

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 14-1873

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

MATT ERARD,

Plaintiff-Appellant,

V.

MICHIGAN SECRETARY OF STATE RUTH  
JOHNSON,

Defendant-Appellee.

$$\begin{array}{c} ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \end{array}$$

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

**FILED**  
May 20, 2015  
DEBORAH S. HUNT, Clerk

O R D E R

Before: COLE, Chief Judge; GILMAN and SUTTON, Circuit Judges.

Matt Erard, a Michigan resident proceeding pro se, appeals the district court's order dismissing his civil rights action filed under 42 U.S.C. § 1983, alleging that Michigan's ballot-access requirements impermissibly burden the First and Fourteenth Amendment rights of voters, new political parties, and the Socialist Party. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2014, Erard wanted to run for Congress as a Socialist Party nominee in Michigan’s general election. Erard also wanted to vote for other Socialist Party candidates. In Michigan, there are two ways that a party may appear on the ballot: (1) an existing party may requalify by receiving “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,” Mich. Comp. Laws § 168.560a; or (2) a new party may “file[] with the secretary of state . . . [110] day[s] before the

No. 14-1873

- 2 -

general November election, a . . . petition . . . 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” gubernatorial election, Mich. Comp. Laws § 168.685(1). Thus, a new party wishing to appear on the November 2014 ballot needed to collect 32,261 signatures, while an existing party’s principal candidate would have needed to receive 16,083 qualifying votes in the November 2012 election.

A petition to form a new political party must contain warning language “in substantially the following form:”

#### PETITION TO FORM NEW POLITICAL PARTY

We, the undersigned, duly registered electors of the city, township (strike one) of ..... county of ..... state of Michigan, residing at the places set opposite our names, respectfully request the secretary of state, in accordance with section 685 of the Michigan election law, 1954 PA 116, MCL 168.685, to receive the certificate and vignette accompanying this petition, and place the names of the candidates of the ..... party on the ballot at the ..... election.

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.

Mich. Comp. Laws § 168.685(3).

Because the Socialist Party has not appeared on the Michigan ballot since 1976, the Socialist Party was required to petition. Erard circulated ballot-access petitions, but collected only 926 signatures. Erard then sued Michigan Secretary of State Ruth Johnson, seeking a declaration that Michigan’s ballot-access laws are unconstitutional and an injunction putting him and other Socialist candidates on the next general election ballot. Erard asserted four claims: (1) Michigan’s ballot-access scheme violated the Fourteenth Amendment and the purity-of-election clause of Michigan’s constitution by making new political parties satisfy greater burdens to appear on the ballot than existing parties; (2) Michigan’s scheme violates the First Amendment by placing severe burdens on new parties’ ballot access without a corresponding

No. 14-1873

- 3 -

compelling state interest, by, among other things, deterring people from signing the petition because it must include the mandatory warning language; (3) the Socialist Party was qualified to appear on Michigan's ballot because (a) it was not a disqualified party under Michigan Compiled Law § 168.685(6) and (b) its principal candidate Dwain Reynolds, who ran for the Board of Education on the Green Party ticket in 2012, had received the required number of votes to appear on the 2014 ballot; and (4) the alleged violations of Michigan's ballot-access laws entitle him to relief under the "Federal Elections Clauses."

A magistrate judge recommended dismissing Erard's complaint except for his First Amendment claim. The district court adopted the report and recommendation in part, but concluded that Erard had not stated even a First Amendment violation and thus dismissed Erard's complaint in its entirety.

Erard appealed and moved for a preliminary injunction to have his name and the Socialist Party placed on the November 2014 general election ballot. We denied his motion. Erard now challenges the dismissal of his complaint, arguing (1) that Michigan's ballot-access scheme violates the Equal Protection Clause and the Michigan constitution's purity-of-election clause, Mich. Const. art. II, § 4, by imposing different burdens for gaining ballot access on existing parties and new parties, (2) that the percentage requirement and mandatory language impose severe burdens on new parties without a compelling state interest, and thus Michigan's ballot-access scheme violates the First Amendment, (3) that the Socialist Party is not a disqualified party under § 168.685(6), and (4) that the Secretary of State violated the Equal Protection Clause by refusing to apply to the Socialist Party the 2002 amendments to § 168.685(6), which redefined "principal candidate."

