooks the fact that Petitioner and other circulators of his Party's petitions are themselves criminally prohibited from knowingly collecting the signature of any statutorily disqualified signer. *Id.* at 50 ¶ 98 & n. 121, Pg.-ID# 956 (quoting Mich. Comp. Laws § 168.544c(1), as incorporated by § 685(4)); *accord* Mich. Comp. Laws § 168.544c(8)(b), (9), (15).

of both (1) Michigan's complete absence of any alternative means for an unqualified party to field even a single candidate for any level of office, and (2) the statute's narrow 180-day time limit for completing a new party petition,[26] the Sixth Circuit falsely discerned that Petitioner "challenges only the number of signatures required and the mandatory warning language." *Id.* at 6a. Additionally, upon observing that Petitioner "suggests that Michigan's scheme may impose additional restrictions on ballot access" (*id.*), as outlined in great detail in Petitioner's Complaint and appellant brief-cited 'factual summary,'[27] the Sixth Circuit deemed all pleaded allegations concerning other burden-contributing factors, for which Petitioner's appellant brief lacked space for further direct textual discussion, to be abandoned.[28] *Id.*

In drawing upon this Court's observation that important state interests are "'generally sufficient'" to justify State election regulations imposing only "'reasonable, nondiscriminatory restrictions'" on voters' First and Fourteenth Amendment rights,[29] the Sixth Circuit further induced not only that such a challenge elementally relies on the showing of a severe burden, but also that such a burden's status of

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[26] *See* (Cir. Doc. 24, Appellant Br. at p. 20, 27-28 n. 24, pp. 33-35 & nn. 30-31, p. 44).

[27] *See id.* at 4 (Statement of the Case) (citing Cir. Doc. 7-1, Appellant's Mot. Inj. Pending Appeal at 3-14 ('Factual Summary')).

[28] As most recently observed by Justice O'Connor, and similarly noted in prior decisions of this Court, "A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition." *Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J. concurring); *accord Storer*, 415 U.S. at 737; *Williams*, 393 U.S. at 34.

[29] *Burdick v. Takushi*, 504 U.S. 424, 434 (1992) (quoting *Anderson*, 460 U.S. at 788). The text relying on that dictum within both decisions of the courts below is cited to *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) (quoting *Burdick*, *supra*).

being 'severe' hinges on it being found facially "unreasonable" and infirm. *Id.* at 6a. Accordingly, the court concluded that Michigan's new-party petition requirement "is not unreasonable," and therefore not severe, *"in light of* this court's previous holding that requiring a new party to collect the signatures of at least 2.5% of the votes cast in the last gubernatorial election *is not unconstitutional on its face*." *Id.* (emphasis added) (citing *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 824 (6th Cir. 2012)).

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S CONCLUSION ON PETITIONER'S PRINCIPAL CHALLENGE CLAIM IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISIONS AND CRITICALLY IMPORTANT CANONS OF POLITICAL-EQUALITY AND ASSOCIATIONAL-RIGHTS JURISPRUDENCE.

While both this Court and those of multiple circuits have upheld two-tier ballot access schemes which require an established party "to improve its showing of support from the petition process to be accorded automatic ballot access,"[30] never prior to the instant case had any United States court constitutionally upheld a scheme inversely requiring a fledgling new party to attain a larger showing of electorate-support than its established party counterparts for the same election. Nor, for that matter, had any United States court ever before upheld an election statute which, in *any* manner, conditions the opportunity for "one identifiable political group" to "associate in the

[30] *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1222 (4th Cir. 1995). *See Am. Party of Tex. v. White*, 415 U.S. 767, 773-74, 777 (1974); *Jenness*, 403 U.S. at 433; *McLaughlin*, *supra* at 1223 (collecting circuit level cases).

electoral arena"[31] upon having to demonstrate a greater minimum quantum of voter-support than another political group with which it seeks to directly compete.

