
No. 20-1337

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTOPHER GRAVELINE; WILLARD H. JOHNSON; MICHAEL
LEIBSON; KELLIE K. DEMING,

Plaintiffs-Appellees,

v.

JOCELYN BENSON, Secretary of State of Michigan; DANA NESSEL,
Attorney General of Michigan; JONATHAN BRATER Director of
Michigan Bureau of Elections, in their official capacities,

Defendants-Appellants.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Victoria A. Roberts

BRIEF FOR DEFENDANTS-APPELLANTS

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Dated: July 12, 2020

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is appropriate for this case because it presents significant questions concerning a state's ability to set reasonable requirements for candidates for statewide offices who are unaffiliated with a major party to access the state's ballot, and the extent to which a district court may—as part of an injunction—replace statutory requirements with the court's own determination of appropriate requirements.

JURISDICTIONAL STATEMENT

Under 28 U.S.C. §1291, this Court has jurisdiction over appeals from all final decisions of the district courts. The district court's order denying Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater's motion for summary judgment and granting Christopher Graveline, Willard H. Johnson, Michael Leibson, and Kellie K. Deming's motion for summary judgment was entered December 23, 2019, and the district court's order denying Secretary of State Benson, Director Brater, and Attorney General Dana Nessel's motion to alter or amend the judgment was entered on March 19, 2020. Secretary of State Benson, Director Brater, and Attorney General Nessel filed a notice of appeal on April 29, 2020.

STATEMENT OF ISSUES PRESENTED

1. Whether a state may—without violating any First Amendment principles—require independent candidates for statewide office to obtain a number of signatures amounting to less than 1% of the state population?
2. Whether the district court erred in replacing the statutory number of signatures required for a candidate for statewide office to appear on the ballot with a new number that is a fraction of what was required under the statute?

INTRODUCTION

Under Michigan's election law, Christopher Graveline had 180 days to gather 30,000 petition signatures before he could appear on the November 2018 general election ballot as an independent candidate for Michigan's Attorney General. Instead of using those 180 days, he waited almost five months, and collected signatures for only 43 days. Nevertheless, in that 43-day period, he collected nearly 50% of the statute's requirement, gathering almost 15,000 signatures. But it was not enough. Graveline and several individual voters—Willard H. Johnson, Michael Leibson, and Kellie K. Deming—then filed suit seeking a declaration that the statute was unconstitutional as applied to Graveline.

The district court ignored Graveline's inexplicable delay and evidence that statewide petition efforts are more than possible, and erroneously determined that the number of signatures and the deadline for filing petitions had a combined effect of denying Graveline access to the ballot in violation of the First and Fourteenth Amendments. Compounding this error, the district court supplanted the role of the Legislature and directed that a candidate for statewide office obtain

only 12,000 signatures. The district court's order, however, failed to include a maximum number of signatures, which conflicts with the process for virtually every other elected office in the state, and the district court refused to amend its order to address the conflict.

Intervenor-Appellant Attorney General Dana Nessel respectfully requests that this Court reverse and remand for dismissal this unwarranted intrusion into the State's sovereignty. Appellants Secretary of State Benson and Director of Elections Jonathan Brater, together with Intervenor-Appellant Attorney General Nessel, also request that this Court reverse the district court's imposition of a new minimum signature requirement of 12,000 or, alternatively, its refusal to establish a corresponding maximum in conformity with the rest of the statute.

STATEMENT OF THE CASE

A. Michigan Ballot Eligibility Requirements for Independent Candidates for Statewide Office.

All candidates for statewide office are required to comply with Michigan's Election Law, which includes signature gathering requirements and statutory deadlines. There are three ballot eligibility requirements for unaffiliated or independent candidates for statewide

office that are challenged in this case: (1) the 30,000 minimum signature requirement that candidates for statewide office without a political party affiliation must obtain, Mich. Comp. Laws § 168.544f, (2) the requirement that the 30,000 signatures include at least 100 registered voters in each of at least 1/2 of the congressional districts in the state, Mich. Comp. Laws § 168.590b(4), and (3) the filing deadline for qualifying petitions—the 110th day before the general election, Mich. Comp. Laws § 168.590c(2), which was July 19, 2018 for the November 2018 general election. Those three requirements do not exist in a vacuum and are part of a larger election regulation framework.

The Secretary of State is required by law to certify the general election ballots to the state's 83 county clerks, and this certification must be completed no later than 60 days before the election, which in this case was September 7, 2018. Mich. Comp. Laws § 168.648. This certification includes the names of candidates for partisan and non-partisan offices who have qualified to appear on the ballot. (R. 28-2, Def's Mot. for Summ. Jgdmt, Ex. A, Affidavit of S. Williams, ¶4, Page ID # 352.) The 83 Boards of County Election Commissioners are in turn responsible for preparing and printing ballots for the general election.

Mich. Comp. Laws § 168.689. In the case of the November 2018 general election, the ballot preparation process began after the results of the August 7 primary election. (*Id.* at ¶6, Page ID # 353.)

The persons responsible for programming, coding, and printing ballots were to begin no later than August 28, 2018, and some could begin as early as August 21, 2018. (*Id.*) The arrangement of the ballot is performed in such a way so that the names of state-wide candidates subsequently certified to the general election by the Board of State Canvassers—along with any ballot proposals—may be promptly programmed and printed. (*Id.*)

In the November 2018 general election, the minimum number of ballots to be printed was 7.4 million. (*Id.* at ¶8, Page ID # 354.) In addition, every county in the state produces multiple ballot styles, based on the geographic boundaries for the various elective offices that will appear on the ballot. (*Id.* at ¶12, Page ID #355-356.) In total, the ballot preparation process can take up to 3 weeks. (*Id.* at ¶14, Page ID # 356.) The deadlines for ballot preparation are in part based upon the deadlines for actual delivery of the ballots.

By law, absent voter ballots must be delivered to the Board of County Election Commissioners by the 47th day before the election, which was September 20, 2018 for the November 2018 general election. Mich. Comp. Laws § 168.712. (*Id.* at ¶15, Page ID # 356; see also R. 28-11, Ex. J, 2018 Michigan Election Dates, Page ID # 445-455.) And under state and federal law, absent voter ballots must be available to military and overseas voters no later than the 45th day before the election, which was September 22, 2018 for the November 2018 general election. Mich. Comp. Laws §§ 168.714 and 759a; 52 U.S.C. § 20302(a)(8). (*Id.*) But, in order for ballots to be delivered and available on time, the necessary work for preparation must be done in advance of that time.

The 110th day filing deadline for independent candidates filing qualifying petitions occurs in the context of this ballot preparation and delivery process. The 110th day before the election filing deadline for qualifying petitions, Mich. Comp. Laws § 168.590c(2), and the 60th day before the election certification deadline, Mich. Comp. Laws § 168.648, creates a window of 50 days. Here, that window transpired between July 19, 2018 and September 7, 2018.

Within the 50-day period, the Secretary of State was required to complete the following tasks:

- a. Review every qualifying petition filed with the Secretary of State, including an examination of each petition sheet and signature, for facial defects that would render the sheet or signature invalid. This also includes random selection of signatures for checks against the Qualified Voter File (QVF). (R. 28-2, Ex. A, ¶17b, Page ID # 357.) For Graveline's 15,000 petition signatures, this process was estimated to require a minimum of 4 business days. (*Id.* at ¶22, Page ID #360.) Canvassing the 30,000 statutorily required signatures would likely take longer.
- b. Accept any challenges against qualifying petitions submitted within 7 days of the filing deadline (in the case of 2018, that deadline was July 26, 2018). (R. 28-2, Ex. A, ¶17b, Page ID # 357; Mich. Comp. Laws §§ 168.552(8), 168.590f(1)).
- c. If a challenge is received, the Secretary must compare individual signatures to the QVF to ensure that the signer was registered to vote in the jurisdiction on the date of signing, and that the signature matches the QVF. This is a more in-depth and time-consuming review of each individual signature. (R. 28-2, Ex. A, ¶17c, Page ID # 358.)
- d. Also, in the event of a challenge, the Board of State Canvassers must convene a meeting to hold on hearing on the complaint. (Mich. Comp. Laws § 168.552(9); Ex. A, ¶17c). At least 2 business days before that meeting, the board must release its staff report concerning the challenges filed against the petition. (Mich. Comp. Laws § 168.552(10); R. 28-2, Ex. A, ¶17c, Page ID # 358.)
- e. Complete any legal challenges to the Board's determination on any challenges filed against qualifying petitions before the

deadline for Secretary of State certification (in 2018, the September 7 deadline).

