State of Michigan
In the Supreme Court
Application for Leave to Appeal
from the Court of Appeals
Stephen L. Borrello, Presiding Judge

Socialist Party of Michigan
and **Dwain C. Reynolds III**,
Plaintiffs-Appellants,

v

Michigan Secretary of State
Terri Lynn Land, in her official capacity,
Defendant-Appellee.

Trial Court (Ingham County Circuit Court/
30th Judicial Circuit) Case #: **10-867-CZ**

Court of Appeals Docket #: **299951**

Supreme Court Docket #: _____

Application for Leave to Appeal

(with Notice of Hearing and Proof of Service)

ORAL ARGUMENT REQUESTED

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November 29, 2010

NOTE: THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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Statement of Jurisdiction, Order Appealed From, and Grounds for Appeal

On September 1, 2010, Plaintiffs-Appellants appealed the trial court's order signed August 25, 2010 – which stated, "This is a final order and resolves the last pending claim and closes the case." Therefore, the trial court's order was a final order as defined by MCR 7.202(6)(a)(i), and the Court of Appeals had jurisdiction over that appeal per MCR 7.203(A)(1). The Court of Appeals denied that appeal in an order dated September 3, 2010. Plaintiffs-Appellants filed a timely Motion for Reconsideration per MCR 7.215(I) on September 24, 2010. The Court of Appeals denied the motion in an opinion mailed October 15, 2010. 42 days after that date – November 26, 2010 – was a Court holiday per MCR 8.112(D)(2)(a). Accordingly, this Court's jurisdiction per MCR 7.301(A)(2) and MCR 7.302(C)(2) to hear Plaintiffs-Appellants' appeal of the Court of Appeals order denying their Motion for Reconsideration extends to the filing date of this application – November 29, 2010.

Plaintiffs-Appellants state the following grounds for the appeal, per MCR 7.302(B):

(1) The issue involves a substantial question as to the validity of a set of legislative acts – the various acts forming and amending Michigan's overall scheme of ballot access, most notably 2002 PA 399 and 1988 PA 116 (and their effect on MCL § 168.685).

(2) The issue involves significant public interest, and the case is one against an officer of the state or one of its agencies or subdivisions in the officer's official capacity – namely, the Secretary of State and the agencies and subdivisions under that office.

(3) The decision is clearly erroneous because the Court of Appeals panel ignored both

(a) Plaintiffs-Appellants' claims to equal protection of the fundamental rights of political parties and candidates under US Const, Am I; US Const, Am XIV; and Const 1963, art 1, § 2 (under the test for such claims from *Anderson v Celebrezze*, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983)); and

(b) Plaintiffs-Appellants' claims regarding the challenged statutory scheme's violation (as presently applied by Defendant-Appellee) of the distinct, "although overlapping, . . . right of [Plaintiff-Appellant Reynolds and other] qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v Rhodes*, 393 US 23, 30; 89 S Ct 5; 21 L Ed 2d 24 (1968).

(4) The decision is clearly erroneous because the Court of Appeals panel failed to properly apply the clear facial requirements of MCL §§ 168.532, 168.560a, and 168.685(6) to the question of Plaintiff-Appellant SPMI's ballot status, and erroneously viewed Defendant-Appellee's claim that Plaintiffs-Appellants had failed to comply with the requirements of MCL § 168.685 as having been undisputed by Plaintiffs-Appellants.

(5) The decision conflicts with a Supreme Court decision – *Socialist Workers Party v Secretary of State*, 412 Mich 571; 317 NW2d 1 (1982) (hereafter "*SWP v SOS*"); its standard that any "election procedure [which] affords an unfair advantage to one party or its candidates over a rival party or its candidates" is unconstitutional, *id.* at 598-99; and the related test of the art 2, § 4 constitutionality of a "new" party ballot-qualification procedure under MCL § 168.685 by whether it "imparts a substantial unfair advantage to political parties entitled to automatic general election ballot placement … as distinguished from 'new' political parties", and so is "inconsistent with the goal of 'equality of treatment' of parties and their candidates seeking access to the general election ballot in violation of the 'purity of elections' clause, Const 1963, art 2, § 4." *SWP v SOS*, 412 Mich at 599-600.

Plaintiffs-Appellants stipulate that one item of relief formerly requested – placing Plaintiff-Appellant Socialist Party of Michigan ("SPMI") and its duly nominated candidates on the November 2, 2010 ballot – is no longer possible. However, the case is not moot – because similar harm to Plaintiff-Appellant SPMI (and to candidates it nominates in the future, whether or not they include Plaintiff-Appellant Reynolds) is not only capable of repetition but likely to continue to repeat if the lower courts' rulings are allowed to stand. Thus, Plaintiffs-Appellants ask this Court to recognize the serious and ongoing issues involved in the case, and hear it.

Statement of Questions Involved

1. Does MCL § 168.685 (as presently applied by Defendant-Appellee) violate the "Purity of Elections" Clause of Const 1963, art 2, § 4; the Equal Protection clauses of US Const, Am XIV and Const 1963, art 1, § 2; and US Const, Am I by giving political parties already on the ballot a substantial unfair advantage over any "new" party seeking to challenge such parties?

Court of Appeals: **NO** (did not directly answer the question – or provide any reference to claims presented under Const 1963, art 2, §4 or US Const, Am I)
Plaintiffs-Appellants: **YES**

2. Does MCL § 168.685 (as presently applied by Defendant-Appellee) violate the "Purity of Elections" Clause of Const 1963, art 2, § 4; the Equal Protection clauses of US Const, Am XIV and Const 1963, art 1, § 2; and US Const, Am I by inequitably diluting the weight of votes cast by supporters of Plaintiffs-Appellees' party?

Court of Appeals: **NO** (did not directly answer the question – or provide any reference to claims presented under Const 1963, art 2, §4 or US Const, Am I)
Plaintiffs-Appellants: **YES**

3. Does MCL § 168.685 (facially and/or as presently applied by Defendant-Appellee) violate the "Purity of Elections" Clause of Const 1963, art 2, § 4; the Equal Protection clauses of US Const, Am XIV and Const 1963, art 1, § 2; and US Const, Am I by effectively requiring any "new" political party to raise and spend tens of thousands of dollars to complete a statewide petition drive and qualify to get on the ballot in any partisan election in Michigan?

Court of Appeals: **NO** (did not directly answer the question – or provide any reference to claims presented under Const 1963, art 2, §4 or US Const, Am I)
Plaintiffs-Appellants: **YES**

4. Does MCL § 168.685 (facially and/or as presently applied by Defendant-Appellee) violate the "Purity of Elections" Clause of Const 1963, art 2, § 4; the Equal Protection clauses of US Const, Am XIV and Const 1963, art 1, § 2; and US Const, Am I by requiring a public declaration of party affiliation only from voters signing petitions for "new" political parties – and does this requirement impose a particularly chilling burden on Plaintiffs-Appellants?

Court of Appeals: **NO** (did not directly answer the question – or provide any reference to claims presented under Const 1963, art 2, §4 or US Const, Am I)
Plaintiffs-Appellants: **YES**

5. Are the burdens MCL § 168.685 (as presently applied) imposes on Plaintiffs-Appellees' equal-protection, associational, and voting rights narrowly tailored to the least restrictive means to achieve the statute's purpose, and are the legislative interests underlying its present formulation compelling or legitimate interests of the state capable of justifying those burdens?

Court of Appeals: did not answer the question
Plaintiffs-Appellants: **NO**

6. Does MCL § 168.685 (facially and/or as presently applied) function to excessively "limit the field of candidates from which voters might choose", *Bullock v Carter,* 405 US 134, 143; 92 S Ct 849; 31 L Ed 2d 92 (1972) – and now "operate to freeze the political status quo", *Jenness v Fortson*, 403 US 431, 438; 91 S Ct 1970; 29 L Ed 2d 554 (1971)?

Court of Appeals: did not answer the question
Plaintiffs-Appellants: **YES**

7. Does Defendant-Appellee Secretary of State's application of 2002 PA 399 to restore other parties to the ballot – while refusing to apply it to the similarly situated Plaintiffs-Appellants' party – violate the "purity of elections" clause of Const 1963, art 2, § 4; the equal protection clauses of US Const, Am XIV, and Const 1963, art 1, § 2; and MCL §§ 168.532 and 168.560a?

Court of Appeals: did not answer the question
Plaintiffs-Appellants: **YES**

8. Does the showing of Plaintiff-Appellant Socialist Party of Michigan's principal candidate in the 2008 general election render Plaintiff-Appellant SPMI a ballot-qualified party pursuant to MCL §§ 168.532 and 168.560a, rather than a "disqualified party" per MCL § 168.685(6)?

Court of Appeals: **NO**
Plaintiffs-Appellants: **YES**

9. Does laches apply, by law or under the facts of the case, to invalidate Plaintiffs-Appellants' claims for relief or justify denial of Plaintiffs-Appellants' motion for summary disposition?

Court of Appeals: did not answer the question
Plaintiffs-Appellants: **NO**

Statement of Material Proceedings and Facts

Since 1954 PA 116 took effect, the only general election in which no "new" political party qualified for the Michigan ballot for the rest of the 20th Century was in 1978.[1] And the 1978 "new" party ballot-qualification procedures were held unconstitutional in *Socialist Workers Party v Secretary of State*, 412 Mich 571; 317 NW2d 1 (1982) (hereafter "*SWP v SOS*"). But no "new" party has petitioned its way onto the Michigan general-election ballot since 2000 – and for the first time since 1954 PA 116, all parties that nominated a statewide candidate kept ballot access for four (now five) straight elections.[2]

Before 1988, MCL § 168.685 used the same formula (1% of the most recent winning Secretary of State vote total) to calculate the vote threshold for an already-qualified party to stay on the ballot in the next general election and the number of valid signatures of electors required for a "new" political party to gain ballot qualification by petition. In 1988 PA 116, the Legislature changed the petition-signature formula to 1% of the votes cast for ***all*** candidates for Governor in the last gubernatorial election. For the 2010 general election, MCL § 168.685 required a "new" political party to collect nearly twice as many valid signatures to ***get*** on the ballot (38,013) as any of a returning party's nominated candidates had to get votes for that party to ***stay*** on the ballot (20,899).[3]

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[1] Mich Dep't of State, Bureau of Elections. *Performance of Minor Parties in Michigan General Elections 1900-2008* <http://michigan.gov/ documents/sos/Minor_Party_Chart_4-20091_274669_7.pdf> (accessed June 22, 2010).

[2] *Performance of Minor Parties*, fn 1, *supra*. No Michigan general election since 1976 has had more than seven parties on the ballot; Defendant-Appellee listed only six parties on the 2010 general-election ballot, and currently lists only those same six parties as ballot-qualified for 2012. Mich Dep't of State, Bureau of Elections, *Political Party Status* [for 2012] <http://michigan.gov/documents/sos/Pol_Party_Status_2010_338986_7.pdf> (accessed November 28, 2010); cf *Political Party Status* for 2010 <http://michigan.gov/documents/PoliticalPartyStatus_135123_7.pdf> (accessed June 22, 2010).

In 2010, only three state or federal races for single partisan offices or tickets had as many as six candidates: 1st, 9th, and 12th Congressional District US Representative; each such race averaged slightly over 2.7 candidates or tickets. Mich Dep't of State, Bureau of Elections, "2010 Official Michigan General Candidate Listing" <http://miboecfr.nictusa.com/election/candlist/10GEN/10GEN_CL.HTM> (accessed November 28, 2010). In 2008, partisan single-office/-ticket state or federal races had on average under 2.7 candidates or tickets; only President/Vice President and US Senator had as many as six. Mich Dep't of State, Bureau of Elections, "2008 Official Michigan General Candidate Listing" <http://miboecfr.nictusa.com/election/candlist/08GEN/08GEN_CL.HTM> (accessed June 22, 2010). By contrast, ten candidates were on the 1996 Michigan Republican presidential primary ballot. Richard Winger, *How Many Parties Ought to Be on the Ballot?: An Analysis of* Nader v Keith, 5 Election L J 170, 187 Appendix B (2006).