Since no State scheme, prescribing a party ballot-access petition process, bars disqualified parties from re-obtaining access by such means; any established party failing to satisfy a statutory voter-support threshold for automatic requalification loses only the privilege of bypassing the petition procedure. Thus, two-tiered ballot-access schemes, which contrastingly require a larger voter-support showing for automatic retention than for access via petition, do not engender an unequal "availability of political opportunity," (*Anderson*, 460 U.S. at 793) between the voters aligned with any one political party and those aligned with another.[32]

Conversely, Michigan's content-based debasement to the comparatively assigned weight of *specifically* "those voters whose political preferences lie outside the existing political parties" (*id.* at 794) thereby subjects those voters to "substantially unequal burdens on both the right to vote and the right to

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[31] *Anderson*, 460 U.S. at 793-94.

[32] Moreover, since the underlying purpose of a "signature requirement is [] to predict whether the potential [party] can garner sufficient support to sustain [its] access to the ballot," *Amarasinghe v. Quinn*, 148 F. Supp. 2d 630, 636 (E.D. Va. 2001); *accord McLaughlin*, 65 F.3d at 1222, the function of differing thresholds, under schemes requiring a larger voter-support showing for automatic retention than for petition-based access, is to afford a new party "a chance to prove itself when it otherwise would be kept off the ballot." *Id.* at 1222. Thus, such a two-tiered scheme of that kind serves to foster "an inclusive, not an exclusive policy" (*id.*) in directly opposite contrast to Michigan's scheme.

associate"[33] upon the very basis of their "associational choices protected by the First Amendment." *Id.* at 793-94. Thus, Michigan's scheme undeniably "places a particular burden on an identifiable segment of [] independent-minded voters," (*id.* at 792) by directly denying the equal availability of political opportunity to those favoring new partisan "challenges to the status quo."*Id.* at 794.

Furthermore, Michigan's need to have at least 31,566 voters declare support for placing a new party on the election-ballot is plainly belied by the fact that the State "Legislature has determined that its interest in avoiding overloaded ballots in [] elections is served" by having only 16,491 voters indicate support for placing an established party on the ballot for the same election cycle. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). Thus, by requiring Petitioner's political party to show nearly double the quantum of support that the State itself deems sufficient to warrant access, Michigan's scheme both "unfairly [*and*] *unnecessarily* burdens the availability of political opportunity."*Anderson*, 460 U.S. at 793 (emphasis added).

A. The Sixth Circuit's Conclusion Directly Conflicts with this Court's *Williams* and *Anderson* Decisions.

As this Court set forth in *Anderson*:

> A burden that falls unequally on new or small political parties . . . impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and — of particular importance —

[33] *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

> against those voters whose political preferences lie outside the existing political parties.

460 U.S. at 793-94.[34]

Accordingly, in striking down Ohio's party ballot access scheme in *Williams*, this Court unequivocally declared that, whereas the challenged 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."[35] 393 U.S. at 24-26 (emphasis added).[36] Consequently, the Sixth Circuit's

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[34] Accordingly, in the context of restrictions affecting access to the political process, the constitutional concern with equal opportunity between associational choices derives most centrally from "the primary values protected by the First Amendment" because unequal burdens "limiting the opportunities of independent-minded voters to associate in the electoral arena" consequently "threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 794; *see, e.g., Reform Party v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 316 n. 12 (3d Cir. 1999) (*en banc*) ("Because the Pennsylvania laws discriminate against minor [non-automatically qualified] parties, they are not politically neutral.").

[35] *Compare with Williams*, 393 U.S. at 55 (Stewart, J. dissenting) (declaring his disagreement with the Court majority's conclusion that a legislative choice to require a greater support exhibition "for getting on [than] staying on the ballot" necessarily constitutes an "invidiously discriminatory" classification).