We review a dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. *City of Columbus, Ohio v. Hotels.com, L.P.*, 693 F.3d 642, 648 (6th Cir. 2012). A civil complaint survives a motion to dismiss only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

No. 14-1873

- 4 -

Erard claims that Michigan's ballot-access scheme discriminates against new parties by requiring them to show twice the amount of voter support that existing parties must show to obtain requalification, in violation of the Fourteenth Amendment. Because of the competing interests at stake, we analyze ballot-access claims under the *Anderson/Burdick* framework, which weighs the burden placed on the right of ballot access against the state's regulatory interests. *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012); see *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Estill v. Cool*, 320 F. App'x 309, 310 (6th Cir. 2008) (per curiam). States have a compelling interest in preserving the integrity of the electoral process by regulating the number of candidates on an election ballot so as to alleviate the risks of confusion, deception, and frustration of the democratic process. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193–94 (1986). Thus, “[s]tates have an undoubted right to require candidates to make a preliminary showing of substantial support . . . to qualify for a place on the ballot.” *Id.* at 194 (citation and internal quotation marks omitted).

“[A] state provision [that] distinguishes among groups (such as candidates affiliated with a recognized political party and those not so aligned) is insufficient by itself to establish an equal protection violation. Rather, a claim of unconstitutionality must be grounded in a showing of substantial discrimination.” *Barr v. Galvin*, 626 F.3d 99, 109 (1st Cir. 2010). Indeed, states may create classifications, and it is only those classifications that are invidious, arbitrary, or irrational that offend the Equal Protection Clause. *Id.* (citing *Clements v. Fashing*, 457 U.S. 957, 967 (1982)). Although Michigan's requirements for existing and new parties are different, “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. See Mich. Comp. Laws § 168.560a; *Jenness v. Fortson*, 403 U.S. 431, 440 (1971). All 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). Erard has not shown that Michigan's ballot-access classifications violate the Equal Protection Clause, so the district court properly dismissed this claim. The same reasoning

No. 14-1873

- 5 -

justifies the court's dismissal of Erard's state constitutional claim as well. *See McDonald v. Grand Traverse Cnty. Election Comm'n*, 662 N.W.2d 804, 818 (Mich. Ct. App. 2003).

Erard also argues that Michigan's ballot-access requirements impose a severe burden on the First Amendment rights of voters, new political parties, and the Socialist Party, and thus the ballot-access requirements must be narrowly tailored to serve a compelling state interest. We review this claim under the *Anderson/Burdick* balancing framework. Usually, we do not deem a burden "severe" unless it affects a political party's ability to perform its primary functions such as organizing, recruiting members, and choosing and promoting candidates. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 547 (6th Cir. 2014). But the existence of such effects is not enough to conclude that a burden *is* severe. We must also consider the effects of the regulation on voters, parties, and candidates, *id.*, and "evidence of the real impact the restriction" places on the political process, *id.* By contrast, if the burden is merely a "reasonable, nondiscriminatory restriction[]" on First Amendment rights, then the state's interest in regulating elections is generally sufficient to justify it. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006). Although Erard asserts that Michigan's ballot-access requirements impose an unreasonable burden on new parties, he challenges only the number of signatures required and the mandatory warning language. And although he suggests that Michigan's scheme may impose additional restrictions on ballot access, he fails to develop any argument in support of those conclusions. He has thus abandoned those additional challenges. *See Fed. R. App. P.* 28(a)(8)(A); *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003).

Michigan's requirement that a new party collect signatures equaling 1% of the total votes cast for governor is not unreasonable 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. *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 824 (6th Cir. 2012); *see Jenness*, 403 U.S. at 438-49.