[3] *Performance of Minor Parties*, fn 1, *supra*. See also *Political Party Status* for 2010 (and 2012), fn 2, supra, each at 1.

2002 PA 399 changed the definition of a party's "principal candidate" in MCL § 168.685 from "the candidate whose name shall appear nearest the top of the party column" (the "top-of-the-ticket" candidate) to "the candidate who receives the greatest number of votes of all candidates of that political party for that election". Thus, if any candidate nominated by a party gets votes in one general election at least equal to 1% of the votes cast for the most recent Secretary of State winner, the party qualifies for the next general-election ballot. Leaders of the then-majority-Republican legislature passed HB 5237 of 2001, which became 2002 PA 399, in exchange for the Libertarian Party of Michigan ("LPM") agreeing not to challenge key Republican Party candidates in the 2002 general election.[4] But Defendant's "Political Party Status" documents misstate this statutory definition, telling voters that the present statutory criterion for the qualification of minor parties in the 2010 and 2012 general elections is "the greatest number of votes received by ***any*** candidate whose name appeared ***in the party's column*** on the [relevant November] general election ballot" (latter emphasis added)[5].

The Natural Law Party of Michigan and the U.S. Taxpayers Party of Michigan were taken off the ballot after their 2000 Presidential candidates failed to get enough votes to pass the old top-of-the-ticket-only ballot-access retention test. After 2002 PA 399 amended MCL § 168.685 and changed the test, the then-Secretary of State ruled them back on the ballot – based on the fact that both parties nominated candidates for other offices in 2000 who met the new standard.

Plaintiff-Appellant Socialist Party of Michigan (hereafter "SPMI") is a state-level political party affiliated with the Socialist Party of the United States of America ("SP-USA"), founded in 1901 and one of the eight United States political parties presently designated with national party status by the Federal Election Commission. Plaintiffs-Appellants' Complaint, ¶ 5. Like SP-USA, SPMI is

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[4] Tim O'Brien, "Public Act 399 and the Michigan Legislation Factory" <http://home.comcast.net/~tobrien321/PublicAct399.htm> (accessed June 22, 2010).

[5] *Political Party Status* for 2010, fn 2, *supra*, at 1; *Political Party Status* for 2012, fn 2, *supra*, at 1.

distinguished by its orientation to providing political representation to voters who have no assets to sell on the market but their own labor power. A wide majority of its members report earning less than $20,000 a year. Plaintiffs-Appellants' Complaint, ¶ 26. Plaintiffs-Appellants argue from this that any requirements to raise and spend substantial funds to get on the ballot are a particular burden for them.[6]

Formerly, MCL § 168.685(3) defined "new political party" as "a party whose principal candidate received a vote equal to less than 1 percent of the total number of votes cast for the successful candidate for the office of Secretary of State at the last preceding election in which a Secretary of State was elected." 2002 PA 399 removed that definition. The Michigan Election Code does not define "new political party" – or even "political party". However, MCL § 168.560a defines the threshold of support by voters in one general election for a political party to qualify for the next general-election ballot:

> 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.[7]

Plaintiff-Appellant SPMI exceeded this ballot-qualification vote threshold in the three general elections prior to the filing of this action. The threshold for the 2004 and 2006 general elections was 17,033 votes; in 2004, SPMI candidate for MSU Board of Trustees Benjamin Burgis received 75,047 votes, and in 2006, SPMI candidate for State Board of Education Jacob Woods got 60,684 votes[8]. In

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[6] The Michigan Third Parties Coalition (MTPC), which Plaintiff-Appellant SPMI founded, has taken the public position that Michigan's high petition-signature threshold makes it "impossible for a new party to nominate any candidates for the ballot without spending tens of thousands of dollars on a statewide ballot access drive." MTPC, Introductory Statement. <http://sites.google.com/site/mserard/michiganthirdpartiescoalition> (accessed June 22, 2010).

[7] The highest-vote-grossing candidate for Plaintiff-Appellant SPMI's predecessor the Human Rights Party ("HRP") in 1976 – the last preceding general election before HRP was disqualified – topped 1% of votes cast for the previous Secretary of State winner. So, Plaintiffs-Appellants argue, HRP also fits the description in MCL § 168.560a, not the one in MCL § 168.685(6) of a "disqualified party".

[8] Mich Dep't of State, Bureau of Elections, *Previous Election Information: November General Election Results by County* <http://michigan.gov/sos/ 0,1607,7-127-1633_8722---,00.html> (links to results for 2002, 2004, 2006, and 2008 general elections) (accessed June 22, 2010).

2008, the threshold was 20,899 votes; that year, SPMI candidate for State Board of Education Dwain C. Reynolds III (Plaintiff-Appellant Reynolds) received 94,663 votes.[9] All three of these candidates also received secondary nominations from the Green Party of Michigan (hereafter "GPMI"), and were listed on the ballot under the GPMI label.[10] However, all three candidates were first nominated by SPMI; ran on SPMI's state platform; campaigned and were identified principally as SPMI candidates in all campaign activity and mainstream news media coverage; and had campaign Websites and literature which also consistently identified them as principally SPMI candidates.

In those same three election cycles after 2002 PA 399 took effect, Plaintiffs-Appellants tried various approaches to fight ongoing facial and as-applied discrimination in ballot-access standards.

In 2004 Plaintiff-Appellant SPMI held a major statewide ballot-petition drive, entirely member- and volunteer-based. However, it fell short due to a lack of financial resources required to support the drive – and the reluctance of otherwise supportive voters to sign the petition given the reported and documented risk of surveillance, harassment, etc. by government agencies (as well as violent private groups) from being publicly and permanently linked to SPMI based on the language state statute (MCL § 168.685) requires to be in party ballot petitions.[11] Plaintiffs-Appellants' Complaint, ¶¶ 52-54.

The failure of SPMI's 2004 petition drive itself discouraged recruiting volunteers and funds for another statewide drive in the 2005-2006 election cycle, which party leaders saw would be futile as long

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[9] *Previous Election Information: November General Election Results by County*, fn 8, *supra*; SPMI, "Another Michigan Is Possible – Vote Socialist!" <http://www.spmichigan.org/page.php?55> (accessed July 21, 2010). See also fn 31, *infra*.

[10] Statewide independent/"No Party Affiliation" candidates must submit at least 30,000 valid signatures, at least 100 from each of eight Congressional districts – just short of a party ballot petition. MCL §§ 168.544f, 168.53, 168.93, 168.590b. Thus, Plaintiffs-Appellants claim, dual nomination is the only practical way to put an SPMI candidate on the ballot statewide.

[11] MCL § 168.685 requires the words "PETITION TO FORM NEW POLITICAL PARTY" and the name of the party in "24-point boldface type" at the top of petition sheets for a "new" party trying to get on the ballot. MCL § 168.685 also requires the petitions to have the following paragraph in 12-point boldface type (unlike the standard 8-point type on the rest of the petition): "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." Plaintiffs-Appellants argue this imposes an unlimited commitment on voters who sign "new" party organizing petitions – and requires them, alone among Michigan voters, to publicly declare a party affiliation.

as even an adequate critical mass of volunteers was not supported by an adequate supply of equally critical cash.[12] SPMI qualified one State House candidate for No Party Affiliation status in 2006[13], but had to rely on another party to nominate its statewide candidates. Plaintiffs-Appellants' Complaint, ¶ 45.

In 2007 SPMI brought together four other smaller parties in the state to found the Michigan Third Parties Coalition (MTPC). Among MTPC's major actions in the 2007-2008 election cycle were a drive to publicize the inequity of ballot-access requirements in the state, and a lobbying campaign to persuade the Legislature to reduce the petition-signature requirements to a maximum of 5,000 for a statewide party or candidate for statewide office. However, Legislative powerbrokers refused even to let MTPC testify on its proposals. Plaintiffs-Appellants' Complaint, ¶¶ 69-70.

After the lobbying approach also failed, SPMI began in mid-2009 researching a possible lawsuit to enforce its rights, drafting a complaint and other pleadings, and looking for legal representation. But SPMI's controversial views and its lack of financial resources led to rejections by a number of firms and lawyers for seven months.

In mid- to late 2009, Plaintiffs-Appellants noticed that Defendant-Appellee had been misrepresenting the text of MCL § 168.685 in its "Political Party Status" documents since 2002 PA 399 was passed and took effect. Plaintiffs-Appellants' Motion for Reconsideration, ¶ 6B. They incorporated this argument into their draft complaint and related documents.

In the latter half of June 2010, current counsel (while trying to help Plaintiffs-Appellants find more experienced counsel) agreed to take on at least part of the case, and managed to rebuild

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[12] Also, though the text of MCL § 168.685 has not been amended since the 2004 petition drive, the number of valid signatures required by the statute as applied to election results had risen by 6,237 as of the filing of this action. *Performance of Minor Parties*, fn 1, *supra*.

[13] Michigan is in a minority of states that do not allow a candidate of a party not on the ballot to list a party designation on the ballot, even after the candidate satisfies petition requirements for the office – at any level – he or she seeks to run for. Richard Winger, "Good bills signed into law in Ohio and Pennsylvania." 18 *Ballot Access News* No 9, January 1, 2003 <http://www.ballot-access.org/2003/0101.html#1> (accessed June 22, 2010) ("A majority of states let candidates who qualify for the November ballot by petition choose a partisan label. . . ."). Plaintiffs-Appellants' Complaint, ¶ 62, fn 37.

Plaintiffs-Appellants' draft complaint, summary-disposition brief, and other documents in time to file the case on July 21, 2010. Plaintiffs-Appellants' Motion for Reconsideration, ¶ 5D.

Plaintiff-Appellant SPMI held a convention on July 24, 2010 and nominated seven candidates. (Transcript of August 18, 2010 Hearing, page 4, lines 11-19.) Nomination paperwork required by MCL § 168.686a was filed with Defendant-Appellant's Bureau of Elections on July 26, 2010. Two of the seven candidates were later also nominated by GPMI at that party's July 31-August 1, 2010 state convention, and paperwork for them filed on August 2: Diana Demers (for University of Michigan Board of Regents) and James Arnoldi (for Wayne State University Board of Governors).[14]

The parties agreed to have Plaintiffs-Appellants' Motion for Preliminary Injunction and/or Temporary Restraining Order heard on August 4, 2010. At that hearing, the trial court discovered that it had read instead Plaintiffs-Appellants' brief in support of their Motion for Summary Disposition (Transcript of August 4, 2010 Hearing, page 5, lines 20-23) – which per MCR 2.116(B)(2) could not be heard until August 18, 2010. This brief was itself the subject of a motion under MCR 2.119(A)(2) for permission to file a brief in excess of 20 pages. At the August 4 hearing, the trial court denied the MCR 2.119(A)(2) motion; ordered Plaintiffs-Appellants to file a 20-page brief on its summary-disposition motion, and serve that brief on Defendant-Appellee, by August 10; Defendant-Appellee

[14] "2010 Official Michigan General Candidate Listing", fn 2, *supra*, shows that Defendant-Appellee recognized only the secondary partisan nomination of candidate Demers for the University of Michigan Board of Regents, filed by GPMI – rather than her initially filed partisan nomination by Plaintiff-Appellant SPMI. This decision explains why the most recent version of Defendant-Appellee's "Political Party Status" document (intended to define party status for the 2012 general election) identifies candidate Demers as the GPMI's principal candidate in the 2010 general election. Fn 2, *supra*, at 2.