- f. Determine that any candidates who have filed qualifying petitions have submitted a sufficient number of valid signatures to warrant certification to the general election ballot. (R. 28-2, Ex. A, ¶17d.)

This must all occur within the 50 days between the 110th and 60th days before the date of the general election. This process is identical to the canvass process used for candidates who file nominating petitions to run as party-affiliated candidates, except that the party affiliated candidate canvasses must be completed in 45 days instead of 50. (R. 28-2, Ex. A, ¶18, Page ID # 358-359.)

Although independent candidacies for *statewide* office have historically been uncommon, there is no guarantee that will always be so, and the above process would apply to every such candidate regardless how many run in the same election. In the November 2018 general election, there were *four* congressional candidates without a party affiliation who submitted qualifying petitions and were certified to appear on the general election ballot. (R. 28-2, Ex. A, ¶20, Page ID # 359-360.) If a similar number of independent candidates sought qualification for a statewide office, it would require

the canvassing of over 120,000 signatures in the same 50-day window.

While there have been few independent candidates in Michigan's elections, there is no clear evidence that the signature or filing requirements are impeding anyone. For example, few people have even registered to form committees capable of receiving contributions in support of an independent candidate. Under Michigan's Campaign Finance Act, an individual becomes a "candidate" once they receive a contribution or make an expenditure—including volunteer efforts—after which they are required to form a campaign committee and then file a statement of organization. Mich. Comp. Laws §§ 169.203, 169.221, 169.224. Since 1997, the Michigan Secretary of State has made those statements available through its website.¹ Using the search tool available to the public on the Secretary's website, it is possible to learn how many committees were formed for candidates without a party affiliation since 1997. While that does not show how many signatures the committees gathered or why their efforts failed (money, lack of support, etc.), it will show how many candidates were at least legally

¹ <https://cfrsearch.nictusa.com/>

capable of making the attempt. According to the publicly accessible data on that website, there has been exactly one Attorney General candidate without a party affiliation that formed a committee since 1997: Plaintiff Graveline. (R. 34, Def’s Reply to Pl’s Mot. for Summ. J., Ex. A, Attorney General Committee Search Results, Page ID #653-657.) There have been zero committees successfully formed for a Secretary of State candidate without a party affiliation. (*Id.* at Ex. B, Secretary of State Committee Search Results, Page ID # 659) (Note: the “pending” result refers to a committee that has not completed the process and was not a legally formed committee). And even for Governor, after excluding write-in committees (who do not need to gather signatures) and incomplete “pending” committees, there have been only 29 committees formed in the past 22 years—and seven of those were formed within roughly one month of the election date, meaning they were already past the deadline for appearing on the ballot. (*Id.* at Ex. C, Governor Committee Search Results, Page ID # 661-739.) And again, these are just the candidates who were legally capable of gathering signatures—there is no evidence offered by Graveline as to why those efforts failed, or how many signatures they obtained. But

these results do show that there have simply never been very many attempts by independent candidates to run for statewide office in Michigan.

B. Plaintiff Christopher Graveline's Effort to Collect Signatures

On or about June 4, 2018, Plaintiff Graveline filed a statement of organization to become a candidate for the office of Attorney General with no political party affiliation. (R. 28-3, Ex. B, printout of <https://cfrsearch.nictusa.com/committees/518994> (last accessed on August 12, 2019), Page ID # 366-369; R. 1-3, Complaint, Ex. B, Declaration of C. Graveline, ¶9, Page ID # 33.) However, Graveline admitted that he had been considering running for that office after the Democratic Party's early endorsement convention on April 15, 2018, at which time the Party gave its endorsement to current Attorney General Dana Nessel. (R. 1-3, ¶2-3, Page ID # 29-30.) Graveline was also aware that the two announced candidates for the Republican nomination for Attorney General were then-House Speaker Tom Leonard and then-State Senator Tonya Schuitmaker, although the formal nomination would not take place until August 25, 2018. (R. 1-3, ¶4, Page ID #31.) The Republican nomination ultimately went to Mr. Leonard. (R. 28-4,

Ex. C, printout of https://mielections.us/election/results/2018GEN_CENR.html (last accessed August 12, 2019), Page ID # 371.)

Nonetheless, Graveline admits that, even before the Democratic or Republican nominees had been officially chosen, he did not favor any of the potential candidates, finding them to be excessively partisan. (R. 1-3, ¶3-4, Page ID #29-31.) Graveline attested that he began to “seriously consider” running in “early May” of 2018. (R. 1-3, ¶8, Page ID #32-33.) But Graveline did not start collecting signatures until June 7, 2018—three days after launching his campaign. By that time, only 42 days remained until the July 19, 2018 filing deadline for qualifying petitions. (R. 1-3, ¶9, Page ID # 33.)

Notwithstanding Graveline’s self-imposed late start, his campaign volunteers collected 7,899 signatures. (R. 1-3, ¶11, Page ID # 34.) Graveline also retained the services of a professional signature-gathering firm, who collected over 6,000 more signatures, for an approximate total of 14,157. (R. 1-3, ¶13-15, Page ID #35.) This total is slightly less than half the 30,000 minimum number of signatures required for ballot eligibility under § 544f.

Graveline’s reason for having only 42 days instead of the full 180-day signature-gathering period provided for by Mich. Comp. Laws § 168.590b(3), was not the result of any statutory restriction or deadline—instead, Graveline admitted that it was because his decision to run began with his dissatisfaction with the presumptive Democratic nominee, who received her party’s endorsement on April 15. (R. 1-3, ¶10, Page ID # 34.) Graveline also admitted that the fact that he would have to resign from his position at the U.S. Attorneys Office under the federal Hatch Act played a role in delaying his decision to file as a candidate. (R. 1-3, ¶ 8, Page ID #32.)

C. The Parties’ Expert Reports Concerning the Reasonableness and Plausibility of Michigan’s Ballot Eligibility Requirements for Independent Candidates

1. Graveline’s Expert – Richard Winger

Mr. Winger is the editor of Ballot Access News, a printed publication that, “covers changes in ballot access laws that affect minor political parties and independent candidates.” (R. 28-5, Ex. D, Winger Report, 12/14/2018, p 1, Page ID # 373.) Mr. Winger opined that, “the experience of all 50 states, since the beginning of government printed ballots, shows that a very small petition requirement is sufficient to keep frivolous candidates from getting on the ballot and causing ballots

to be overcrowded.” (*Id.* at p 3, Page ID # 375.) This conclusion is apparently founded on Mr. Winger’s “fifty years of research,” in which he has “collected returns from all states for all statewide general elections since the beginning of government printed ballots,” and “studied the history of each state’s ballot access laws, from their beginning.” (*Id.*).

Mr. Winger concluded that “any state that required more than 5,000 signatures for general election ballot access for independent candidates for statewide office, and among the states that require *exactly* 5,000 signatures, only Ohio 1976 had more than eight candidates, that was nine candidates for president.” (*Id.*). Mr. Winger also opined that Michigan could adopt a later filing deadline “in August or September,” which he believed would still allow it sufficient time to prepare and print ballots and mail absentee ballots. (*Id.* at p 4, Page ID # 376.)

2. Secretary Benson and Director Brater’s Experts

a. Lee Albright

Lee Albright is the president of National Petition Management, and has experience gathering signatures for petition efforts nationwide since 1988. (R. 28-6, Ex. E, Albright CV, Page 1-6, Page ID # 383-388.)