[36] Although the percentage formulas for both new and established parties were much greater than those at issue here, that fact is irrelevant to the *Williams* Court's determination as to whether such a nature of disparity constitutes "a burden that falls unequally on new . . . political parties" relative to "the existing political parties." *Anderson*, 460 U.S. at 793-94. And

unfounded conclusion that "it is not inherently more burdensome" for a new party to gather signatures of approximately twice as many voters as the number from whom an established party must receive candidate-votes (App. at 5a) is in direct contradiction to *Williams*, which makes no caveats in declaring the very opposite.[37]

Under *Williams*, the review level required for this precise form of "unequal burden[] on minority groups" is that of strict scrutiny. 393 U.S. at 31. *See Green Party of N.Y. v. N.Y. State Bd. of Elections*, 389 F.3d 411, 419-20 (2d Cir. 2004) ("The Supreme Court has said that if state law grants '*established parties a decided advantage over any new parties struggling for existence and thus place[s] 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.") (emphasis added) (modification in original) (quoting *Williams*, *supra*). Indeed, as further clarified by the four-Justice concurring opinion in *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974), the settled rule "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 this

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the proportional disparity between Michigan's new and established party thresholds is nearly twice as wide as that applied under the Ohio scheme at issue in *Williams*.

[37] *See also Storer v. Brown*, 415 U.S. 724, 743 (1974) (implicitly equating the "showing of support through a petition requirement" that can 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."); *Jackson v. Ogilvie*, 325 F. Supp. 864, 869 (N.D. Ill. 1971) (three-judge court) (distinguishing the Illinois' challenged scheme from *Williams* because "the party and the independent must receive equivalent electorate support. Thus no substantial benefit is secured to the established parties by legislative action."), *summarily aff'd*, 403 U.S. 925 (1971); *Gelb. v. Bd. of Elections*, 888 F. Supp. 509, 516 (S.D. N.Y. 1995) (Sotomayor, J.).

Court's *Williams* decision. *Id.* at 451 (Powell, J., joined by Burger, C.J., Blackmun, J., and Rehnquist, J., concurring).[38]

Furthermore, even in the event that it could somehow be concluded that *Williams* does not definitively compel a strict scrutiny standard for the support-threshold disparity under challenge, that decision's plain language would still incontestably establish that such a disparity imparts the benefit of "substantially smaller burdens" to the State's established political parties. *Id.* at 24-26. Ergo, because "a burden that falls unequally on new . . . political parties" gives rise, "by its very nature," to a discriminatory infringement of fundamental rights (*Anderson*, 460 U.S. at 793-94), such a disparity must, at the very least, require justification under the *Anderson-Burdick* balancing framework.[39] Thus, the reviewing court must, at a bare minimum, identify and assess the precise interests proffered to justify such disparate and infringing treatment, and weigh the extent to which such uneven burdens are necessary to further those interests. *Id.* at 789.

Accordingly, while Respondent has made abstract reference to generic interests in requiring political parties to demonstrate some measure of support, Respondent has made no attempt to proffer any theory for "how these interests are served by the unequal burden imposed here." *Reform Party v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 315

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[38] The divisional issue between the five-member *Whitcomb* majority-opinion and four-member concurrence was the appropriateness of deciding the facial validity of Indiana's party oath requirement, rather than disagreement about the case law set forth by *Williams*. Indeed, at least two Justices joining the majority opinion held, if anything, a broader general view of matters invoking *Williams*' standard of review than did those joining the concurring opinion. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 201 (1986) (Marshall, J., joined by Brennan, J., dissenting); *Ill. State Bd. of Elections*, 440 U.S. at 184-85 (Marshall, J., for the Court).

[39] *See Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434.

(3d Cir. 1999) (*en banc*). Hence, while it can ordinarily be said that "[t]he results of this evaluation will not be automatic" (*Anderson*, 460 U.S. at 789), the disparate standard challenged here "imposes these unequal burdens on the right to vote and the right to associate without protecting any significant countervailing state interest." *Reform Party*, *supra*.[40] *See Baird v. Davoren*, 346 F. Supp. 515, 520 (D. Mass. 1972) (three-judge court) (declaring that "the court is unable to find any rational basis for the distinction between [established] minor parties and [new] parties" in striking down a ballot access scheme applying a voter-signature threshold for the latter far exceeding the retention vote threshold for the former).