However, the number of votes received by both parties' second-highest vote-getting nominees in the 2010 general election also clearly exceeded the 16,083-vote threshold for automatic ballot access in 2012. Candidate Arnoldi, whose initial SPMI nomination for the Wayne State University Board of Governors was certified to Defendant-Appellee's office on July 26, 2010 (concurrently with its nomination of candidate Demers) received 46,757 votes for that office in the 2010 General Election. Likewise, candidate Mary T. Wood, whose nomination by GPMI for the office of State Board of Education was certified to Defendant-Appellee's office on August 2, 2010, received 78,586 votes for that office in the 2010 General Election.

was then to file and serve a response by August 17, and another hearing on the summary-disposition motion would be held on August 18. (Transcript of August 4, 2010 Hearing, page 7, lines 9-13.)[15]

At the August 18 hearing, the trial court framed its conclusion around an argument by Defendant-Appellee sounding in laches – declaring that Plaintiffs-Appellants had "sat on their rights for years" (Transcript of August 18, 2010 Hearing, page 15, line 25) – and characterized the 94,000-plus votes obtained by Plaintiff-Appellant Reynolds as Plaintiff-Appellant SPMI's principal candidate in 2008 as "nothing" (Transcript of August 18, 2010 Hearing, page 16, line 18).

Defendant-Appellee submitted a proposed written version of the trial court's oral order in seven-day form on August 19, 2010. Despite some questions as to its scope, Plaintiffs-Appellants stipulated to the entry of this order on August 25, 2010 to expedite further proceedings. The trial court signed the order, and Plaintiffs-Appellants filed and served their Motion for Reconsideration, that same day.

The trial court did not act on the Motion for Reconsideration at its next Motion Day September 1, 2010. Plaintiffs-Appellants, mindful of Defendant-Appellee's stated plan to finalize the 2010 general-election ballot by September 3, 2010 (Transcript of August 4, 2010 Hearing, page 6, lines 21-22), filed and served their appeal of right, brief, and motions to the Court of Appeals and Defendant-Appellee on September 1, 2010. The Court of Appeals denied the appeal in an order dated September 3, 2010. Plaintiffs-Appellants filed a timely Motion for Reconsideration per MCR 7.215(I) on September 24, 2010. The Court of Appeals denied that motion in an opinion mailed October 15, 2010.

[15] Defendant-Appellee drafted an order after the hearing, but it would have denied instead the Motion for Preliminary Injunction and/or Temporary Restraining Order, which was not decided. Plaintiffs-Appellants objected, and the order was never signed.

General Standards of Review

The order signed by the trial court August 25, 2010 denied summary disposition to Plaintiffs-Appellants and granted it to Defendant-Appellee. The standard of review for that was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999) (internal case citations omitted):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.

Interpretations of US Const, Const 1963, and the Michigan Election Code are questions of law, and reviewed de novo. *Smith*, 460 Mich at 458. Issues of laches are equitable in nature, and thus also reviewed de novo. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583, 582; 458 NW2d 659 (1990). Rules of review for particular issues and arguments are discussed under their headings.

Argument

1. By giving political parties already on the ballot a substantial unfair advantage over any "new" party seeking to challenge such parties, MCL § 168.685 (as presently applied by Defendant-Appellee) violates the "purity of elections" clause of Const 1963, art 2, § 4; the Equal Protection clauses of US Const, Am XIV, and Const 1963, art 1, § 2; and US Const, Am I.

Const 1963, art 1, § 2 and US Const, Am XIV provide assurances of equal protection in general. But the "purity of elections" clause of Const 1963, art 2, § 4 specifically tells the Legislature to enact laws to preserve "'equality of treatment' of parties and their candidates ***seeking access*** to the general election ballot" (emphasis added). *SWP v SOS*, 412 Mich at 599-600.

> Although the "purity of elections" concept has been applied in different factual settings, it unmistakably requires, as plaintiffs correctly argue, fairness and evenhandedness in the election laws of this state. . . .
>
> The instant case does not involve a litigant who alleges unfair treatment on the ballot by the Legislature but rather unfair treatment which has prevented access to the ballot. We take cognizance of this argument as an art 2, § 4, issue for two reasons. First, the phrase, "The legislature shall enact laws to preserve the purity of elections", does not limit the term "elections" to any specific times or actions. Nor would this be expected when the sentence immediately preceding this clause mandates the Legislature to enact laws to regulate the time, place and manner of nominations and elections. Clearly, the Legislature was meant to be given constitutional authority to enact laws governing the entire election process. Just as clearly, the election process includes access or failure to gain access to the ballot. Second, since we have required "equality for all candidates whose names appear upon the ballot", *Wells v Kent Co Bd of Election Comm'rs*, [382 Mich 112; 168 NW2d 222 (1969)], it would be a hollow right if we were to allow unfair restrictions to deny placement on the ballot. The Legislature could then do indirectly what art 2, § 4, forbids it from doing directly.

SWP v SOS, 412 Mich at 598.[16] The "touchstone" for whether an election statute governing political parties violates Const 1963, art 2, § 4 is "whether the election procedure created affords an unfair advantage to one party or its candidates over a rival party or its candidates." *SWP v SOS*, 412 Mich at

[16] See *Coon v Bureau of Elections*, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2002 (Docket No 229884) (included in Appendix H); *Taylor v Currie*, 277 Mich App 85, 96-97; 743 NW2d 571 (2007); *McDonald v Grand Traverse Co Election Comm'n*, 255 Mich App 674, 692-95; 662 NW2d 804 (2003).

598-99. And we assess the art 2, § 4 constitutionality of a "new" party ballot-qualification procedure under MCL § 168.685 by whether it "impart[ed] a substantial unfair advantage to political parties entitled to automatic general election ballot placement … as distinguished from 'new' political parties", and so functioned "inconsistent[ly] with the goal of 'equality of treatment' of parties and their candidates seeking access to the general election ballot in violation of the 'purity of elections' clause, Const 1963, art 2, § 4." *SWP v SOS*, 412 Mich at 599-600.

Defendant-Appellee focuses on the fact that the "substantial unfair advantage" invalidated by the *SWP v SOS* Court came in the form of a "two-tiered" signature-plus-primary-vote ballot-access requirement, and argues that the lack of such a two-tiered format in and of itself means that the statute as currently enacted does not also provide a substantial unfair advantage.[17] But this ignores the US Supreme Court's direct examination of this question only four years after *SWP v SOS*.

In *Munro v Socialist Workers Party*, 479 US 189; 107 S Ct 533; 93 L Ed 2d 499 (1986), the US Supreme Court directly addressed the scale of burdens imposed by Washington's two-tiered primary-vote requirement for "new" parties seeking to qualify for the ballot, substantively paralleling that previously imposed in Michigan by 1976 PA 94, and compared the scale of burdens imposed by Washington State's legislative scheme to the magnitude of burdens alternatively imposed by requiring "new" parties to divert such efforts and resources into obtaining high petition-signature thresholds.[18] "Appellees urge that this case differs substantially from our previous cases because requiring primary

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[17] Defendant-Appellee's Answer to Plaintiffs-Appellants' Brief on Appeal, p 11.

[18] In order for a minor-party candidate to appear on the general election ballot under the Washington state scheme reviewed by the *Munro* Court, such a candidate was required first to submit a certificate signed by at least 100 registered voters who had attended the partisan nominating convention at which such a candidate received his/her party's nomination for the office he or she sought, and then to subsequently obtain at least 1% of the vote for that office in the correspondingly held primary election. *Munro*, 479 US at 191. The Washington procedure reviewed by the *Munro* Court was so closely parallel to the Michigan procedure reviewed by the *SWP v SOS* Court four years earlier that Justices Marshall and Brennan chose to cite this Court's *SWP v SOS* opinion within the text of their dissent in *Munro*. *Id.* at 202 (Marshall, J. and Brennan, J. dissenting). See also Plaintiffs' (Original) Brief on Motion for Summary Disposition, at 26-27.

votes to qualify for a position on the general election ballot is qualitatively more restrictive than requiring signatures on a nominating petition. . . .We are unpersuaded, however, that the differences between the two mechanisms are of constitutional dimension." *Munro*, 479 US at 197.

Recently, the US District Court for the District of Idaho noted that such arbitrarily inequitable ballot-access standards also violate the Equal Protection clause of US Const, Am XIV. In *Daien v Ysursa*, 711 F Supp 2d 1215 (D ID, 2010), the court voided an Idaho statute imposing a significantly higher petition-signature threshold for independent Presidential candidates than for independent candidates for other statewide offices, saying it had no

> rational connection to the protection and reliability of the Idaho election process. It does, however, create an unnecessary and therefore "undue hindrance[ ] to political conversations and the exchange of ideas." *Buckley* [*v American Constitutional Law Foundation, Inc*], 525 U.S. 182, 192 (1999). . . . That is not to say, however, that the Court holds that the total number of signatures required for an independent presidential candidate violates the equal protection clause, but rather that the statute's different treatment of the independent presidential candidate from the independent statewide candidate, on these facts, is constitutionally infirm.

Daien, 711 F Supp 2d at 1238, fn 9. Michigan's equally arbitrary, and increasingly divergent, petition-signature and vote-count support thresholds impose different treatment on whole parties in direct competition – a more invidious equal-protection violation. Cf. *Williams v Rhodes*, 393 US 23, 30; 89 S Ct 5; 21 L Ed 2d 24 (1968). In fact, Michigan statute gives more "substantial unfair advantage to political parties entitled to automatic general election ballot placement", *SWP v SOS*, 412 Mich at 599, today than in 1982.

The Legislature responded to *SWP v SOS* by passing 1988 PA 116, unbalancing the signature and vote thresholds for party ballot qualification and retention respectively. The "principal candidate" vote threshold for a party to retain ballot access was left at 1% of the votes cast for the ***winner*** of the previous election for ***Secretary of State***, but the number of valid signatures required of a "new" party to obtain ballot access by petition was raised to 1% of the votes cast for ***all*** candidates for ***Governor***. As of

the filing of this action, that worked out to nearly twice as many supporters at present – as will be the case after any Secretary of State race where the winner gets a narrow majority of the total vote. In fact, if there is a winner by plurality instead of by absolute majority, the ratio would go above two to one.[19]

2002 PA 399 changed the definition in MCL § 168.685 of "principal candidate" to "the candidate who receives the greatest number of votes of all candidates of that political party for that election." This lets a qualified party re-qualify each election year with any of hundreds of candidates, a dozen or more running statewide – and thus reinforces the "substantial unfair advantage to political parties entitled to automatic general election ballot p

In practical application, no "new" party has qualified for the Michigan ballot by petition since 2002 PA 399 was enacted. By contrast, three "new" parties did so in 1980 – despite the burdens then imposed on "new" parties, struck down in *SWP v SOS*.[20] The ***vote*** threshold for parties already on the ballot to stay there rose by only 2,560 votes (i.e., 14%) between the 1980 general election reviewed by the *SWP v SOS* Court in 1982 and the filing of this action. But the number of valid ***petition*** signatures a "new" party needs to gain ballot access increased by 19,380 in that time (107%), due to 1988 PA 116's unbalancing act. As with Idaho's scheme for independent statewide candidates, "[e]ven allowing for the imperfect fit that sometimes still meets a rational basis test, the disparity of . . . different requirements . . . is simply no fit at all." *Daien*, 711 F Supp 2d at 1238.