Included in his experience are almost twenty statewide petition efforts in Michigan. (*Id.*) Mr. Albright described several petition-gathering scenarios that may apply to an independent candidate qualifying for the ballot under Michigan law. (R. 28-7, Ex. F, Albright Report 2/26/2019, p 1, Page ID # 390.) Of note, Mr. Albright stated that using 179 of the 180 days provided by law, the effort to gather 30,000 valid signatures requires collecting only 224 signatures per day depending on the weather and available venues for gathering. (*Id.*) But, if a candidate reduces the number of days to collect signatures, it increases the number of signatures needed per day. (*Id.* at p 2, Page ID # 391.) In Mr. Albright's experience, it is easier to gather signatures in the early part of an effort and becomes more difficult later in the process. (*Id.*)

Mr. Albright also stated that, in his opinion, had Plaintiff Graveline used the full 180 days allotted by statute, his costs per signature would have been lower. (*Id.* at p 3, Page ID # 392.) According to Mr. Albright, "gathering 30,000 valid signatures of qualified Michigan voters within the 180 days allowed can most certainly be done." (*Id.*)

b. Dr. Colleen Kelly

2. Dr. Colleen Kelly is a tenured professor of statistics at San Diego University, and a consultant with expertise in statistical analysis. (R. 28-8, Ex. G, Kelly Report 2/28/2019, p 11, Page ID # 409.) Dr. Kelly rebutted Graveline's expert Mr. Winger in several ways:

- a. Mr. Winger's analysis is not a statistical or mathematical analysis of data, and his conclusion that 5,000 signatures are sufficient is not supported with any logical justification. (*Id.* at p 4, 8, Page ID # 402, 406.)
- b. To make a conclusion about the effect of instituting a 5,000 signature requirement, data from states with that requirement should be considered. (*Id.* at p 4, Page ID # 402.)
- c. Mr. Winger does not include analysis of the number of candidates on the ballot that would lead to voter confusion. (*Id.*). Winger offered no evidence to support his claim that a limit of 8 candidates would avoid voter confusion, except for a statement from Justice John Harlan in his concurring opinion in *Williams v. Rhodes*, 393 U.S. 23 (1968) that he did not believe that as many as 8 would cause confusion. (*Id.* at p 8, Page ID # 406.)

Dr. Kelly correlated signature requirements for independent candidates for President and a number of candidates on the ballot using data from 2000 to 2016 from all 51 states (255 data points in total) to estimate the effects of a 5,000 signature requirement on Michigan's ballot. (*Id.* at p 4, Page ID # 402.) Comparing the absolute number of signatures required across 46 states (5 states do not elect attorneys general) as

well as the required number of signatures as a percentage of the total state population, Dr. Kelly found that Michigan's 30,000 signature requirement was not unusual. (*Id.* at p 4-5, Page ID # 402-403.)

In terms of absolute number of signatures, Michigan's 30,000 signature requirement is in the 87th percentile, but is in the 67th percentile when viewed as a percentage of the state population. (*Id.*). Dr. Kelly also conducted a statistical analysis that determined that lowering the signature requirement to 5,000 signatures could result in up to 11 candidates on the ballot for one office per year. (*Id.* at p 9, Page ID # 407.)

3. The Experts' Rebuttal Reports

a. Winger Rebuttal April 15, 2019

Mr. Winger took exception to Dr. Kelly's conclusion that there was "no logical justification" for a 5,000 signature requirement being sufficient to protect against overcrowding ballots. (R. 28-9, Ex. H, Winger Rebuttal 4/15/2018, p 1, Page ID # 416.) Winger noted a factual error in Dr. Kelly's report, where she stated that there were three instances when Florida required more than 5,000 signatures and there were more than eight candidates on the ballot. (*Id.*). Mr. Winger pointed out that Florida did not have a signature requirement for minor

political parties from 1999 to 2016. (*Id.*) Mr. Winger then reiterated his historical analysis as justification for his 5,000 signature threshold. (*Id.*)

b. Dr. Kelly's Rebuttal to Winger's 4/15/2019 Report

In response to Mr. Winger's rebuttal, Dr. Kelly stated that the error concerning Florida's election was not significant, and the change to those four single data points did not substantially change her statistical analysis or conclusions. (R. 28-10, Ex. I, Kelly Rebuttal, May 15, 2019, p 1, Page ID # 442.) Her revised analysis still predicted that, according to Mr. Winger's definition of crowded as being 9 or more candidates, Michigan's ballot would be crowded 13% of the time if the requirement were dropped to 5,000 signatures. (*Id.* at p 2, Page ID # 443.)

Further, Dr. Kelly found that Mr. Winger's opinion did not consider the specific signature requirements of each state, and instead grouped together all states requiring at least 5,000 signatures. But that group included a wide range of requirements, ranging from 5,000 to 194,118. (*Id.* at p 1, Page ID # 442.) As a result, "it is no wonder that

he concludes a 5,000 signature requirement can be substituted for a 30,000 signature requirement.” (*Id.*).

D. Outcome of the 2018 General Election for Attorney General

In the November 2018 general election, the total number of votes for Attorney General among all candidates was 4,184,026. (R. 28-4, Ex. C, 2018 Election Results, Page ID # 371.) Dana Nessel was the prevailing candidate with 2,031,117 votes. (*Id.*) Tom Leonard placed second with 1,916,117 votes. (*Id.*) Libertarian candidate Lisa Lane Gioia earned 86,807 votes. (*Id.*) Graveline received 69,889 votes, or 1.69% of all votes for Attorney General. (*Id.*).

E. Procedural History

Graveline, along with the individual voter plaintiffs, filed their complaint on July 27, 2018. (R. 1, Page ID # 1-17.) On August 8, 2019, they filed a motion for preliminary injunction. (R. 4, Mot. for Prelim. Inj., Page ID # 62-92.) Then Secretary of State Ruth Johnson and then Director of Elections Sally Williams filed a brief opposing that motion on August 16, 2018. (R. 8, Def’s Resp. to PI, Page ID # 100-128.) Graveline filed a reply on August 20, 2018. (R. 9, Pl’s Reply, Page ID # 129-140.) On August 27, 2018, the district court granted the

preliminary injunction, and ordered that the State must accept and canvass Graveline's petition and signatures, and place him on the ballot if he had collected more than 5,000 valid signatures. (R. 12, Op. & Order, Page ID # 145-169.)

Defendants thereafter filed a notice of appeal against the preliminary injunction on August 29, 2018. (R. 13, Notice, Page ID # 170.) At the same time, they filed an emergency motion for stay pending appeal with the district court. (R. 14, Em. Mot. for Stay, Page ID # 171-220.) The district court denied the motion for stay on August 30, 2019. (R. 17, Order, Page ID # 230-240.) On September 7, 2018, this Court issued its opinion on the State's emergency motion for stay pending appeal before that Court, in which—noting the lack of evidentiary record—the panel majority held that the State was unlikely to succeed in showing that the district court abused its discretion. (R. 19, Opinion, Page ID # 241-260.) Judge Griffin filed a dissenting opinion. (R. 19, Page ID # 255-260.)

The case proceeded in the district court through discovery, and the parties filed cross motions for summary judgment. Secretary of State Benson and Director of Elections Brater, the new officeholders, filed

their motion on August 15, 2019. (R. 28, Page ID # 300-462.) Graveline and the individual voters filed their motion on August 15, 2019. (R. 30, Pl's Mot. for Summ. J, Page ID # 466-554.) The parties each filed their responses on September 5, 2019. (R. 31, Def's Resp., Page ID # 555-590; R. 33, Pl's Resp., Page ID # 594-640.) On September 19, 2020, the parties filed their respective replies. (R. 34, Def's Reply, Page ID # 641-739; R. 35, Pl's Reply, Page ID # 740-748.) Graveline filed a surreply on October 15, 2019. (R. 41, Page ID # 856-864.)

On December 22, 2019, the district entered an order granting Graveline's motion for summary judgment, denying the State's motion, and enjoining the State of Michigan from enforcing its signature requirement and filing deadline in combination against independent candidates for statewide office. (R. 42, Op. & Order, Page ID # 865-911.) In addition, the district court imposed an "interim requirement" that independent candidates could qualify for the ballot by submitting 12,000 signatures, instead of the 30,000 required by the now-enjoined statute. (R. 42, Page ID # 910.)