Unlike even the regulation challenged in *Anderson* itself, which only correlatively discriminated against independent Presidential candidates' supporters by subjecting such candidates to a distinctly early filing deadline, Michigan's scheme directly and disparately classifies the weight of *individual voters themselves* upon the basis of their associational preferences. 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 associate for the advancement of political beliefs" and "to cast their votes effectively" (*Williams*, 393 U.S. at 30), Michigan's scheme directly deprives Plaintiff and other such voters of equal opportunity to expressively participate in the political process. And any such infringement of the "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982), is "especially difficult for the

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[40] *See also Bullock v. Carter*, 405 U.S. 134, 145 (1972) (observing, in the context of ballot-access regulations, that "even under conventional standards of review, a State cannot achieve its objectives by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation.")

State to justify" where it "limits political participation by an identifiable political group whose members share a particular viewpoint[and] associational preference.'" *Anderson*, 460 U.S. at 793; *see Rodriguez*, *supra* (recognizing the infringement of that right by statutes which "afford unequal treatment to different classes of voters or political parties.").

Whether assessed from either a strict or flexible scrutiny standard, this Court's decisions plainly establish that Michigan's facially-discriminatory support-threshold disparity supports a soundly plausible constitutional challenge claim. And from the standpoint of burdens on voters, the Sixth Circuit's conclusion that Michigan's electorate-support threshold for new parties is not inherently more burdensome than that applied to established parties (App. at 5a) is not only clearly wrong as a matter of law, but also as a matter of arithmetic.

B. The Equal Protection Challenge at Issue in *Jenness* is Entirely Inapposite.

In declaring that "it is not inherently more burdensome" for new parties to obtain signatures of approximately twice the number of voters from whom a party must receive votes for any election candidate, *id.* (brackets omitted), the Sixth Circuit relied on this Court's observation in *Jenness* that the equal protection claim put forth by the plaintiff-petitioners to that case was "necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary." 403 U.S. at 440.

To say that *Jenness* is distinguishable would be an immense understatement. In rejecting the plaintiffs' contention that Georgia's scheme's violated the equal protection clause by subjecting nonparty

(i.e. political body and independent) general election candidates to petition-signature requirements not required of party primary election candidates, the *Jenness* Court based its conclusion upon the recognition that winning a primary election necessarily entailed obtaining votes from a *much greater* number of voters than the number from whom a nonparty candidate needed to obtain signatures. *See id.* at 440. Thus, unlike both Michigan's scheme and the Ohio scheme struck down in *Williams*, Georgia's scheme did not subject new political groups and candidates from outside the established parties to a disparately larger needed showing of electorate-support.

Accordingly, the Sixth Circuit's decision's approach in relying on *Jenness* is actually more akin to that urged by the plaintiffs to that case than that of the Court. Upon being unable to establish that nonparty candidates were subjected to a greater *quantitative* showing of support, the *Jenness* plaintiffs consequently sought for the Court to simply accept on faith that the signature process is more *qualitatively* burdensome. In refusing to do so, the Court declared that neither of those "two alternative paths . . . can be assumed to be inherently more burdensome than the other." *Id.* at 441. Here, by contrast, despite the actual subjection of new parties to such a *quantitative* support-threshold disparity, the Sixth Circuit's conclusion that such a facial disparity does not inherently give rise to an unequal burden is necessarily bottomed on the premise that the retention-vote path *can be assumed* to be more *qualitatively* burdensome that of the petition procedure. Consequently, in addition to taking the opposite approach of the *Jenness* Court then cited, the Sixth Circuit's implicit presumption of the nature of candidate vote-total-based qualification requirements to be more *qualitatively* burdensome than those measured through voter-signatures results in not a direct conflict with both *Williams*, 393 U.S. at 24-26, and *Munro*, 479 U.S. at 197.