Plaintiffs-Appellants note in particular that both the trial court and the Court of Appeals have refused to recognize the equal-protection violations and totally ignored the "purity of elections" claims. They call on this Court to redress that oversight.

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[19] This further expansion of the disparity has happened as a result of the 2010 general election. The number of valid signatures that a "new" party would have to have in order to qualify for the forthcoming 2012 general-election ballot by petition (32,261) now amounts to more than double the number of preceding general-election votes that any one of an automatically returning party's nominated candidates had to get in order for that party to stay on the ballot for the 2012 general election (16,083). See *Political Party Status* for 2012, fn 2, *supra*, at 1.

[20] *Performance of Minor Parties*, fn 1, *supra*; accord *Libertarian Party of Ohio v Blackwell*, 462 F3d 579, 587 (CA 6, 2006).

2. By inequitably diluting the weight of votes cast by Plaintiffs-Appellants' party's supporters, MCL § 168.685 (as presently applied by Defendant-Appellee) violates the "purity of elections" clause of Const 1963, art 2, § 4; the equal protection clauses of US Const, Am XIV, and Const 1963, art 1, § 2; and US Const, Am I.

> Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Bush v Gore, 531 US 98, 104-105; 121 S Ct 525, 148 L Ed 2d 388 (internal citations and quotations omitted). Defendant-Appellee's refusal to measure SPMI's voter support by votes cast for SPMI's principal candidates in the past three general elections has diluted the weight of votes cast for the candidates, and denied those voters "the constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *League of Women Voters of Ohio v Brunner*, 548 F3d 463, 476 (CA 6, 2008) (quoting *Bush*, 531 US at 104).

Defendant-Appellee's application (by inaction) of MCL § 168.685 violates the fundamental "right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams*, 393 US at 30. Denying SPMI an equal chance to gain ballot access from votes cast for its 2008 principal candidate infringes " 'equality of treatment' of ***parties and their candidates seeking access to the general election ballot.***" *SWP v SOS*, at 599-600 (emphasis added).

SPMI's 2004, 2006, and 2008 principal candidates appeared on the ballot with the GPMI label because GPMI secondary nomination was the only practical way to give Michigan voters a choice to vote for SPMI statewide candidates.[21] But educating voters on the dual affiliation took scarce time and effort. "[T]he identification of candidates with particular parties plays a role in the process by which voters inform

[21] See fn 9, *supra*. Without this option, voting in these elections would have been "a Hobson's choice" for SPMI supporters, precluding true "expression of [their] political preference[s]". *SWP v SOS*, 412 Mich at 588. Accord *Reynolds v Sims*, 377 US 533, 555; 84 S Ct 1362; 12 L Ed 2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society").

themselves for the exercise of the franchise." *Tashjian, Secretary of State of Conn v Republican Party of Conn*, 479 US 208, 220; 107 S Ct 544; 93 L Ed 2d 514 (1986). Given the role party labels play, one party's candidate should not need to adopt another party's ballot label to get votes.[22] And per Const 1963, art 2, § 4, "[i]t has been the legislature's constant purpose to insist upon full and complete identification of candidates for public office in order to provide the electorate with the information necessary to cast their ballots effectively for the candidates of their choice." *Sullivan v Hare*, 373 Mich 627, 630-31; 130 NW2d 392 (1964).

Recently, the US District Court for the Eastern District of Michigan rejected Defendant-Appellee's faulty argument that a statute barring Michigan's minor parties from accessing the records of Michigan primary-election voters' party ballot selections was not unconstitutional because Michigan's major and minor parties were not similarly situated:

> [This] approach to the Equal Protection Clause would strip the clause of all meaning. Any statute could avoid running afoul of the clause simply by creating an arbitrary classification to divide those whom the statute intends to protect from those it does not. This would strike at the very heart of the clause, the basic concern of which is "with state legislation whose purpose or effect is to create discrete and objectively identifiable classes."

Green Party of Mich v Land, 541 F Supp 2d 912, 916 (ED Mich, 2008) (quoting *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 60; 93 S Ct 1278; 36 L Ed 2d 16 (1973)). This case challenges Defendant-Appellee's faulty claim that past exclusion of Plaintiff-Appellant SPMI from ballot status nullifies any qualifying election result SPMI achieves anyway. In both cases, a state creates classifications that burden "new" parties' rights, pinning voters between "a favored group [which] has full voting strength … (and) (t)he groups not in favor … [who] have their votes discounted." *Reynolds v Sims*, 377 US at 555, fn 29 (1964) (ellipses and parentheses in original) (quoting *South v Peters*, 339 US 276, 279; 70 S Ct 641 94 L Ed 834 (1950) (Douglas, J. dissenting)).

[22] Cf. *McLaughlin v NC Bd of Elections*, 65 F3d 1215, 1225 (CA 4, 1995) ("A candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process").

2002 PA 399 removed the words in MCL § 168.685's definition of "principal candidate" that limited its application to parties with a column on the ballot. Defendant-Appellee's "Political Party Status" documents for 2010 and 2012 ignore this, and erroneously conflate the present wording of MCL § 168.685(6) with the text before enactment of 2002 PA 399, telling voters that the present statutory criterion for the qualification of minor parties in the 2010 and 2012 general elections is "the greatest number of votes received by ***any*** candidate whose name appeared ***in the party's column*** on the [respective November] general election ballot" (emphasis added).[23]

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Taylor*, 277 Mich App at 94 (citation omitted). However, courts

> may not speculate regarding the intent of the Legislature beyond the words expressed in the statute. . . . "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). The omission of a provision should be construed as intentional. "It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248, 505 NW2d 519 (1993).

GMAC LLC v Dep't of Treasury, 286 Mich App 365, 372; 781 NW2d 310 (2009) (some internal citations omitted). "[S]tatutes must be so construed as to render them constitutional, if such construction is reasonably possible". *Albert v Gibson*, 141 Mich 698, 703; 105 NW 19 (1905). "The presumption of constitutionality may justify a narrow construction or even construction against the natural interpretation of the statutory language." *People v Lueth*, 253 Mich App 670, 675; 660 NW2d 322 (2002). This Court must not let Defendant-Appellee continue to interpret and apply MCL § 168.685 so as to dilute the equitable voting weight of Plaintiffs-Appellants' party's supporters in violation of US Const, Am XIV and Const 1963, art 1, § 2 – and Const 1963, art 2, § 4.

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[23] *Political Party Status* for 2010 and 2012, fn 2, *supra*, each at 1.

3. By effectively requiring any "new" political party to raise and spend tens of thousands of dollars to qualify to nominate candidates for the ballot in any partisan election in Michigan, MCL § 168.685 (as presently applied by Defendant-Appellee) violates the "purity of elections" clause of Const 1963, art 2, § 4; the equal protection clauses of US Const, Am XIV, and Const 1963, art 1, § 2; and US Const, Am I.

> 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.

Anderson v Celebrezze, 460 US 780, 793-794; 103 S Ct 1564; 75 L Ed 2d 547 (1983). One unequal burden under Michigan's statute is the need for money to qualify for the ballot. "In determining the magnitude of the burden imposed by a State's election laws, the Supreme Court has looked to the associational rights at issue, including . . . evidence of the ***real impact*** the restriction has on the process. . . ." *Libertarian Party of Ohio v Blackwell*, 462 F3d at 587 (emphasis added). And "[t]he Constitution requires that access to the electorate be real, not 'merely theoretical.' " *American Party of Tex v White*, 415 US 767, 783; 94 S Ct 1296; 39 L Ed 2d 744 (1974).

> Cases invalidating governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office rest on the conclusion that wealth "is not germane to one's ability to participate intelligently in the electoral process," and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote.

Buckley v Valeo, 424 US 1, 41 fn 55; 96 S Ct 612; 46 L Ed 2d 659 (1976) (internal citations omitted).

The right of equal standing in electoral participation is more fundamental than the right to vote itself. *San Antonio Independent School Dist*, 411 US at 35, n 74 (citing *Dunn v Blumstein*, 405 US 330, 92 S Ct 995, 31 L Ed 2d 274 (1972)). And this applies specifically to ballot-access restrictions:

> [O]ur tradition has been one of hospitality toward all candidates without regard to their economic status. The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants. . . . Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.

Lubin v Panish, 415 US 709, 718; 94 S Ct 1315; 39 L Ed 2d 702 (1974) (internal citation omitted).

The citations above deal with states directly imposing fees on or restricting wealth of voters or candidates. However, "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes ***the affluence of the voter*** or payment of any fee an electoral standard." *Harper v Va Bd of Elections*, 383 US 663, 666; 86 S Ct 1079, 16 L Ed 2d 169 (1966) (emphasis added).

Many aspects of Michigan's ballot-access scheme make wealth a precondition for a "new" party to participate in elections. The only path to qualification (at least the only path recognized by Defendant-Appellee) is a prohibitively expensive statewide petition. The state bars "new" parties from qualifying at the local level, participating in primaries, or even qualifying a candidate to run for election with its party label in any single race. Contrast *Burdick v Takushi*, 504 US 428, 434-437; 112 S Ct 2059; 119 L Ed 2d 245 (1992); *Munro v Socialist Workers Party*, 479 US 189, 189-190; 107 S Ct 533; 93 L Ed 2d 499 (1986); *Jenness v Fortson*, 403 US 431, 438-441; 91 S Ct 1970; 29 L Ed 2d 554 (1971).

> It is especially difficult for the State to justify a restriction that limits political participation by an ***identifiable political group whose members share a particular viewpoint,*** associational preference, ***or economic status***. "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as ***a mechanism to exclude certain classes of candidates from the electoral process*** [– to which a] restriction unfairly or unnecessarily burdens the 'availability of political opportunity.' "

Anderson v Celebrezze, 460 US at 793 (emphasis added; citations omitted).[24] The US Supreme Court has rejected indirect wealth restrictions on candidates similarly situated to SPMI and its candidates:

> Unlike a filing-fee requirement that most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. ***Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded*** from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. . . . Not

[24] Cf. *Clements v Fashing*, 457 US 957, 964, 965; 102 S Ct 2836; 73 L Ed 2d 508 (1982) (plurality opinion). "[One of two] essentially separate, although similar, lines of ballot access cases . . . involves classifications based on wealth. In invalidating candidate filing-fee provisions, for example, ***we have departed from traditional equal protection analysis because such a 'system falls with unequal weight on voters, as well as candidates, according to their economic status.'*** . . . Economic status is not a measure of a prospective candidate's qualifications to hold elective office, and a filing fee alone is an inadequate test of whether a candidacy is serious or spurious. . . ." (Emphasis added; internal citations omitted.)

> only are voters substantially limited in their choice of candidates, but also there is the obvious ***likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system.*** To the extent that the system requires candidates to rely on contributions from voters . . . , it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor. . . . ***we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.***

Bullock, 405 US at 143-144 (emphasis added).[25] Similarly, the size of the financial investment required to complete a statewide ballot petition per MCL § 168.685 falls more heavily on candidates and voters aligned with Plaintiffs-Appellants' party SPMI because of their economic status – it has a greater "real impact" on the process for Plaintiffs-Appellants. *Libertarian Party of Ohio v Blackwell*, 462 F3d at 587.