On January 21, 2020, Secretary Benson and Director Brater filed a motion to alter or amend the district court's order. (R. 45, Mot. to

Alter/Amend, Page ID# 1033-1049.) That motion expressly raised the issue that the district court’s “intermediate” remedy was silent as to the maximum number of signatures that could be submitted with the new 12,000 signature minimum. (R. 45, Page ID # 1046-47.) At approximately the same time, Attorney General Dana Nessel filed a motion to intervene as a party for the purpose of filing an appeal to defend the constitutionality of the statute. (R. 46, Mot. to Intervene, Page ID # 1050-1072.) On January 28, 2020, Graveline filed a response opposing the motion to alter or amend, arguing in part that the maximum number of signatures had not been raised earlier. (R. 49, Pl. Resp. to Alter/Amend, Page ID # 1203-1213.) Graveline also opposed the intervention of the Attorney General. (R. 55, Pl. Resp. to Intervention, Page ID # 1242-1251.)

On March 24, 2020, the district court denied the motion to alter or amend the judgment, holding—in pertinent part—that the issue was not raised before the judgment had been entered. (R. 52, Order Denying Motion to Alter/Amend, Page ID #1222-1227.) On the same day, the Court also ordered Attorney General Nessel to file a supplemental brief explaining the necessity of her intervention. (R. 53,

Order RE: Intervention, Page ID # 1228-1230.) Attorney General Nessel filed that brief on March 30, 2020. (R. 54, Nessel Supp. Brf., Page ID # 1231-1241.) Graveline filed another brief in opposition to the intervention on April 15, 2020. (R. 55, Pl's Opp. Brf., Page ID # 1242-1251.) Secretary Benson, Director Brater, and Attorney General Nessel filed their notice of appeal on April 20, 2020.² (R. 57, Notice, Page ID # 1383-1385.) Attorney General Nessel filed a reply brief in support of her intervention on April 23, 2020. (R. 59, Nessel Reply, Page ID # 1387-1394.) The district court granted the motion to intervene on May 1, 2020. (R. 61, Order Granting Intervention, Page ID # 1445-1449.)

STANDARD OF REVIEW

In evaluating a district court's grant of a permanent injunction, this Court reviews the factual findings under a clearly erroneous standard, the legal conclusions de novo, and the scope of injunctive relief under an abuse of discretion standard. *ACLU of Ky. v. McCreary County*, 607 F.3d 439, 445 (6th Cir. 2010) (citing *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006)).

² Because the motion to intervene had not yet been granted, Attorney General Nessel filed the notice as a proposed intervening defendant.

In general, “[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that [for a preliminary injunction] the plaintiff must show a likelihood of success on the merits rather than actual success.” (*Id.*) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) (internal citations omitted)). In that context, “a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer ‘continuing irreparable injury’ for which there is no adequate remedy at law.” (*Id.*) (citing *Baird*, 438 F.3d at 602).

SUMMARY OF ARGUMENT

The district court erred in enjoining the enforcement of Michigan’s statutory petition-signature threshold and filing deadline for independent candidates for statewide elected offices. First, the district court lacked subject matter jurisdiction over Graveline’s claims after the 2018 election. Second, the signature and filing requirements—either alone or in combination—do not combine to place a significant burden on Graveline’s First and Fourteenth Amendment rights to ballot access. And, even if they had imposed a severe burden on such rights, Michigan’s laws were narrowly drawn to recognized state interests.

The district further erred in substituting its own figure of 12,000 signatures for the previous statutory requirement of 30,000. In addition, after imposing this new requirement, the district court erred by not amending its order to place a coordinate maximum number of signatures to match the newly-created 12,000 minimum.

ARGUMENT

I. Once the 2018 election was completed, Graveline no longer had a live claim that fell within the subject matter jurisdiction of the district court, and his claims should have been dismissed.

A. Graveline’s claims are moot.

The district court had a duty to determine whether the completion of the November 2018 general election deprived it of jurisdiction. In general, a federal court has a continuing duty to ensure that it adjudicates only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *McPherson v. Mich. High School Athletic Ass’n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc). If “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,” then the case is moot and the court has no jurisdiction. *Los Angeles County*

v. Davis, 440 U.S. 625, 631 (1979). A “live” controversy is one that “persists in ‘definite and concrete’ form even after intervening events have made some change in the parties’ circumstances.” *Mosely v. Hairson*, 920 F.2d 409, 414 (6th Cir. 1990) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974)); *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) (“The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.”) (internal quotation marks and citation omitted).

1. Effective relief can no longer be granted regarding the 2018 General Election.

Here, Graveline and the individual voter plaintiffs alleged that § 590c(2) (the filing deadline) was facially unconstitutional, and that the combined effect of § 544f (the 30,000 signature requirement), § 590b(4) (congressional district signature requirement) and § 590c(2), as applied to Plaintiffs, violated their constitutional rights by resulting in the exclusion of Plaintiff Graveline from the November 6, 2018, general election ballot.³ (Doc. 1, Page ID # 15-16, ¶¶ 33-44.) They sought a

³ The Plaintiffs dropped their facial challenge to § 590c(2) at the preliminary injunction hearing, and Plaintiffs’ counsel subsequently confirmed that they are no longer pursuing the facial claim.

declaration that these statutes were unconstitutional *as applied* and an “order placing Plaintiff Graveline on the ballot as a no party affiliation candidate for Attorney General in the upcoming November 2018 election[.]” *Id.*, Page ID # 17. The district court made a preliminary finding that the statutes in combination were applied unconstitutionally to Graveline and entered an injunction ordering Graveline to be placed on the November 2018 general election ballot so long as he had obtained at least 5,000 valid signatures, (R. 12, Op. & Order), which he did. The individual voter Plaintiffs thus had the opportunity to cast their ballot for Graveline at that election, as they requested. Because the Plaintiffs received all the practical relief they were seeking—placement on the ballot and an opportunity to vote for Graveline in the November 2018 general election—a declaration that the statutes—as applied to the plaintiffs—was unconstitutional would not make a difference to the legal interests of the parties. *Ford*, 469 F.3d at 504. Accordingly, there was no “live” controversy remaining as to Graveline’s claims post the November 2018 general election. *Mosely*, 920 F.2d at 414. Graveline’s claims are now moot and should be dismissed.

2. The exception to the mootness doctrine does not apply.

There is an exception to the mootness doctrine for wrongs that are “capable of repetition, yet evading review.” *See Rosen v. Brown*, 970 F.2d 169, 173 (6th Cir. 1992) (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514 (1911)). But “the ‘capable of repetition, yet evading review’ doctrine [i]s limited to the situation where two elements combine[]: (1) the challenged action [i]s in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party w[ill] be subjected to the same action again.” *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *Honig v. Doe*, 484 U.S. 305, 318-19 n. 6 (1988). “The ‘capable of repetition, yet evading review’ doctrine, in the context of election cases, is appropriate when there are ‘as applied’ challenges as well as in the more typical case involving only facial attacks.” *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974). “The party asserting that this exception applies bears the burden of establishing both prongs.” *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005).

a. The challenged action was not fully litigated before the November 2018 election.

Courts have recognized that legal disputes involving election laws almost always take more time to resolve than the election cycle permits. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006); *Lawrence*, 430 F.3d at 371. Here, Graveline’s complaint was filed in July 2018 after his insufficient petition was rejected, the deadline for finalizing ballots was in September of 2018, and the election was held in November 2018, all before the case could be fully resolved on the merits. Whether the same result would occur in the future is speculative. But although Graveline’s claims may satisfy this prong of the inquiry, they cannot fulfill their burden as to the second.

b. There is no reasonable expectation that the controversy will recur as to Plaintiffs.

Under the second prong, Graveline must show that there is a “reasonable expectation” or “demonstrated probability” that the alleged controversy will recur as to these Plaintiffs. *See Weinstein*, 423 U.S. at 149. In *Federal Election Comm v. Wisconsin Right To Life, Inc.*, the U.S. Supreme Court observed that “[o]ur cases find the same controversy sufficiently likely to recur when a party has a reasonable

expectation that it ‘will again be subjected to the alleged illegality,’ or ‘will be subject to the threat of prosecution’ under the challenged law.” 551 U.S. 449, 463 (2007) (internal citations omitted). To meet this burden, a party need not show “repetition of every ‘legally relevant’ characteristic of an as-applied challenge—down to the last detail[.]” (*Id.*) (citation omitted). Rather, a party must show that “materially similar” circumstances will recur. (*Id.*) at 464. In that case, the Supreme Court concluded that Wisconsin Right To Life, Inc. “credibly claimed that it planned on running ‘‘materially similar’’ future targeted broadcast ads mentioning a candidate within the blackout period[.]” (*Id.*) (citations omitted).