Erard also contends that the mandatory warning language imposes a severe burden and deters people from signing the petition because the language suggests that a person signing the petition (1) must commit to organizing the new party, and (2) may sign only one such petition

No. 14-1873

- 6 -

ever. Neither argument holds water. The first fails because the mandatory petition language does not require a person to commit to organizing the Socialist Party. The second fails because, even assuming that a reasonable person could read the warning language to suggest that he may sign only one new-party petition in his lifetime, *see* Mich. Comp. Laws § 168.685(3), Erard's complaint says nothing about the "real impact" of that specific warning on the political process. It simply reports that some Michigan citizens refused to sign *his* petitions because they were afraid of "state surveillance, blacklisting, harassment, employment repercussions, or other similar ramifications, as a result of their publically documented (and formatively initiatory) association with socialist or politically radical organizing." R. 44 at 51, ¶ 99. Those factual allegations have nothing to do with a desire to sign multiple petitions. And it then speculates that a hypothetical voter might not sign *any* such petitions out of fear of committing a criminal offense "if []he has ever signed a party access petition in the past" or plans to sign one "in the future." *Id.* at 87, ¶ 190. But speculation and facts are not the same—and only well-pleaded facts may defeat a motion to dismiss. *See Iqbal*, 556 U.S. at 678–79.

Erard further contends that, by tying ballot access to public petitions, Michigan burdens unpopular political parties because citizens fear publicly associating with them. But a petition's inherently public nature cannot be attributed to the "petition-language requirements of . . . § 168.685(3)–(4) and corresponding provision of § 168.685(8)" Erard challenges. *See* Appellant's Br. at 45. At any rate, "States are not burdened with a constitutional imperative to . . . 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot." *Munro*, 479 U.S. at 198. What is true for candidates is true for political parties too.

Erard next contends that the Secretary of State violated the Equal Protection Clause by not applying the statutory amendments made to § 168.685(6) to the Socialist Party. That provision states:

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

No. 14-1873

- 7 -

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.

Erard argues that the Socialist Party should not be a disqualified party (i.e., a party that had not re-qualified to appear on the ballot), because Michigan changed the definition of “principal candidate” in 2002 and, under the new definition, the Socialist Party received the required number of votes in 1976 to requalify for the 2014 ballot. Before 2002, a principal candidate was the party’s “candidate whose name appear[ed] nearest the top of the party column.” Mich. Comp. Laws § 168.685(6) (West 1989). In 2002, the definition was relaxed and the principal candidate was defined as a party’s candidate who receives the greatest number of votes of all the candidates of that political party in an election. Mich. Comp. Laws § 168.685(6). To determine whether a party requalifies to appear on the ballot, the principal candidate’s votes in “the last preceding general November election” are reviewed. *See id.*; *see also* Mich. Comp. Laws § 168.560a. Thus, the Socialist Party’s votes in 1976 are not the proper reference point. Erard has not stated a claim that the Socialist Party was improperly deemed a disqualified party.

Erard argues that Reynolds, the Socialist Party’s principal candidate, received the required number of votes in the November 2012 election for the Socialist Party to appear on the 2014 ballot. *See* Mich. Comp. Laws § 168.685(6). But Reynolds ran on the Green Party ticket in 2012, and it is undisputed that no candidates appeared on the Socialist Party ticket in that election. Thus, the district court properly dismissed this claim.

For all these reasons, we affirm the district court’s judgment.

ENTERED BY ORDER OF THE COURT



---

Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt  
Clerk

100 EAST FIFTH STREET, ROOM 540  
POTTER STEWART U.S. COURTHOUSE  
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000  
[www.ca6.uscourts.gov](http://www.ca6.uscourts.gov)

Filed: May 20, 2015

Mr. Matt Erard  
400 Bagley Street  
939  
Detroit, MI 48226

Ms. Ann M. Sherman  
Office of the Attorney General  
of Michigan  
P.O. Box 30736  
Lansing, MI 48909

Re: Case No. 14-1873, *Matt Erard v. Michigan Secretary of State*  
Originating Case No. : 2:12-cv-13627

Dear Sirs,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Robin Baker  
Case Manager  
Direct Dial No. 513-564-7027

cc: Mr. David J. Weaver

Enclosure

Mandate to issue