The Michigan Court of Appeals has held that a provision of MCL § 168.558(1) requiring candidates to file a campaign-finance compliance affidavit before being put on the ballot did not "impart [] a substantial unfair advantage to [***specific***] political parties". *Coon*, unpublished per curiam opinion, *supra*, at *4 (quoting *SWP v SOS*, 412 Mich at 599) (emphasis added; brackets in quote in original). But MCL § 168.685 ***does*** impart a substantial unfair advantage specifically to parties with substantial financial backing over those whose orientation is to constituencies who cannot provide that kind of support.[26] This Court must recognize that wealth-based discriminatory as-applied impact, and strike it down as a violation of equal protection and of the "purity of elections" clause of Const 1963, art 2, § 4.

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[25] Cf. *McConnell v FEC*, 540 US 93, 159; 124 S Ct 619; 157 L Ed 2d 491 (2003) ("A nascent or struggling minor party can bring an as-applied challenge if [a statute] prevents it from amassing the resources necessary to engage in effective advocacy").

[26] The only filing of a petition to put a party on the ballot since 2002 PA 399 passed was that of The Tea Party on July 14, 2010. Whether this was an attempt to form a legitimate new party associated with the nationwide Tea Party movement, branching primarily off from one of the state's two major political parties; or a political ploy to divide that party's constituency, funded by the other major party (or some of its supporters), the facts behind this petition drive – and its cost, estimated by an experienced political consultant at over $120,000 – serves only to confirm Plaintiffs-Appellants' arguments that the petition path to ballot qualification in Michigan discriminates against smaller, less well-funded parties in general and Plaintiffs-Appellants' party in particular. See Dawson Bell, "Tea Party on the ballot? Some say it's a trick", Detroit *Free Press*, July 15, 2010 (p 1A of print edition; accessed July 16, 2100 at <http://www.freep.com/article/20100715/NEWS06/7150463>).

4. By requiring a public declaration of party affiliation only from voters signing petitions for "new" political parties, MCL § 168.685 (as presently applied by Defendant-Appellee) violates the "purity of elections" clause of Const 1963, art 2, § 4; the equal protection clauses of US Const, Am XIV, and Const 1963, art 1, § 2; and US Const, Am I – and places a particularly severe burden on Plaintiffs-Appellants.

Michigan conducts open primaries and lacks any process of voter registration by party, so no Michigan voter needs to associate with a political party in any manner, much less go on the public record as an official "organize[r]" of any particular political party exclusively and indefinitely – except signers of party ballot-access petitions. MCL § 168.685 requires any "new" political party's ballot-qualification petition sheets to include the terms "FORM [a] NEW POLITICAL PARTY" and "organize a new state political party" – and language binding signers to an exclusive, explicit, and public declaration of association with the petitioning party, with no reference to an expiration time or a way to withdrawing from that association in the future. Thus, a "new" party's prospective petition signers are presented with the indication that a decision to sign such a petition entails a commitment that extends well beyond their mere support for placing the petitioning party on the ballot. But, as the US Court of Appeals for the Fourth Circuit has pointed out:

> ***[T]he state can have no legitimate interest in requiring signers to commit to being party organizers . . .*** [T]he 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.

McLaughlin, 65 F3d at 1226-27 (internal citations omitted) (emphasis added).

The US Court of Appeals for the Fourth Circuit has recognized the discriminatory impact of such selectively imposed party-disclosure requirements on "new" parties trying to qualify for a state ballot by petition, holding that

> the power of the states to determine the manner of holding elections is limited by the Equal Protection Clause of the Fourteenth Amendment. Since it is very clear that West Virginia is discriminating between those of its citizens who vote in primary elections to

> choose candidates for major parties, and those who choose to exercise their primary franchise through nominating certificates, the injuries to the appellants must be weighed against the justification offered by the state under the *Anderson v Celebrezze* balancing test. It is obvious that compelling disclosure of a person's intention to vote can have a substantial effect on the ability of small political groups to compete on the electoral battleground. . . . [S]ome individuals who have made up their minds, and who would ordinarily have no objection to stating their preferences, might be put off by the possible reaction to associating themselves with the more unpopular political groups.

Socialist Workers Party v Hechler, 890 F2d 1303, 1309-10 (CA 4, 1989). And Defendant-Appellee itself recently argued that the state's interest in public access to party-preference information is oriented toward the protection of voter privacy:

> The importance of voter confidentiality is well documented in Michigan's history. In 1988 newly passed Public Act 275 provided that for the purpose of voting in the presidential preference primary, a voter would have to declare a political party preference on their registration record at least 30 days before the primary. Responding to public concern over privacy concerns, [sic] the Legislature in 1994 repealed that portion and paid local clerks to expunge this information. In 1995, the Legislature enacted Public Act 87, which eliminated the provision of law requiring the declaration of party preference in order to be eligible to vote in the presidential preference primary. [2007] PA 52 assures Michigan voters that if they declare the party ballot they want, the information will not be made available to the general public and will be made available to participating political part[ies] only with certain restrictions.

Green Party of Mich v Land, 541 F Supp 2d 912 (ED Mich, 2008) (Docket No 10149), Defendant's Response to Plaintiff's Motion for Summary Judgment at 13, fn 51. Defendant-Appellee's explicit identification of "privacy concerns" over voters' declarations of major-party preferences, and expressed desire to protect that information from becoming "available to the general public" under 2007 PA 52, is in sharp contrast with Defendant-Appellee's lack of concern over the requirement that publicly available party-preference declarations be made by "new" party petition signers. Juxtaposing these two views suggests Defendant-Appellee views only voter preferences for one of the major parties to have substantive weight on the scale of state interests.

In past ballot-access petition efforts, Plaintiffs-Appellants' party's volunteer petition circulators frequently encountered otherwise supportive voters who said they would cast ballots for Plaintiff-

Appellant SPMI's candidates within the privacy of the voting booth, but cited fear of state surveillance or other harmful personal consequences of publicly associating with a notably radical political party as their sole reason for declining to sign petitions to "form" and "organize" Plaintiffs-Appellants' 109-year-old but allegedly "new" political party. Plaintiffs-Appellants are inequitably burdened by the exclusive path of demonstrating support through voters willing to relinquish their right to anonymity in asserting their party preferences through the franchise – and doubly and distinctly burdened by the chilling effect of fears of repression, harassment, or similar dangers among voters considering whether to sign Plaintiffs-Appellants' petition. And given the scale and scope of government surveillance of domestic political organizations and individuals similarly politically situated to Plaintiffs-Appellants in recent years, and reports that Socialists at all levels have been targeted for surveillance by both the US Defense Department and extremist hate groups (Complaint, ¶¶ 55-58), apprehension about publicly registering one's association with Plaintiffs-Appellants' party is understandable. So is the effect of this perceived threat (largely at government's hands), combined with the harsh binding warning language required on the petitions, on the pool of petition signers effectively available. Compare *Storer v Brown*, 415 US 724, 742; 94 S Ct 1274; 39 L Ed 2d 714 (1974).

This Court should recognize the potential for such a chilling effect to emerge toward the ballot-access efforts of particular "new" political parties, as the US Court of Appeals for the Sixth Circuit did in striking down the declaration required on Kentucky's independent-candidate qualifying petitions in *Anderson v Mills*, 664 F2d 600, 609 (CA 6, 1981):

> The chilling effect that such a practice has on associational and voting rights is obvious. The voting citizen must decide whether to sign the petition, having his political preference clearly and unmistakably disclosed, or to refrain from signing. A potential subscriber, who is uncertain about whom he will support in the general election, but with an interest in the candidate, will be unable to sign the petition because of the requisite declaration. [The candidate] is unable to espouse his views because the declaration greatly curtails his ability to appear on the ballot and become widely known. . . . [T]his requirement fosters a system which favors the status quo, while discouraging independent candidates and new political parties.

5. The burdens MCL § 168.685 (as presently applied) imposes on Plaintiffs-Appellees' equal-protection, associational, and voting rights are not narrowly tailored to the least restrictive means to achieve the statute's purpose, and the legislative interests underlying its present formulation are not compelling or legitimate interests of the state capable of justifying those burdens.

"The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. 'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' " *Tashjian*, 479 US at 215 (internal citations omitted). But "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot, and thus denied an equal opportunity to win votes." *American Party*, 415 US at 781.

> The right [to create and develop new political parties] advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.

Norman v Reed, 502 US 279, 288-289; 112 S Ct 698; 116 L Ed 2d 711 (1992) (internal citations omitted).[27] Courts must look at whether "the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights." *Williams*, 393 US at 34.

The *Anderson v Celebrezze* Court noted that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.*, 460 US at 789. But it went on to establish that, before deciding whether [a] challenged provision is unconstitutional, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

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[27] Cf. *Ill State Bd of Elections v Socialist Workers Party*, 440 US 173, 184; 99 S Ct 983, 59 L Ed 2d 230 (1979) ("When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest").

Id. The injury to Plaintiffs-Appellants' Constitutional rights is crippling: total denial of access to the ballot, implicating multiple fundamental rights and the fundamental purpose of Plaintiff-Appellant SPMI's existence. Defendant-Appellee has refused to identify the precise interests it claims justify the burdens imposed, or how those interests make it necessary to burden Plaintiffs-Appellants' rights. Therefore, in this case, the balance of interests in the test established by *Anderson v Celebrezze* (and followed up by *Burdick*) is in favor of Plaintiffs-Appellants.

In its attempt to justify its restrictions, Defendant-Appellee offers nothing specific – only the generic interests in "[p]revention of the clogging of a state's election machinery and avoidance of voter confusion", *Bullock*, 405 US at 145 (quoted in *SWP v SOS*, 412 Mich at 591). But the *SWP v SOS* Court is clear that such a claim is not enough:

> Even if, as defendant argues, [the legislative scheme] is justifiable by reference to the *Bullock* state interests, we are required to inquire further. We must determine whether the [challenged] requirement for "new" political parties is necessary to further the claimed interests and, thus, does not unnecessarily restrict plaintiffs' constitutionally protected liberty. We must also determine whether the Legislature adopted the least drastic means to achieve its objective, thereby avoiding unreasonable burdens on plaintiffs.

Id.

In further attempts to justify its restrictions on Plaintiffs-Appellants' rights, Defendant-Appellee also mischaracterizes a number of other ballot-access cases. It quotes only the first clause of a standard set in *Storer v Brown*, 415 US at 742:

> ***[I]n the context of [state] politics,*** could a reasonably diligent [party] be expected to satisfy the signature requirements, ***or will it be only rarely that the [party] will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent [parties] have qualified with some regularity, and quite a different matter if they have not.***

(Emphasis added to the portions not quoted by Defendant-Appellee.) The frozen status quo in Michigan since 2002 PA 399 is evidence that the petition path to the ballot is not functioning.

Defendant-Appellee likewise mentions the 5% petition threshold for ballot access in *Jenness*, *supra*, and claims that justifies the restrictions it applies here. But the Georgia scheme reviewed in *Jenness* let a "political body" qualify an individual candidate for the ballot, associate that candidate with a party name (though the party itself was not yet on the ballot), and gain party access through the candidate's election showing. In fact, this alternative party path to the ballot is quite similar to the path found by Plaintiffs-Appellants to have opened up when the definition of "principal candidate" in MCL § 168.685 was amended by 2002 PA 399. By contrast, Michigan's ballot-access scheme bars any party not recognized as ballot-qualified from having ***candidates*** on the ballot under their party label – for any partisan office, state or local. And, unlike in Michigan, Georgia's system also avoided imposition of any limiting restrictions on signers of a political body's petitions, whether to qualify one of its partisan candidates or to fully qualify itself as a statewide party. *Jenness*, 403 US at 438-41.