Here, there was and is nothing in the record that demonstrates it is probable, reasonable, or even credible, to expect that in four (or more) years Graveline—or any other independent candidate—will again spontaneously decide to run as an independent candidate for statewide office, consciously wait to collect signatures until half the time period had run, and then fail to collect sufficient signatures in his effort to qualify for the ballot. Or likewise, that an unknown future independent candidate will do the same. Even if it is theoretically possible that

Graveline or another candidate may do so, it is not “reasonable” under the present circumstances to expect that this will occur. *Murphy v Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (“The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the [capable-of-repetition] test[.]”). *See also Hall v Secretary of State*, 902 F.3d 1294, 1298 (11th Cir. 2018) (“reasonable expectation requires more than a theoretical possibility”).

As for some unidentified, independent candidate that the individual voter Plaintiffs might want to vote for at a future election, it would be pure speculation to conclude that materially similar circumstances will occur as to that candidate. *Wis. Right To Life, Inc.*, 551 U.S. at 464. In other words, that this future candidate will decide late to become a candidate and ultimately fail to collect sufficient signatures. Those facts are material to Plaintiffs’ as-applied claims.

The district court relied heavily on the decision in *Lawrence v. Blackwell* to conclude that the present case is not moot. 430 F.3d at 371-72. But *Lawrence* was decided before the Supreme Court’s 2007 decision in *Wisconsin Right to Life, Inc.*, which was also an elections case. In *Wisconsin Right To Life, Inc.*, the Court reconfirmed that the

inquiry is whether the *same* plaintiffs will be personally re-exposed to the challenged illegality, and that with respect to as-applied claims, the plaintiffs must credibly claim that the future controversy will be “materially similar” to the former controversy. The district court erred by failing to address whether “materially similar circumstances” to the present case will recur in the future, and concluded that because the individual voters stated their intention to vote for independent candidates in the future, that was enough. (R. 42, Page ID # 880.) But that is not sufficient.

Graveline intentionally chose to start his signature drive late, and that decision had consequences for the success of his effort. As stated earlier in the recitation of facts, Defense expert Lee Albright has conducted several statewide petition efforts and attested that gathering signatures is easier at the start of a drive and grows more difficult with time. Reducing the number of days to gather signatures makes it necessary to gather more per day in order to reach the target. Thus, the unique circumstances of Graveline’s effort materially affected the outcome and would need to recur in order for the exception to mootness to apply. Graveline and the individual voters did not meet their

burden, and the district court should have held that the claims are moot.

B. Graveline and the individual voters lacked standing after the 2018 election.

Even if their claims are not moot, Graveline and the individual voter Plaintiffs lacked standing to maintain their claims for declaratory relief. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) (“Art. III, § 2, underpins both our standing and our mootness jurisprudence, but the two inquiries differ in respects”). To establish Article III standing, a party’s injury must be “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-150 (2010). And “Article III demands that an ‘actual controversy’ persist throughout all stages of litigation.” *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (citation omitted). It is the plaintiffs’ burden to establish they have standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Here, the Plaintiffs arguably had standing as of the initial filing of this case; they had an actual injury (denial of access to the 2018 ballot/denial of opportunity to vote for candidate of choice in 2018,

which implicated their First and Fourteenth Amendment rights) that was traceable to the challenged action (the Secretary's rejection of the qualifying petition as insufficient as of the filing deadline) that would have been, and in fact was, redressed by a favorable ruling (the district court's granting of preliminary injunctive relief placing Graveline on the November 2018 ballot).

But after that, neither Graveline nor the individual voters any longer had an actual injury. At this point, they could only speculate as to an injury at some election in the future. But a future injury must be "imminent" to support standing. *Monsanto Co.*, 561 U.S. at 149-150.

The Supreme Court has explained that:

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." Thus, we have repeatedly reiterated that "threatened injury must be *certainly impending* to constitute injury in fact," and that "[a]llegations of possible future injury" are not sufficient. [*Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal citations omitted) (emphasis in original).]

Again, the threatened injury with respect to Graveline is that he may decide late to run again for Attorney General or another statewide office in 2022, thereby reducing his signature circulation window and

that he will again fail to collect sufficient signatures within the remaining window by the filing deadline. There are too many variables in this scenario for him to demonstrate that this “threatened injury” is “certainly impending.” *Clapper*, 568 U.S. at 409. The same is true with respect to the individual voters, whose threatened injury is simply that they may wish to vote for another independent candidate in the future, who apparently will encounter problems similar to Graveline and not qualify for the ballot. Under these circumstances, neither Graveline himself nor the individual voters can show a sufficiently imminent injury in order to demonstrate they have standing to sue. Because they lacked standing, their claims should have been dismissed by the district court.

II. The district court erred in permanently enjoining the 30,000 signature requirement, because neither that requirement nor the combined effect of that requirement and the filing deadline, are unconstitutional under the First and Fourteenth Amendments.

The “right to vote in any manner . . . [is not] absolute,” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted); the Constitution recognizes the states’ clear prerogative to prescribe time, place, and manner restrictions for holding elections. U.S. Const. art. I, § 4, cl. 1.

Indeed, there “must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730). Federal law thus generally defers to the states’ authority to regulate the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (Stevens, J., op.) (recognizing that neutral, nondiscriminatory regulation will not be lightly struck down, despite partisan motivations in some lawmakers, so as to avoid frustrating the intent of the people’s elected representatives).

When a constitutional challenge to an election regulation requires courts to resolve a dispute concerning these competing interests, courts apply the *Anderson-Burdick* analysis from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick, supra*, which requires the following considerations:

[T]he court must first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate. Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally, it must determine the legitimacy and strength of each of those interests and consider the extent to which

those interests make it necessary to burden the plaintiff's rights.

Green Party of Tenn. v. Hargett (Hargett II), 791 F.3d 684, 693 (6th Cir. 2015)(internal quotation marks and citations omitted). “Though the touchstone of *Anderson-Burdick* is its flexibility in weighing competing interests, the ‘rigorousness of [the court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.’” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (quoting *Burdick*, 504 U.S. at 434).

If a state imposes “severe restrictions” on a plaintiff’s constitutional right to vote, its regulations survive only if “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. But “minimally burdensome and nondiscriminatory” regulations are subject to a “less-searching examination closer to rational basis” and “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Ohio Council 8 Am. Fed’n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett (Hargett I)*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). Regulations falling somewhere

in between—“i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a ‘flexible’ analysis, ‘weighing the burden on the plaintiffs against the state’s asserted interest and chosen means of pursuing it.’ ” *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

In this case, the district court concluded that the signature requirement and filing deadline, in combined effect, severely burdened the associational rights of Graveline and the individual voter plaintiffs. (R. 42, Page ID # 890.) The district court also held that the filing deadline and geographic distribution requirement were narrowly drawn to advance important state interests. (R. 42, Page ID # 903-904.) The district court held, however, that the 30,000 signature requirement, was not narrowly drawn. (R. 42, Page ID # 904.)

1. The statutory scheme imposed a minimal burden on Graveline.

The combined effect of Michigan’s statutory scheme does not impose more than a minimal burden on independent candidates, justifying the “less searching” analysis more akin to rational basis. *Husted*, 814 F.3d at 335. Graveline did not meet the burden to explain how the filing deadline and signature requirement amplify or aggravate

one another. Neither of the statutes creates more than a minimal burden when considering Graveline's motivations and timing for entering the race and his ability to follow the law. For clarity, the statutes will be discussed individually before their combined effects are analyzed.

**a. Mich. Comp. Laws § 168.590b(4), the
“geographic distribution requirement.”**

Section 590b(4) required Graveline to obtain at least 100 signatures from registered electors in at least half (7 of the 14) congressional districts in Michigan. Thus, of the 30,000 required signatures at least 700 must come from at least 7 of the congressional districts. This geographic distribution requirement serves the state's interest by requiring statewide candidates to show a modicum of support from voters within roughly half the state. See, e.g., *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 577 (6th Cir. 2016) (recognizing state interest in requiring candidates to demonstrate significant modicum of support for placement on the ballot). Graveline conceded that he met the requirement by obtaining at least 100 signatures from 12 of the 14 districts. (R. 1, ¶ 25, Page ID # 12.) And again, since Plaintiffs suffered no actual injury from the application of §

590b(4), and thus there is no certainty of an imminent future injury, they did not have standing to challenge its constitutionality as applied to them. *Monsanto Co.*, 561 U.S. at 149-150; *Clapper*, 568 U.S. at 409.

b. Mich. Comp. Laws § 168.544f, “the signature requirement.”