C. The Sixth Circuit's Reliance on Historical Election-Petitions Entails Rejecting the very Premise of Constitutional Protection given to New Political Party Supporters from Unequal Election-Access Burdens.

As its sole other asserted ground for finding no plausibility to Petitioner's challenge to the support-quantum double-standard, the Sixth Circuit reasoned that the State's requirements are equitable because "parties that seek requalification through § 168.560a must first qualify under§ 168.685(1)." (App. at 5a). In putting aside the factual inaccuracy of that assertion (*see supra* pp. 8-9); the very notion of justifying such political advantage for established parties based on credentials shown for an election held decades or generations prior would entirely negate all meaning to the concept of a ballot-access burden that distinctly discriminates "against those voters whose political preferences lie *outside the existing* political parties." *Anderson*, 460 U.S. at 794 (emphasis added).

Correspondingly, once such shift is made from the context of comparing burdens imposed for ballot access within a given election-cycle – to comparing past election credentials from over a party's organized lifespan, – the concept of a "a burden that falls unequally on *new* . . . parties" (*id.* at 793) (emphasis added) similarly loses all meaning— as does the notion that imparting the "established parties [such] a decided advantage over any new parties struggling for existence [] thus place[s] substantially unequal burdens on both the right to vote and the right to associate." *Williams*, 393 U.S. 31. Consequently, such a novel theory not only manifestly serves to "foster[] a system which favors the status quo" over "new political parties," *Anderson v. Mills*, 664 F.2d 600, 609 (6th Cir. 1981), but also appears to envision a legitimate state interest in

keeping established parties insulated from the impact of political senescence.

Furthermore, such a theory is directly in conflict with Respondent's repeated assertion over the proceedings that, "[w]hether by petition performance or election performance, *all* parties must re-establish ballot access status in each November general election." (Dist. Doc. 46, Resp't's Mem. Supp. Mot. Dismiss at 15) (emphasis in original); *see* (Cir. Doc. 25, Appellee Br. at 7). Accordingly, the reviewing court cannot properly supplant the justificatory theories proffered by the State with its own suppositions. *See Edenfield v. Fane*, 507 US 761, 768 (1993); *accord Anderson*, 460 U.S. at 789.

II. THE SIXTH CIRCUIT APPLIED A PROSCRIBED LITMUS TEST IN LIEU OF THE *ANDERSON-BURDICK* FRAMEWORK.

Although Petitioner's principal argument for challenging Michigan's new party signature threshold requirement has at all times been that the "overall quantum of needed support" for ballot access of established parties for the same cycle should applicably be the "criteri[on] in the first instance for judging" whether Michigan's party-access signature threshold is "narrow enough to pass constitutional muster," *see Norman v. Reed*, 502 U.S. 279, 293-94 (1992)), the Sixth Circuit failed to address either that contention or such other challenge factors noted *supra* pp. 16-17.[41]

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[41] Although both *Norman* and *Ill. State Bd. of Elections* involved statutes which required a local political party to satisfy a larger voter-signature threshold than a party qualifying at the State level, the invidious illogic of the nature of disparity at issue in those two cases is much the same as that here. Both such disparate schemes apply a lower support-showing expectation to the larger, more developed parties than to those struggling to get off the ground; thereby frustrating

Accordingly, in concluding that Michigan's signature burden is non-severe "in light of" *Hargett's* holding that a signature threshold of "2.5% of the votes cast in the last gubernatorial election is not unconstitutional on its face" (App. at 5a) (citing 700 F.3d at 824), the Sixth Circuit's decision not only conflated both burden-severity with facial-validity, and the *Anderson-Burdick* balancing test itself with the mere first of its four steps, but patently relied on a litmus test for its conclusion, in direct contradiction to this Court's directives. *See Anderson*, 460 U.S. at 789 ("Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions."); *Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 191 (2008) (Stevens, J., writing for the Court) ("In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.') (quoting *Norman*, 502 U.S. at 288-89). Consequently, the Sixth Circuit's decision not only failed to *apply* the *Anderson-Burdick* standard, but completely contravened it.