Defendant-Appellee similarly contorts the US Supreme Court's opinion in *Timmons v Twin Cities Area New Party*, 520 US 351; 117 S Ct 1364; 137 L Ed 2d 589 (1997), claiming that it shows "SMPI [sic] 'retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and Party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate'." *Id.*, 520 US at 363 (cited in Defendant-Appellee's Brief on Appeal, at 15). But this out-of-context quote concerns – not the (significantly limited) ability of a non-qualified party's candidates to seek a different party's nomination for the ballot – but only the challenge brought to Minnesota's ban on party fusion by the ballot-qualified "New Party" of Minnesota. In the paragraph right after Defendant-Appellee's excerpted quote, the *Timmons* Court explicitly notes:

> The laws [challenged] do not directly limit the party's access to the ballot. . . . Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party.

Id. at 363.[28]

Where the US Supreme Court has addressed this type of question, it has instead noted that

> [T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a state-wide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office.

Storer v Brown, 415 US 724, 745; 94 S Ct 1274; 39 L Ed 2d 714 (1974). This Court has agreed:

> A political party denied access to the ballot is not an effective device for advancing the ideas or political aspirations of its adherents. As a result, access restrictions operate to deter membership and participation in the excluded political association. Voters, faced with statutorily limited ballot choices, may find exercise of the right to vote a Hobson's choice and not an expression of political preference, the bedrock of self-governance.

SWP v SOS, 412 Mich at 588.

Defendant-Appellee also strings eight cases into a single footnote, in an effort to support the claim that "Numerous state and federal cases have upheld ballot access restrictions on similar grounds." Defendant-Appellee's Brief on Appeal, at 9-10. None of these cases were decided by any Michigan courts, the US Supreme Court, or any federal court in the Sixth Judicial Circuit. Nor have the allegedly similar grounds given for upholding the statutes under review in these cases included an assessment of their constitutionality under the "Purity of Elections" clause of Const 1963, art 2, § 4.

Even putting aside such relevant factors, however, a closer examination of these cases reveals substantial differences from the Michigan statute challenged in the instant case, and sometimes from Defendant-Appellee's characterizations of the cases' holdings. For example, *Green Party of Alaska v State, Div of Elections*, 147 P3d 728 (Alaska, 2006); *Libertarian Party New Hampshire v State*, 910 A2d 1276 (NH, 2006); *Rogers v Corbett*, 468 F3d 188 (CA 3, 2006); and *Nader v Keith*, 385 F3d 729 (CA 7, 2004) all deal with statutory schemes that provided parties with the opportunity to individually

[28] This right of candidates to choose one party over another is the same right guaranteed by MCL §§ 168.692 and 168.693, and other parts of the Michigan Election Code – a right that Defendant-Appellee has refused to accord Plaintiffs-Appellants.

qualify candidates to appear with their party label on the ballot for the races in which they were nominated. And the unpublished order issued in *Nader 2000 Primary Committee, Inc v Bartlett*, 230 F3d 1353 (CA 4, 2000) did not determine the constitutional questions involved, but only addressed the question of whether the lower court had abused its discretion in denying the case's plaintiff a preliminary injunction.

As noted above, Defendant-Appellee even tries to claim that the reason for striking down ballot restrictions challenged in *SWP v SOS* was ***because*** the qualification process involved had two tiers. Defendant-Appellee's Answer to Plaintiffs-Appellants' Brief on Appeal, p 11. But later in the same paragraph, the *SWP v SOS* Court says, "1976 P.A. 94 violates the First and Fourteenth Amendments" – and adds that the statutory scheme was struck down because it was "not necessary to serve the claimed interest and [] the Legislature did not choose the least drastic means." *SWP v SOS*, 412 Mich at 591).[29] The *SWP v SOS* Court noted that the state interest put forth by Defendant-Appellee to justify the burdens then imposed on "new" parties was that

> legitimate state interests in prevention of the clogging of this state's election machinery and in avoidance of voter confusion are furthered if no more than nine parties with straight-ticket voting are allowed. Conceding for the sake of this argument that the limits of the capacity of voting machines do further these interests, ***a justifiable inference is that the evils sought to be addressed by the Legislature do not occur if nine or fewer parties are on the ballot. Significantly, there has been no allegation or showing to the contrary.*** Yet, the act operated to eliminate plaintiff political party from the 1980 general election ballot before the nine-party capacity of the voting machines was reached. Such ***premature elimination*** is inconsistent with the claimed legislative judgment about when the evils sought to be prevented should be addressed. It follows immediately that the act, as it has been applied, does not use the least drastic means to avoid unreasonable burdens on plaintiffs' constitutionally protected liberty.

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[29] Neither did the *SWP v SOS* Court attribute its separate finding regarding the 1976 PA 94 scheme's violation of Const 1963, art 2, § 4 to the involvement of two tiers, rather than one, in its process for ballot qualification of "new" parties. Rather, the basis and controlling principle upon which this Court held 1976 PA 94 to be invalid under the "Purity of Elections" clause of Const 1963, art 2, § 4 was that the statutory scheme imparted "an unfair advantage to one party or its candidates over a rival party or its candidates" and hence was "inconsistent with the goal of 'equality of treatment' of parties and their candidates seeking access to the general election ballot. *Id.* at 598-600. (With regard to the application of the US Supreme Court's *Munro* decision to this claim asserted by Defendant-Appellee, see p 14, *supra*.)

SWP v SOS, 412 Mich at 592-93 (emphasis added); see also *Performance of Minor Parties*, fn 1, *supra*. In no general election since *SWP v SOS* was decided have more than eight parties been on the ballot. So 1988 PA 116 is also not the least drastic means. The *SWP v SOS* Court found Defendant-Appellee's argument "tautologous" and its " 'machine logic' . . . intellectually unsatisfying." *Id.*, 412 Mich at 592, n 17. That logic cannot hold any greater justification today, given the replacement of voting machines for all precincts with more advanced models over the past decade. And the total freezing of the political status quo deprives Plaintiffs-Appellants and Michigan voters of "the primary values protected by the First Amendment – 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' – [values which] are served when election campaigns are not monopolized by the existing political parties." *Anderson v Celebrezze*, 460 US at 794 (internal citation omitted).

One reason it is hard for Defendant-Appellee to show a legitimate state interest reflected by the current party ballot-qualification scheme is that it was largely crafted around an illegitimate interest.

> [T]he State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. . . . As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition.

Clingman v Beaver, 544 US 581, 603; 125 S Ct 2029; 161 L Ed 2d 920 (2005) (O'Connor, J, concurring).[30] Republican legislators agreed to move HB 5237 of 2001, the bill that became 2002 PA 399 (Plaintiffs-Appellants' Brief on Appeal, Appendix C), through the Capitol in exchange for LPM leaders' reluctant agreement not to nominate candidates for governor or any of 14 specified State Senate races that year.[31] This sheds light on why the Legislature enacted 2002 PA 399 and gave political parties

[30] Cf *Tashjian*, 479 US at 224 ("the views of the State . . . to some extent represent the views of the one political party transiently enjoying majority power" – all the more true of the views and interests of two major parties versus any challengers).

[31] See Tim O'Brien, "Public Act 399 and the Michigan Legislation Factory", fn 4, *supra*.

entitled to automatic ballot placement even more inequitable advantages, with no corresponding relief from the increasingly burdensome qualification requirements still imposed today on their "new"-party challengers. While a party in the first group[32] had the leverage to strike a tit-for-tat deal to benefit the legislative majority's partisan interests, those in the second group clearly did not. The Legislature not only abdicated, but directly contravened, its duty to have the state's party ballot-qualification scheme serve to preserve the purity of elections. Plaintiffs-Appellants have tried other approaches to resolve the problem, but now have turned to the courts for relief – and ask this Court to provide it.

6. MCL § 168.685 (facially and as presently applied) functions to excessively "limit the field of candidates from which voters might choose", *Bullock v Carter,* 405 US 134, 143; 92 S Ct 849; 31 L Ed 2d 92 (1972) – and now "operate to freeze the political status quo", *Jenness v Fortson*, 403 US 431, 438; 91 S Ct 1970; 29 L Ed 2d 554 (1971).

As noted above, in *Jenness* the US Supreme Court held that a state's ballot-qualification procedures may not "operate to freeze the political status quo" among the state's already-qualified parties. *Id.*, 403 US at 438. However, the legislative scheme in *Jenness* – taken as a whole, *Williams*, 393 US at 34 – allowed both individual candidates and parties an alternative path onto the ballot with their associations intact. *Id.*, 403 US at 439-440. Finding this path available – and that it had been used by candidates who won pluralities even at the top of the ticket – the Court held that "[t]he open quality of the Georgia system is far from merely theoretical", *id.*, 403 US at 439, and upheld the law.

In *American Party*, 415 US at 783, the US Supreme Court said "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 [of Texas] may require before according political parties ballot position." (Emphasis

[32] See Tim O'Brien, "Public Act 399 and the Michigan Legislation Factory", fn 4, *supra*. LPM gathered enough petition signatures to re-qualify for the 2002 general-election ballot, at a cost of over $30,000 plus thousands of hours of volunteer time. However, due to the Secretary of State's retroactive application of 2002 PA 399 to the showings of parties in the 2000 election, LPM's 2002 ballot status is not marked as "Qualified By Petition" in *Performance of Minor Parties*, fn 1, *supra*.

added.)[33] But "the facial validity of a signature requirement is but one indication of the constitutionality of a state's access provisions." *McLain v Meier*, 637 F2d 1159, 1164 (CA 8, 1980) (citing *Mandel v Bradley*, 432 US 173; 97 S Ct 2238; 53 L Ed 2d 199 (1977)). Even a past record of "schemes with similar tiers hav[ing] been ***uniformly*** upheld" is not sufficient ground for later rejecting a new challenge to a State's comparably structured ballot-qualification provision. *McLaughlin*, 65 F3d at 1223 (emphasis added). The successful petition drives and resultant qualification of two "new" minor political parties in Texas's general election directly preceding the US Supreme Court's 1974 decision in *American Party*, 415 US at 779, stand in sharp contrast to the unprecedented failure of any "new" political party to qualify by petition for the Michigan ballot in the past four (now five) consecutive general elections.

Again, the "*Bullock* state interests" put forth by Defendant-Appellee in *SWP v SOS*, 412 Mich at 591, to justify the burdens then imposed on "new" parties were that "legitimate state interests in prevention of the clogging of this state's election machinery and in avoidance of voter confusion are furthered if no more than nine parties with straight-ticket voting are allowed." *Id.* at 592.

> Conceding for the sake of this argument that the limits of the capacity of voting machines do further these interests, ***a justifiable inference is that the evils sought to be addressed by the Legislature do not occur if nine or fewer parties are on the ballot. Significantly, there has been no allegation or showing to the contrary.*** Yet, the act operated to eliminate plaintiff political party from the 1980 general election ballot before the nine-party capacity of the voting machines was reached. Such ***premature elimination*** is inconsistent with the claimed legislative judgment about when the evils sought to be prevented should be addressed. It follows immediately that the act, as it has been applied, does not use the least drastic means to avoid unreasonable burdens on plaintiffs' constitutionally protected liberty.

SWP v SOS, 412 Mich at 592-93 (emphasis added); cf. *Performance of Minor Parties*, fn 1, *supra*. As noted above, in no general election since *SWP v SOS* have more than eight parties been on the ballot,[34]

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[33] The burden Michigan imposes on "new" parties amounts to over 70% more valid signatures than the *American Party* Court placed at the outer boundaries of an acceptable requirement. And Texas had more population in 1970 – a bigger gross pool of potential signers – than Michigan had then or has now. Cf. *Storer*, 415 US at 742.