Under § 544f Graveline was required to file at least 30,000 valid petition signatures.⁴ The Supreme Court has consistently recognized that states, like Michigan, have an important interest in requiring some preliminary showing of a significant modicum of support before printing the name of a candidate on the ballot; this protects the integrity of the electoral process by regulating the number of candidates on the ballot and avoiding voter confusion. *See Jenness v. Forton*, 403 U.S. 431, 441 (1971); *American Party of Texas v. White*, 415 U.S. 767, 783 (1974); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). The Sixth Circuit has likewise recognized that states have “an important interest in ensuring that candidates demonstrate a ‘significant modicum of

⁴ Before § 544f’s enactment in 1999, independent candidates were required to obtain signatures from not less than 1% of the total number of votes cast for all candidates for governor in the last election. *See* 1988 P.A. 116; Mich. Comp. Laws §168.590b(2).

support,' before gaining access to the ballot, primarily in order to avoid voter confusion, ballot overcrowding, and frivolous candidacies.”

Libertarian Party, 835 F.3d at 577 . Section 544f advances that important interest in Michigan by requiring unaffiliated candidates, who lack the support and interest of a major or even minor party, to demonstrate they have a significant modicum of public support for their candidacy.

As for the number of signatures required, the State does not dispute that many other states apparently have lower requirements for the absolute number of signatures required for independent candidates seeking to run for a statewide office. But it is also true, as noted by Graveline’s own expert, that there are at least five states with higher signature requirements than Michigan: Alabama, Arizona, Georgia, North Carolina, and Texas. (R. 28-5, p 1, Page ID # 376.) Further, the State’s expert, Dr. Kelly, found that Michigan’s requirement is in the 67th percentile as a percentage of the state population. (R. 28-8, p 4-5, Page ID # 402-403.) Simply put, Michigan’s signature requirement is neither unusual for the size of its population, nor unreasonable.

In *Lawrence v. Blackwell*, 430 F.3d 368, 375 (6th Cir. 2005), the Sixth Circuit held that Ohio’s one-percent signature requirement for independent candidates was reasonable and nondiscriminatory. As the Court stated, “[t]he signature requirement meets Ohio’s important state interest in verifying a candidate’s support.” (*Id.*) In comparison, Michigan’s 30,000 signature figure is less than 1% of the 3,077,164 votes cast for Attorney General in 2014,⁵ and of the 4,184,026 votes cast for Attorney General in 2018. (R. 28-4, Page ID # 371.)

Similarly, in *De La Fuente v. California*, 278 F. Supp. 3d 1145, 1155 (C.D. Cal., 2017), the district court found that California’s requirement that independent candidates for president obtain signatures from one percent of the electorate was not objectively unreasonable and was not a severe burden on independent candidates. Notably, that Court dismissed Mr. Winger’s suggestion in that case that a 5,000 signature requirement was sufficient, finding that the plaintiff’s reliance on Winger’s opinion was not sufficient to overcome the state’s interests. (*Id.*) at 1156. Again, in comparison, Michigan’s 30,000

⁵ See 2014 Michigan Election Results, Michigan Secretary of State, <https://mielections.us/election/results/14GEN/>.

signature figure is less than 1% of the total votes cast for Attorney General in the last two election cycles.

In addition, numerous federal courts have upheld similar signature requirements for minor party candidates, similarly situated in many respects to independent candidates. (R. 8, Page ID # 111-117.) *See also Storer*, 415 U.S. 740 (upholding California’s petition requirements for independent candidates).

The burden associated with the number of signatures required is mitigated by the lengthy circulation period permitted. By law, independent candidates, including Graveline, have 180 days (six months) in which to circulate a qualifying petition and obtain the required 30,000 signatures. *See Mich. Comp. Laws § 168.590b(3)*. The ability of independent candidates to reach the 30,000 signature requirement is supported by the expert opinion of Lee Albright, who has conducted numerous statewide petition efforts in Michigan. (R. 28-7, Page ID # 390-392.) According to Mr. Albright, “gathering 30,000 valid signatures of qualified Michigan voters within the 180 days allowed can most certainly be done.” (*Id.*) at 392.

Indeed, in 42 days Graveline collected 14,157 signatures, 7,899 of which were collected by his unpaid volunteers. (R. 1-3, Page ID # 33, ¶ 9.) Just based on simple math, 14,157 signatures over 42 days translates into a rate of 337 signatures per day. If Plaintiffs' volunteers and paid circulators had circulated for 180 days at that rate, they would have collected over 60,000 signatures, satisfying the 30,000 signature requirement and, in fact, reaching the maximum number of signatures that are allowed to be submitted.

c. Mich. Comp. Laws § 168.590c(2), “the filing deadline.”

Finally, § 590c(2) required Plaintiff Graveline to file his qualifying petition by the 110th day before the November general election, which again was July 19, 2018. As noted above, states have the power to prescribe time, place, and manner restrictions for holding elections, and there “must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick*, 504 U.S. at 433. Here, the filing deadline is not arbitrary or designed to short-change independent candidates like Graveline; it is part of a carefully constructed set of election deadlines extending backwards from the date of the election.

The affidavit of Sally Williams, the former Director of Elections, demonstrates that the filing deadline is part of a chain of deadlines culminating in the 45th-day deadline for having ballots available to absent voters. (R. 28-2, ¶15, Pag ID # 356, citing Mich. Comp. Laws §§ 168.714 and 759a; 52 U.S.C. § 20302(a)(8); *see also* R. 28-11, Page ID #447-455.) As discussed above, another critical deadline is the deadline for certifying candidates to the local election officials, which is the 60th day before the November general election, in this case September 7, 2018. The 110th day filing deadline and the 60th day certification deadline create a window of 50 days within which the Secretary of State must canvass all qualifying petitions filed for statewide offices to determine whether the required number of signatures have been collected. This window also permits time for interested third parties to challenge a petition, and for the Secretary of State to process such challenges. In addition to qualifying petitions, during this window the Secretary of State may also be canvassing petitions proposing constitutional amendments, which require several hundred thousand signatures. *See* Mich. Comp. Laws § 168.471 (deadline for filing

petitions to amend the constitution is 120th day before the election at which the proposal will be voted upon).

Any extension of the filing deadline for qualifying petitions would obviously encroach upon the 50-day window, thereby reducing the time for the Secretary of State to perform her duties with respect to such petitions, and potentially interfering with the performance of her other duties during the same time period. Other than complain that the filing deadline should be later, Plaintiffs have not proffered what the deadline should be or explained how a later deadline will not detrimentally impact the Secretary of State's processes.

Graveline's expert, Mr. Winger, did not explain how Michigan could implement a filing deadline in August or September and still comply with the certification deadline and other deadlines, like the requirement that absent voter ballots must be available to military and overseas voters no later than 45 days before a November election. This 45-day requirement was recently adopted into the state constitution. Const. 1963, Art. II, §4(1)(b). Instead, he points to other states that have a later filing deadline but offers no analysis or comparison to their ballot preparation procedures, the structure of their elections system, or

the specific deadlines each state uses. While Mr. Winger may have a general knowledge of election laws throughout the nation, Director Williams has the greater expertise in conducting elections in Michigan.

Williams' affidavit demonstrates that § 590c(2)'s filing deadline is another necessary cog in Michigan's election machinery that keeps the process running in an orderly manner. This Circuit has recognized that "easing administrative burdens" on elections officials is "undoubtedly '[an] important regulatory interest[].'" *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) (citation omitted). The filing deadline advances that important regulatory interest by ensuring that the Secretary of State and her staff have sufficient time to canvass qualifying petitions to meet the 60th day before the election deadline for certifying candidates under Mich. Comp. Laws § 168.648, which triggers final preparations for ballot printing by the counties.

d. The statutes, as applied, had no "combined effect" resulting in the unconstitutional treatment of Plaintiffs.