Although this Court has not provided clear instructions as to the factors for determining whether a ballot access requirement is severe, the Court has, with the exception of *Jenness*, consistently applied strict scrutiny to ballot access

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overlapping constitutional right to "create and develop new political parties" (*Norman*, 502 U.S. at 288) while correspondingly "working to increase their strength from year to year." *Williams*, 393 U.S. at 32. Hence, under both types of disparate schemes, the State grants "what, in effect, is a significant subsidy only to those parties which have least need therefor." *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D. N.Y. 1970) (three-judge court), *aff'd*, 400 U.S. 806 (1970).

schemes imposing qualification hurdles which result in fully "exclud[ing] a particular group of citizens, or a political party, from participation in the election process." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361 (1997). *See Norman*, 502 U.S. at 288-89, 293-94; *Ill. State Bd. of Elections*, 440 U.S. at 185-87; *Am. Party of Tex.*, 415 U.S. at 780; *Storer*, 415 U.S. at 741; *Bullock*, 405 U.S. at 144; *Williams*, 393 U.S. at 31. Such is exactly the situation under Michigan's scheme, which, due to the 180 day limit on signature collection and total lack of any alternative means of access at any level, renders it impossible for any party to obtain access without the resources to expend a six-figure investment in hired petitioning firms. *See also* (Dist. Doc. 55, Report and Recommendation to Grant in Part and Deny in Part Resp't's Mot. Dismiss at 57, Pg.-ID# 1461) ("Because the foregoing suffices to conclude that [Petitioner] Erard has plausibly shown that Michigan's ballot-access scheme is unconstitutional, the Court does not need to now address whether Michigan's party-wide, statewide method of ballot qualification is narrowly tailored to forward Michigan's interest in avoiding ballot clutter and ensuring viable candidates.").

Furthermore, in construing the 'severe burden' determination to be independently dispositive, the Sixth Circuit's decision entirely neglected to identify or evaluate the "precise interests" proffered by Respondent. Accordingly, the court likewise neglected to consider Petitioner's extensive rebuttals to each of the State's asserted interests, *see* (Cir. Doc. 24, Appellant Br. at 39-43); (Cir. Doc. 26, Appellant Reply Br. at 23-25), as well as the limited degree of direct connection between the number of ballot-qualified parties and number of candidates on the ballot, and the present elimination of the voting-machine limitation which had been the basis for the disequilibrating increase to the State's new-party signature-requirement under 1988 Public Act 116. Hence, given that, "only after weighing all the[] [*Anderson-Burdick* balancing-test] factors is the

reviewing court in a position to decide whether the challenged provision is unconstitutional" (*Anderson*, 460 U.S. at 789), the courts below clearly did not conduct the steps needed to reach that position here.

III. THE SIXTH CIRCUIT'S REJECTION TO THE PLAUSIBILITY OF ANY BURDENS STEMMING FROM THE CHALLENGED PETITION LANGUAGE REQUIREMENTS GIVES RISE TO A DIRECT CONFLICT WITH THE FOURTH CIRCUIT AND SHARP DIVERGENCE FROM THE PREVAILING APPROACH AMONG OTHER COURTS ADDRESSING SIMILAR CLAIMS.

In further affirming the dismissal of Plaintiff's claim that the statute's mandatory petition language concerning the intent to "form" and "organize" a new party invalidly suggests "far more than just a desire to see the Party on the ballot,"[42] the Order simply asserts that the language "does not require a person to commit to organizing the Socialist Party." (App. at 6a). Such a conclusion is directly contrary to the Fourth Circuit's conclusion in *McLaughlin*, in which the court found that the state had "no legitimate interest" in requiring petitions to state that the signers seek to "organize a new political party to participate in the next succeeding general election" and thus that such required language would fail the *Anderson* test if the plaintiffs had proffered any evidence of it hampering their petition efforts in even the slightest degree. 65 F.3d at 1226-27. Here, Petitioner has had no *opportunity* to present any such evidence.