[34] *Performance of Minor Parties*, fn 1, *supra*.

so 1988 PA 116 (passed after *SWP v SOS*) was another "premature elimination" – and, judging by the results, 2002 PA 399 has not yielded any meaningfully less drastic limitation on party ballot access.

Defendant-Appellee looks only at the successful ballot petitions some parties filed between 1988 PA 116 and 2002 PA 399. But courts must look at whether "the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights," *Williams*, 393 US at 34. Michigan's scheme now includes 2002 PA 399 – and since its passage, the political status quo has frozen to an unprecedented degree. The natural conclusion is that Michigan's ballot-access scheme excessively "limit[s] the field of candidates from which voters might choose", *Bullock,* 405 US at 143.

7. Defendant-Appellee Secretary of State's application of 2002 PA 399 to restore other parties to the ballot – while refusing to apply it to the similarly situated Plaintiffs-Appellants' party – violates the "purity of elections" clause of Const 1963, art 2, § 4; the equal protection clauses of US Const, Am XIV, and Const 1963, art 1, § 2; and MCL §§ 168.532 and 168.560a.

As noted above, "statutes must be so construed as to render them constitutional, if such construction is reasonably possible". *Albert v Gibson*, 141 Mich 698, 703; 105 NW 19 (1905). "The presumption of constitutionality may justify a narrow construction or even construction against the natural interpretation of the statutory language." *People v Lueth*, 253 Mich App 670, 675; 660 NW2d 322 (2002). The text of MCL § 168.560a can be seen as ambiguous in one key timing-related phrase:

> 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.

(Emphasis added.) If "the last preceding general election" refers to the most recent election in which a party appeared on the ballot, then Plaintiffs-Appellants' party satisfied this requirement through HRP's general-election showing in 1976, and thus was similarly situated with the parties restored to

the ballot in 2002 by the then-occupant of Defendant-Appellee's office. The only differences between Plaintiffs-Appellants' party and those parties are (1) that the other parties lost ballot status in 2000 – closer to the enactment of 2002 PA 399 than when Plaintiffs-Appellants' party failed the same old standard; and (2) the Natural Law Party of Michigan's national organization dissolved before the end of the 2004 election cycle, while Plaintiffs-Appellants' party has kept on functioning and nominating candidates in Michigan and nationwide. Even if enactment of 2002 PA 399 had been intended as the least restrictive means to meet a legitimate state interest, Defendant-Appellee's arbitrary and capricious cut-off point for applying 2002 PA 399 – unsupported by any interpretation of the text to allow retroactivity – has not benefitted any state interest so compelling as to justify infringing Plaintiffs-Appellants' right to equal protection under US Const, Am XIV, and Const 1963, art 1, § 2.

Defendant-Appellee's selective application of 2002 PA 399 also violates Const 1963, art 2, § 4, by denying Plaintiffs-Appellants "equality of treatment [in] seeking access to the general election ballot", *SWP v SOS*, 412 Mich at 600. "Clearly, the Legislature was meant to be given constitutional authority to enact laws governing the entire election process. Just as clearly, the election process includes access or failure to gain access to the ballot." *Id.*, 412 Mich at 598. The Michigan Supreme Court has also applied the duty to preserve the purity of elections to the acts of state election officials:

> [W]e think the conclusion is justified that, even in the absence of specific constitutional or statutory provision, it is the clear duty of election officials, when reasonably possible, to prepare ballots in such a manner as will most effectively comply with the constitutional mandate touching the preservation of the purity of elections and guarding against abuse or misuse of the elective franchise.

Elliott v Secretary of State, 295 Mich 245, 250; 294 NW 171 (1940). Plaintiffs-Appellants ask this Court to recognize the violation of equal protection, and of fairness and evenhandedness, *SWP v SOS*, 412 Mich at 598, inherent in Defendant-Appellee's restoration of other parties to the ballot after 2002 PA 399 passed, but not Plaintiffs-Appellants' similarly-situated party.

8. The votes received by Plaintiff-Appellant Socialist Party of Michigan's principal candidate in the 2008 general election render Plaintiff-Appellant Socialist Party of Michigan a ballot-qualified party for 2010 pursuant to MCL §§ 168.532 and 168.560a, rather than a "disqualified party" pursuant to MCL § 168.685(6).

The Court of Appeals errs when it says Plaintiffs-Appellants did not qualify for the 2010 ballot, and errs again in saying that statement is undisputed. Plaintiffs-Appellants duly and accurately claimed that, despite unconstitutional discrimination against parties like Plaintiff-Appellant SPMI in general and against Plaintiff-Appellant SPMI in particular, the party did qualify for the 2010 ballot.

As noted above, "[t]he primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Taylor*, 277 Mich App at 94 (citation omitted). But

> "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). ***The omission of a provision should be construed as intentional.*** "It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248, 505 NW2d 519 (1993).

GMAC LLC v Dep't of Treasury, 286 Mich App 365, 372; 781 NW2d 310 (2009) (some internal citations omitted) (emphasis added).

2002 PA 399 changed MCL § 168.685's definition of "principal candidate" as used to decide party qualification for the ***general***-election ballot under MCL § 168.560a (as opposed to the "top-of-the-ticket" definition used in MCL § 168.532 to decide what parties may participate in ***primary*** elections). In other words, in enacting 2002 PA 399, the Legislature chose to leave being in the party column as a requirement for a party's principal candidate to qualify that party for the primary election, but chose to delete that requirement from what a principal candidate had to do to qualify his/her party for the general election. Thus, by the unambiguous terms of MCL § 168.685, ***Plaintiff-Appellant SPMI did not need to appear itself on the 2008 general-election ballot to have a principal candidate in that election.***

> 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.

MCL § 168.560a (emphasis added). SPMI is clearly a "political party" by any common definition – and the Michigan Election Code offers no other definition – so it meets that criterion in MCL § 168.560a for ballot access in 2010. It is clearly ***not*** a "disqualified party" as defined by MCL § 168.685(6): its principal candidate in the "preceding general November election" did not "receive[] 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".[35]

As noted above, if "the last preceding general election" means the most recent election in which a party appeared on the ballot, then Plaintiffs-Appellants' party satisfied this requirement through HRP's general-election showing in 1976. However, if "the last preceding general election" means the last general election preceding the present time, as argued by Defendant-Appellee (Defendant-Appellee's Response to Plaintiffs-Appellees' Motion for Summary Disposition, pages 18-19), ***then Plaintiffs-Appellants' party meets that condition for 2010 due to the vote total of its 2008 principal candidate.***

Defendant-Appellee's records for the 2008 general election show that Plaintiff-Appellant Reynolds received 94,663 votes as a candidate for the State Board of Education. Complaint, ¶ 42. This vote total made Plaintiff-Appellant Reynolds Plaintiff-Appellant SPMI's principal candidate for 2008, as defined by the plain terms of MCL § 168.685 as amended by 2002 PA 399 – "the candidate who receives the greatest number of votes of all candidates of that political party for that election." Both Defendant-Appellee and the Court of Appeals clearly erred in adding to the plain language of the statute as amended and currently in effect the former requirement that a principal candidate's party already be on the ballot itself. And Plaintiff-Appellant Reynolds's vote total far exceeded the 20,899-

[35] *Previous Election Information: November General Election Results by County*, fn 8, *supra*.

vote threshold that results from calculating "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", *id.* (cf. also MCL § 168.560a). Thus, not by criteria "invented" by Plaintiffs-Appellants (Defendant-Appellee's Response to Plaintiffs-Appellees' Motion for Summary Disposition, page 19), but ***by the terms of the Michigan Election Code, Plaintiff-Appellant SPMI has qualified for the 2010 general-election ballot.*** This conclusion arises purely from the operation of Michigan statute as it is currently worded – and the results of the most recent previous Michigan general elections.[36]

In addition to the plain language of the current statute, this Court has affirmed the expectation that a candidate's own campaign materials, statements, and newspaper coverage provide a sufficient basis for Michigan voters to inform themselves of the candidate's genuine party affiliation – even when that party affiliation does not match the candidate's listing on the ballot.

In upholding 1891 PA 190 (which barred a candidate's name from appearing more than once on an election ballot) against a constitutional challenge from a candidate seeking to have his name listed in the columns of both of the two parties whose nomination he received, the Michigan Supreme Court said:

> It would be a serious reflection upon the intelligence of the voters of Michigan to hold that they could be deceived by such a ballot [i.e., one not having the plaintiff candidate's name listed in both party columns] or impeded in the right to vote. Especially is this true in view of the means of disseminating intelligence through the newspapers, upon the hustings, by printed posters, and the importunities of candidates and their friends. It is, however, said that the voter has the right to suppose that all his party nominees will be on his party ticket. The [Michigan] constitution neither expressly nor impliedly confers any such right. . . .
>
> * * *

[36] Likewise, dual-nominated candidates Diana Demers (for University of Michigan Board of Regents) and James Arnoldi (for Wayne State University Board of Governors) received 80,365 and 46,757 votes for those offices respectively in the 2010 general election. Both easily exceeded the new 16,083-vote threshold (based on the number of votes concurrently received by the successful candidate for Secretary of State in 2010) for a party's "principal candidate" to qualify that party automatically for the 2012 general-election ballot. Michigan Dep't of State, Bureau of Elections. *2010 Official Michigan General Election Results – All Races* <http://miboecfr.nictusa.com/election/results/10GEN/10GENall.html> (accessed November 28, 2010).

> [The statute under challenge] does not prevent coalition between different political parties, which is often very commendable and patriotic. It does not deprive the members of those political parties of the means to put their coalition into effect by their votes, but furnishes all reasonable facilities for so doing. It only requires some degree of intelligence and care on the part of the voters. We hold the law to be constitutional.

Todd v Bd of Election Comm'rs, supplemental opinion, 104 Mich 474, 485-86, 487-88; 64 NW 496 (1895).[37] See also Plaintiffs' (Original) Brief on Motion for Summary Disposition, p 34.

MCL § 168.532 says any "political party whose principal candidate received less than 5% of the total vote cast for all candidates for the office of Secretary of State in the last preceding State election, either in the State or in any political subdivision affected" to nominate candidates for the ballot by convention or caucus. Plaintiff-Appellant SPMI fits this definition, and has nominated its candidates for the 2010 general election by this procedure and filed documentation with Defendant-Appellee's Bureau of Elections to document the nominations as required by MCL § 168.686a. In short, Plaintiff-Appellant SPMI has done everything that a political party in its condition is required by Michigan statute to do to qualify itself and its candidates for the 2010 general-election ballot, and there is no ambiguity affording scope for either Defendant-Appellee or the Court of Appeals to interpret the plain language of the law otherwise.

9. The defense of laches claimed by Defendant-Appellee and relied upon by the trial court (in the absence of any independent substantive reason given for its order) cannot apply, by law or under the facts of the case, to invalidate Plaintiffs-Appellants' claims for relief or justify denial of Plaintiffs-Appellants' motion for summary disposition.

Defendant-Appellee did not prove its claimed defense of laches, and the lower courts have committed errors of law in relying on that claim in basing orders or rulings on the idea that Plaintiffs-Appellants "sat on their rights". Laches is an affirmative defense, related to or a form of estoppel.

[37] The "Purity of Elections" Clause in Const 1850, art 7, § 6 – contemporaneously referenced by the *Todd* Court – accordingly provided that "[l]aws may be passed to preserve the purity of elections and guard against abuses of the elective franchise."

> This judicially imposed principle denotes " 'the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant.' " *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982) (citation omitted). The doctrine reflects " 'the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.' " *Id.* (citation omitted). When considering whether a plaintiff is chargeable with laches, courts must pay attention to ***the prejudice caused by the delay***. Generally, " '[w]here ***the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition***, the defense of laches cannot . . . be recognized.' " *Id.* (citation omitted).