To be clear, Graveline and the individual voters are not alleging each statute created an unconstitutional burden as to them, and the district court held that the geographic distribution requirement and the

filing deadline were narrowly tailored to important state interests. In other words, the statutes are constitutional in their own right.

Rather, the district court held that it is the “combined effect” of the statutes that created an unconstitutional burden on their First and Fourteenth Amendment associational rights. *See, e.g., Libertarian Party*, 462 F.2d at 586. Setting aside the geographical-distribution requirement of § 590b(4), which Graveline satisfied, the two statutes at issue prescribed (1) the 30,000-signature requirement, § 544f, and (2) the July 19, 2018 filing deadline, § 590c(2). The allegedly unconstitutional “combined effect” of these statutes arose when Graveline made his late decision to enter the race for Attorney General, only to find that the petition filing deadline was just around the corner and there were an insurmountable number of signatures to gather in the remaining time.

But the facts show that it was Graveline’s personal decisions that kept him from qualifying for the ballot, not necessarily the filing deadline and the signature requirement. Graveline explained that his motivation for entering the race late within the signature circulation period and fairly close in time to the filing deadline resulted from his

disappointment with the presumptive candidates from the major parties. (R. 1-3, ¶3-4, 10, Page ID # 29-31, 34.) He stated that he entered the race, “when it became reasonably clear” to him that the major parties would not be nominating a candidate who shared his *non-partisan* ideals. (R. 1-3, ¶7, Page ID # 32.) But this rings hollow since the purpose of the major parties is to, in fact, nominate partisan candidates for office. A non-partisan candidate for Attorney General was never going to be nominated by the major parties.

Even if Graveline waited because he wanted to learn more about who might be nominated, the five major party candidates for Attorney General—Nessel, Miles, and Noakes as Democrats, and Leonard and Schuitmaker as Republicans—had declared their candidacies in the Fall of 2017 by publicly forming candidate committees. (R. 8, Page ID # 107 & n.1.) A “reasonably diligent” potential candidate would have at least been aware of who the contenders were going to be at that point. Graveline also cannot argue that the public was not yet politically engaged when he admits that he was building his own opinions on the major party candidates based upon news coverage more than two months before he entered the race. (R. 1-3, ¶3, Page ID #29-30.)

Moreover, the Democratic Party held an early endorsement convention on April 15, 2018, at which time the Party gave its endorsement to Attorney General Nessel. (R. 1-3, ¶2-3, Page ID #29-30.)

But still Graveline waited. And part of his delay, as Graveline admitted, had nothing to do with the field of candidates but rather the fact that he would have to resign from his position at the U.S. Attorneys Office before he could file as a candidate. (R. 1-3, ¶ 8, Page ID # 32.)

Graveline finally filed his paperwork on June 4, 2018, and began collecting signatures a few days later, leaving him only 40 or so days to collect his 30,000 signatures before the filing deadline, which he failed to do. Even if an independent candidate has some right to know or have an idea of who the major party candidates for an office may be before deciding to run as an independent, it is plain from the record that Graveline either had that knowledge or could have had that knowledge well before June 2018. *Cf. Lawrence*, 430 F.3d at 373-74 (“[T]he burden on independent candidates to file . . . before the primary is reasonable because it prevents such candidates from being able to make a decision to run for office after learning which candidates will be representing the major parties.”). The fact that it appears to have taken him weeks if

not months to decide whether he liked any of the candidates should not weigh against the filing deadline or the signature requirement. A reasonably diligent independent candidate would have filed to run earlier. *See, e.g., Storer*, 415 U.S. at 742 (in assessing ballot access claims by independent candidates, the question is “could a reasonably diligent independent candidate be expected to satisfy the signature requirements”).

Graveline’s delay was unreasonable under the circumstances. And because he should have filed as a candidate earlier, there is no way to assess the burden imposed by the signature requirement. This is because had he filed earlier he would have had more time to collect signatures, and could have collected sufficient signatures. Indeed, in the 42 days Graveline collected signatures, he obtained 14,157 signatures, almost half the required 30,000. *Id.*, Page ID # 35, ¶¶ 11, 13, 15.

In this case it was Graveline’s dilatoriness that placed him in a race against the clock—not the statutes. Any burdens created by the filing deadline and signature requirement were minimal; at best, the burden was somewhere between the minimal and severe burdens

contemplated in the *Anderson-Burdick* analysis, which would require only a weighing of the supposed burden against the state's interests and means of achieving them. As discussed above, the filing deadline advances the state's important regulatory interest in easing the administrative burden of the Secretary of State and her staff, and the signature requirement advances the state's interest in requiring independent candidates, like other candidates, to demonstrate a modicum of public support before gaining access to the ballot.

- e. **Even if the burden imposed by Michigan's filing deadline and signature requirements were severe, Michigan's law is narrowly drawn.**

While Defendants maintain that the burdens imposed are not severe, even if they were severe, the statutes would still be constitutional because they are narrowly drawn to the state's compelling interests. *See Ohio Democratic Party v. Husted*, 834 F.3d at 627.

As discussed above, Michigan's law gives the Secretary of State 50 days from the filing deadline in which to review the petitions, resolve any challenges, and certify all non-affiliated candidate petitions. This period of time is not excessive, considering the gravity of the tasks and

the quantity of work required. The conclusion of that 50-day period is the Secretary of State's certification for all candidates, including the major party candidates. Fifteen days after that certification, the ballots are supposed to be available and mailed overseas. The only way to extend the filing deadline would be to further limit the time for review of the petitions and completion of any legal challenges. But this merely trades limits on the candidates for even harsher limits on challengers to their petitions, and on the staff whose job it is to review petition signatures.

Similarly, the 30,000 signature requirement is balanced to the need to protect against overcrowding ballots, confusing voters, and the rise of frivolous candidates. Dr. Kelly's analysis shows that lowering the requirement to 5,000 could lead to nine or more candidates vying for statewide offices. (R. 28-8, Page ID # 407; R. 28-10, Page ID # 442-43.) Mr. Albright, in turn, has stated that collecting 30,000 is "most certainly" possible for an independent candidate, when accompanied by appropriate planning and support. (R. 28-7, Page ID # 392.)

Michigan's statutory scheme, therefore, is narrowly drawn to achieve the important state interests of reviewing, printing, and

distributing ballots that are not confusing or overcrowded with frivolous candidates.

2. Plaintiffs have failed to meet their burden of production as to whether Michigan’s laws prevent independent candidates from reaching the ballot.

To determine the magnitude of the burden imposed by a state’s election laws, courts consider the associational rights at issue, including: (1) “evidence of the real impact the restriction has on the process”; (2) “whether alternative means are available to exercise those rights”; and (3) “the effect of the regulations on the voters, the parties and the candidates.” *Libertarian Party of Ohio*, 462 F.3d at 587.

Graveline—and the district court—relied extensively on Michigan’s 30-year drought of independent candidacies appearing on a statewide ballot. But their use of half of a statistic, without more, does not satisfy their burden of proof. The historical fact is a numerator in need of a denominator; it means nothing without some accompanying evidence creating an inference that people were *trying* to launch independent candidates, yet failed. There simply was no evidence that Michigan’s statutory scheme has *prevented* independent candidates from accessing the ballot.

The conclusion Graveline suggests—that because something has not happened means it has been prevented from happening—assumes causation without evidence. This type of incomplete historical evidence is not sufficient. *See Libertarian Party of Ohio*, 462 F.3d at 589 (stating that historical evidence is “not conclusive in and of itself”). It was Graveline’s burden instead to show that other candidates have tried to comply with the requirements but come up short despite diligent efforts. And, as stated above, there is evidence in the record that there simply have not been many efforts by independent candidates to run for statewide office in Michigan. *See, e.g. R. 34*, Page ID # 653-739. As a result, the 30-year absence of such candidates from the ballot is just as probably linked to a general lack of interest in independent candidacies in this state as opposed to any institutional bar. In any event, Graveline offered no evidence demonstrating any causal link between the lack of independent candidacies and the statutory requirements.