Many other United States courts have reached similar conclusions. *See, e.g.*, *Libertarian Party of S.D. v. Kundert*, 579 F. Supp. 735 (D. S.D. 1984) (striking down a party ballot access statute requiring

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[42] *Libertarian Party of Nev. v. Swackhamer*, 638 F. Supp. 565, 568 (D. Nev. 1986).

petitions to state that the signers "have affiliated one with another for the purpose of *forming the party*.") (emphasis added); *Libertarian Party of Tenn. v. Goins*, 793 F. Supp. 2d 1064, 1082-83, 1085 (M.D. Tenn. 2010); *Libertarian Party of Neb. v. Beermann*, 598 F. Supp. 57, 64 (D. Neb. 1984) (comparing *Kundert*, *supra*); *Swackhamer*, 638 F. Supp. at 568-69; *Workers World Party v. Vigil-Giron,* 693 F. Supp. 989 (D. N.M. 1988).

Key to the view of such decisions is that ballot access requirements may only legitimately measure a voter's support for seeing such a party on the ballot and thus enabling it to officially participate as a voice and choice in the political process. Thus, such petitions may not legitimately compel signers to sign up as party members, organizers, or adherents to its political principals. *See*, *e.g.*, *McLaughlin*, 65 F.3d at 1227 ("Because 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. The number of persons who are sufficiently committed to the party to help organize it is simply not pertinent.").

Similarly, such decisions, and others more broadly, share the recognition, in direct contrast to the Sixth Circuit's opinion here, that it is the deterrent impact of such language, as interpreted by voters, rather than legislative intent that is relevant. *See id.* at 1226 ("Properly understood, a state law that regulates the specific form and content of ballot access petitions is itself a ballot access regulation. The extent to which any prescribed language encourages or deters persons from signing the petition makes it correspondingly easier or harder for the petitioning party to garner the requisite number of signatures to gain ballot access."); *id.* at 1227 ("[W]hat [i]s important [i]s how voters would

interpret the petition language, not what the legislature intended").

Here, in light of widespread concerns over repercussions from enlisting as an organizer of a politically radical group such as Petitioner's Socialist Party, the burdens imposed on Petitioner and his Party by such language are especially drastic. And while the Sixth Circuit's decision dismissed Petitioner's allegations concerning that mandatory petition language's as-applied impact in this context under the notion that the State need not 'handicap' an unpopular' party, this Court has recognized that were such concerns threaten to chill political association with "group[s] espous[ing] dissident beliefs;" such a factor must become part of "the balance of interests." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91-92 (1982); *see Goins*, 793 F. Supp. at 1082-83 (extensively relying on *Brown* in striking down required party petition-language indicating the signer's party membership affiliation).

Accordingly, as concluded by the Magistrate Judge, now sitting as a United States District Judge on the same court, in her report and recommendation for Respondent's motion to dismiss: "[Petitioner] Erard has adequately pled that § 168.685(3) is a substantial hurdle that the Socialist Party must clear to collect the signatures required by § 168.685(1)," whereas "the [Respondent] Secretary has not explained how the mandatory petition language regarding "form[ing]" and "organiz[ing]" a political party, Mich. Comp. Laws § 168.685(3), is narrowly tailored to avoid ballot clutter or voter confusion." (Dist. Doc. 55, Report and

Recommendation to Grant in Part and Deny in Part Rep't's Mot. Dismiss at 48, 56, Pg.-ID#'s 1452, 1460).

CONCLUSION

The errors made below in this case strike at the heart and center of the "constitutional theme of equality among citizens in the exercise of their political rights."[43] In consideration of the fundamental rights at stake, the nature and extent of the legal errors below, the and significance of the issues raised to the open airflow of the political process, the Court should grant this Petition, and concurrently vacate and remand the Sixth Circuit's decision in light of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Williams v. Rhodes*, 393 U.S. 23 (1968).

Respectfully submitted,

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[43] *Moore v. Ogilvie*, 394 U.S. 814, 818-19 (1969).