Kuhn v Secretary of State, 228 Mich App 319, 334; 579 NW2d 101 (1998) (emphasis added).

> The Michigan Court of Appeals has explained in the context of applying laches to elections cases that:
>
> > The state has a compelling interest in the orderly process of elections. Court[s] can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials.
>
> *New Democratic Coalition v Austin*, 41 Mich App 343, 356-57; 200 NW2d 749 (1972) (per curiam) (citing *Reynolds v Sims*, 377 US 533; 84 SCt 1362; 12 L Ed 2d 506 (1964)). . . . The decision in *New Democratic Coalition* was released on June 19, 1972, and the plaintiffs in that case had sought the following injunctive relief:
>
> > Plaintiffs have urged this Court to order that all state senators stand for election in the primary and general elections of 1972, and to declare that Const 1963, Art 4, § 2 and the statutes tied to it are unconstitutional insofar as they conflict with that order. Plaintiffs further urged this Court to order that those primary and general elections be carried out in the new state senate districts declared in effect by the Michigan Supreme Court on May 4, 1972.
>
> *New Democratic Coalition*, 41 Mich App at 345.

Bogaert v Land, 572 F Supp 2d 883, 897 (WD MI, 2008); aff'd 543 F3d 862 (CA 6, 2008).

Plaintiffs-Appellants did not unreasonably delay filing this action. Rather, as Plaintiffs-Appellants have argued from their complaint, they tried various approaches to fight the ongoing facial and as-applied discrimination in ballot-access standards in the election cycles after 2002 PA 399 took effect. Plaintiffs-Appellants' Motion for Reconsideration, ¶ 5. Even if delay could be held to exist, Defendant-Appellee never showed any material prejudice. Plaintiffs-Appellants have shown that the relief requested at prior stages of the case amounted to a few minimal acts by Defendant-Appellee.

Plaintiffs-Appellants' Motion for Reconsideration, ¶ 6. And the acts are within the scope of Defendant-Appellee's duty under Const 1963, art 2, § 4, to "preserve the purity of elections" by administering elections with "fairness and evenhandedness" (as defined by *SWP v SOS*, 412 Mich at 599, 598).

SPMI's slate of seven candidates compares with a typical list in recent non-Presidential election years of 700 or more candidates.[38] It is more comparable to the timely restoration of signatures to one recall petition requested as relief by the plaintiff in *Bogaert*, 572 F Supp 2d at 885, than to the sudden addition, after the primary filing deadline, of 38 State Senate ***races*** to the 1972 general election which the *New Democratic Coalition v Austin* plaintiffs requested as relief. As in *Bogaert*, 572 F Supp 2d at 897,

> [t]he injunctive relief sought by Plaintiff[s] does not pose the same potential for creating "immense administrative difficulties for election officials" as the injunctive relief sought by the plaintiffs in *New Democratic Coalition*. Moreover, [Defendant has] not articulated what change of material condition warrants the application of laches. Therefore, the doctrine of laches does not bar Plaintiff[s'] lawsuit.

Bogaert, 572 F Supp 2d at 897.

In addition, Defendant-Appellee itself denied that the minimal tasks which would provide the relief Plaintiffs-Appellants seek would impose any significant administrative difficulty. At the August 4, 2010 hearing on Plaintiffs-Appellants' motion for a temporary restraining order, counsel for Defendant-Appellee reinforced its written argument that "the ballots for the November 2010 general election [did] not have to be printed until September 3, 2010" (Defendant-Appellee's Response to Plaintiffs-Appellants' Motion for Preliminary Injunction and/or Temporary Restraining Order, page 5, ¶ 8) and argued that relief could easily be provided even without a TRO to force Defendant-Appellee to start work on the tasks immediately. In summary, there was never a "change in condition which would make it inequitable to enforce a claim against the defendant.' " *Kuhn*, 228 Mich App at 334 (citing *Lothian*, 414 Mich at 168). The situation of neither party to this action changed materially due to the timing of its

[38] *Previous Election Information: November General Election Results by County*, fn 8, *supra*.

filing – and no alleged delay by Plaintiffs-Appellants put Defendant-Appellee in a worse condition – so laches cannot bar Plaintiffs-Appellants' claims of relief or its summary-disposition motion. *Id.*

Even if laches could be held to apply now to Plaintiffs-Appellants' claims of past discrimination based on treatment in earlier years (and/or under Plaintiffs-Appellants' Party's former identity as the Human Rights Party, Complaint, ¶¶ 5, 27-29) – such that this Court must focus on the most immediate past election only – by that same token laches cannot exclude Plaintiffs-Appellants' claim to 2010 ballot status based on the accurately-read text of MCL § 168.685 and the vote-getting performance of Plaintiff-Appellant SPMI's principal candidate in 2008, Plaintiff-Appellant Reynolds.

As noted above, Plaintiffs-Appellants began researching the law for this lawsuit in mid-2009. It was in the course of this research that Plaintiffs-Appellants discovered the erroneous conflation of old and new language defining "principal candidate" in MCL § 168.685 (from before and after 2002 PA 399 was enacted and took effect, respectively) in Defendant-Appellee's "Political Party Status" document. This factual and legal error by Defendant-Appellee was incorporated into the draft complaint used to recruit legal services – and later into the Complaint as ultimately filed (including ¶¶ 42, 93, 94, 103B, 104, 106, and 108 of the body of the Complaint and items B(ii) and C(iii) of the relief requested in the Complaint) and into various other pleadings and case documents as appropriate.

Defendant-Appellee's 2008 general-election records show that Plaintiff-Appellant Reynolds got 94,663 votes for State Board of Education. Complaint, ¶ 42. This total made him Plaintiff-Appellant SPMI's principal candidate for 2008, under the plain terms of MCL § 168.685 as amended by 2002 PA 399 – "the candidate who receives the greatest number of votes of all candidates of that political party for that election." And it exceeded the 20,899-vote threshold calculated as "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", *id.* (cf. MCL § 168.560a). Thus, again,

not by criteria "invented" by Plaintiffs-Appellants (Defendant-Appellee's Response to Plaintiffs-Appellees' Motion for Summary Disposition, page 19), but ***by the terms of the Michigan Election Code, Plaintiff-Appellant SPMI had qualified for the 2010 general-election ballot.***

No delay justifying Defendant-Appellee's claim of laches can possibly be found in the filing of a lawsuit to enforce Plaintiffs-Appellants' rights in the current election cycle, in what Defendant-Appellee itself has argued is plenty of time to provide the needed relief. No "unnecessarily precipitate changes [caused by providing that relief] would result in immense administrative difficulties for election officials." *Bogaert v Land*, 572 F Supp 2d at 897 (citing *New Democratic Coalition*, 41 Mich App at 357). In summary, the law and the facts of this case agree that the trial court was in error on the law and the facts in implicitly basing its August 25, 2010 order to invalidate Plaintiffs-Appellants' Constitutional and statutory claims for relief or to justify denial of Plaintiffs-Appellants' motion on laches. Plaintiffs-Appellants respectfully ask this Court to reject the argument and the errors.

Relief Requested

The November 2, 2010 general election has come and gone. No longer can Plaintiffs-Appellants be put on the ballot for that election. However, the case is not moot – because similar harm to Plaintiff-Appellant SPMI (and to candidates it nominates in the future, whether or not they include Plaintiff-Appellant Reynolds) is not only capable of repetition but likely to continue to repeat if the lower courts' rulings are allowed to stand. *Storer*, 415 US at 737 fn 8; *McLain*, 637 F2d at 1162 fn 5.

Accordingly, for all of the above reasons, Plaintiffs-Appellants ask this Court to grant any and all of the following forms of relief:

A. Reverse the trial court's order dated August 25, 2010 granting summary disposition for Defendant-Appellee, and the Court of Appeals' order dated September 3, 2010 affirming the trial court's order, and grant summary disposition for Plaintiffs-Appellants.

B. Declare that MCL § 168.685, as wrongly and wrongfully applied, is unconstitutional in violation of Const 1963, art 2, § 4; the equal protection clauses of US Const, Am XIV, and Const 1963, art 1, § 2; and/or US Const, Am I.

C. Issue orders and/or injunctions to bar Defendant-Appellee Secretary of State from applying or interpreting MCL § 168.685 either

i) to enable or allow ballots to be printed or issued for the November 6, 2012 general-election which do not include Plaintiff-Appellant SPMI or its candidates; or

ii) to deny Plaintiff-Appellant SPMI or its candidates equal treatment with all other parties and candidates qualifying for the November 6, 2012 general-election ballot (including providing ballot status and other information to the public).

D. Order Defendant-Appellee Secretary of State to place the name, vignette, and candidates of Plaintiff-Appellant SPMI on the November 6, 2012 general-election ballot – either

i) because Plaintiff-Appellant Reynolds, Plaintiff-Appellant SPMI's principal candidate in 2008 by the terms of MCL § 168.685 as amended by 2002 PA 399, exceeded the ballot-access threshold set in that section for the 2010 general-election ballot (and, on the same basis, Plaintiff-Appellant SPMI's principal candidate in 2010 likewise exceeded the ballot-access threshold for the 2012 ballot);

ii) based on SPMI's meeting the "requisite community support" standard under which a court may place political parties on the ballot of a state which has no constitutionally valid statutory mechanism for obtaining state-party ballot qualification,[39] if the Court finds this standard applicable; or

iii) based on restoring Plaintiff-Appellant SPMI's ballot qualification as Defendant-Appellee did in 2002 for the then-similarly-situated Natural Law Party of Michigan and U.S. Taxpayers Party of Michigan.

E. Order that Defendant-Appellee pay Plaintiffs-Appellants' costs and attorneys fees, pursuant to 42 USC § 1983 and 42 USC § 1988(b).

F. Grant such other relief as the Court deems just and equitable.

In the alternative, if this Court prefers not to grant Plaintiffs-Appellants summary disposition at this time but desires further development and/or resolution of the constitutional and statutory issues

[39] *Libertarian Party of Ohio v Brunner*, 567 F Supp 2d 1006, 1015 (SD OH, 2008) (citing *McCarthy v Briscoe*, 429 US 1317, 1323; 97 S Ct 10; 50 L Ed 2d 49 (1976)); see also *Goldman-Frankie v Austin*, 727 F2d 603, 607-608 (CA 6, 1984) ("Although Goldman-Frankie's demonstration of the requisite community support was not compelling, the Court finds it sufficient to warrant the relief granted by the district court").

involved in the case (which have already persisted for multiple election cycles), Plaintiffs-Appellants invite this Court to reverse summary disposition for Defendant-Appellee and remand the case to the trial court or the Court of Appeals for further proceedings consistent with that purpose.

Respectfully submitted,

By: _____

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Dated: November 29, 2010

Proof of Service

I certify that on **November 29, 2010**, I served a copy of the **Plaintiffs-Appellants' Application for Leave to Appeal**; the **Notice of Hearing** of same; the **Motion for Waiver of Filing Fees**; and this **Proof of Service** of these documents on the attorneys of record for Defendant-Appellee in this case by enclosing and sealing these documents in an envelope with first-class postage fully prepaid, addressed to the attorneys of record for Defendant-Appellee, and depositing the envelope and its contents in the United States mail.

I declare that the statements above are true to the best of my information, knowledge, and belief.

Date: _____ _____

John Anthony La Pietra – P72121

Appendices

Trial Court Order Dated August 25, 2010
Court of Appeals Opinion Dated September 3, 2010
Court of Appeals Order (Denying Reconsideration) Dated October 15, 2010