Because Graveline and the individual voters failed to carry their burden of proof, Michigan’s election process should have been allowed to proceed unhindered by the federal courts. *Ohio Democratic Party v. Husted*, 834 F.3d at 622 (“Proper deference to state legislative authority

requires that Ohio’s election process be allowed to proceed unhindered by the federal courts.”).

III. The district court abused its discretion by imposing its own “interim” minimum number of signatures, and by failing to set a maximum number of signatures coordinate with the new minimum it imposed.

The Constitution recognizes the states’ clear prerogative to prescribe time, place, and manner restrictions for holding elections. U.S. Const. art. I, § 4, cl. 1. Indeed, there “must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730). Federal law thus generally defers to the states’ authority to regulate the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (Stevens, J., op.) (recognizing that neutral, nondiscriminatory regulation will not be lightly struck down). Michigan’s Constitution expressly provides that the Legislature “shall enact laws . . . to preserve the purity of elections,” and to “guard against abuses of the elective franchise[.]” Mich. Const. 1963 Art. II, § 4(2).

While Graveline and the individual voters had sought a new signature requirement of only a minimum of 5,000 signatures, the

district court concluded that would not be sufficient to protect the important state interests involved. (R. 42, Page ID # 910-911.) Instead, the district court reduced the statutory requirement from 30,000 signatures to 12,000 signatures—the next-lowest amount and the same required for districts with populations between 2,000,000 and 4,999,999. Mich. Comp. Laws §168.544f. As of July 1, 2019, the U.S. Census Bureau estimated the population of Michigan to be 9,986,857.⁶ The district court’s interim remedy thus requires independent candidates for statewide office to gather the same number of signatures as required for a district less than one fifth of the state’s population.

This Court has commented on the role of the courts in fashioning relief in election cases:

[O]ur task (especially with respect to minimally burdensome laws) is neither to craft the “best” approach, nor “to impose our own idea of democracy upon the [Michigan] state legislature.” *Libertarian Party [of Ohio]*, 462 F.3d at 587; see also *Crawford*, 553 U.S. at 196, 128 S. Ct. 1610 ... Rather, we simply call balls and strikes and apply a generous strike zone when the state articulates legitimate and reasonable justifications for minimally burdensome, non-discriminatory election regulations.

⁶ <https://www.census.gov/quickfacts/MI> (last visited August 7, 2020).

Ohio Democratic Party v. Husted, 834 F.3d at 633-34. Here, the district court departed from these principles and hindered Michigan's process. (*Id.*) at 622. The district court's deviation from this Court's instruction is particularly egregious because it is seemingly ungrounded on any other legal basis. Absent from the district court's opinion was any reference to the constitutional standards for ballot access. *See, e.g., Storer*, 415 U.S. at 742 (in assessing ballot access claims by independent candidates, the question is "could a reasonably diligent independent candidate be expected to satisfy the signature requirements"). Instead, the district court determined that if 12,000 was enough for a district of up to 4,999,999 then it was sufficient for statewide office. (R. 42, Page ID # 911.) However, that does little to address whether a reasonably diligent candidate for office serving close to 10 million people could be expected to satisfy any other number.

Indeed, the Supreme Court has, on multiple occasions, upheld signature requirements equaling 5% of the voting base. *See e.g. Norman v. Reed*, 502 U.S. 279, 282 n. 2 (1992); *Am. Party of Tex. v. White*, 415 U.S. 767, 789 (1974) ("Demanding signatures equal in number to 3% or 5% of the vote in the last election is not invalid on its

face ...”); *Jenness* 403 U.S. at 438(1971)(“[W]e cannot say that Georgia's 5% petition requirement violates the Constitution.”) Using Michigan’s most recent gubernatorial election as an example of the voting base for statewide office, that would result in a total electorate of 4,250,585—of which 5% would be 212,529. Michigan’s now-enjoined 30,000 minimum was far below that already—and was actually a reduction from the previous statutory requirement of 1% of the number who voted for governor in the last election. *See* 1988 P.A. 116; Mich. Comp. Laws § 168.590b(2). Regardless, the district court’s analysis failed to consider or account for what amount of signatures a reasonably diligent candidate for statewide office might be required to produce. By simply adopting the next-lowest standard as being sufficient, the district court abused its discretion.

Also, the district court did not identify what *maximum* number of signatures would now apply under its interim remedy. For every population gradient under Mich. Comp. Laws § 544f, there is a minimum and a maximum number. Under the prior statutory structure, an independent candidate for statewide office would have submitted a minimum of 30,000 signatures up to a maximum of 60,000.

Mich. Comp. Laws § 168.544f. On the other hand, in a district with a population up to 4,999,999, an independent candidate would submit a minimum of 12,000 up to a maximum of 24,000. Mich. Comp. Laws § 168.544f.

The district court's opinion and order is silent with respect to the maximum number of signatures. The previous 60,000 maximum was not referenced as being enjoined, but it also does not match the 12,000 figure for the smaller district. In fact, it is five times larger, whereas the rest of the maximums in the statute are twice the minimums.

This is not a difference without impact on the State of Michigan, as it directly affects how many signatures would be canvassed. Also, such a disparate maximum number may actually provide an unfair advantage to independent candidates, who—unlike partisan or non-partisan candidates—could then submit signatures far in excess of the minimum and have less incentive to screen and verify their petitions before filing.

The district court dismissed this issue because it had not been raised previously in the case. (Doc. 52, Page ID # 1226-1227.) But the absence of a maximum number of signatures only arose as an issue in

light of the district court's imposition of its 12,000-signature interim remedy. In fact, the Secretary and Director of Elections had previously asked the district court to refrain from imposing a new signature requirement if it determined that the 30,000 statutory threshold was unconstitutional. (R. 42, Page ID # 909.) The district court did not explain how the Secretary or Director could have suggested a new maximum number before knowing what new minimum might be imposed.

Moreover, Graveline did not suggest that the installation of an appropriate and coordinate maximum number of signatures would cause them to be prejudiced. In fact, there was no substantive argument raised *against* a maximum. In contrast, the unmodified district court order imposed a considerable burden on the Secretary and Director through their having to canvass and review a now-disproportionate number of signatures. Further, it created an unnecessary—and presumably unintended—advantage for independent candidates. Where party candidates would have to carefully review their petitions to ensure a sufficient number of valid signatures, independent candidates could now submit over five times more

signatures than needed without reviewing them at all and be reasonably sure that enough valid signatures would be included. The Secretary and Director's ability to administer elections fairly and even-handedly was thus impaired.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the district court erred in permanently enjoining the enforcement of Michigan's statutory petition-signature threshold, and Intervenor-Appellant Attorney General Dana Nessel respectfully requests that this Court REVERSE the district court's permanent injunction and REMAND with instructions to grant summary judgment in favor of Secretary of State Jocelyn Benson, Director of Elections Jonathan Brater, and Attorney General Dana Nessel.

The district court further erred in substituting its own figure of 12,000 signatures for the previous statutory requirement of 30,000. In addition, after imposing this new requirement, the district court erred by failing to establish a coordinate maximum number of signatures to match the newly-created 30,000 minimum. All appellants respectfully request that this Court should REVERSE the district court's permanent

injunction imposing the 12,000 signature threshold, or in the alternative, to REMAND with instructions to grant the Rule 52 motion to the extent necessary to establish a maximum signature amount.

Respectfully submitted,

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Dated: July 12, 2020

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 12,425 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on July 12, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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**DESIGNATION OF RELEVANT DISTRICT COURT
DOCUMENTS**

Defendants-Appellants, per Sixth Circuit Rule 28(a), 28(a)(1)-(2),
30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	07/27/2018	R. 1	1-57
Declaration of Christopher Graveline	07/27/2018	R. 1-3	28-37
Defendants' Brief in Opposition to Plaintiffs' Motion Preliminary Injunction	08/16/2018	R. 8	100-128
Plaintiffs' Reply Support of Motion for Preliminary Injunction	08/20/2018	R. 9	129-140
Opinion & Order	08/27/2018	R. 12	145-169
Notice of Appeal	08/29/2018	R. 13	170
Defendants' Emergency Motion for Stay	08/29/2018	R. 14	171-220
Order Denying Emergency Motion for Stay	08/30/2018	R. 17	230-240
Defendants' Motion for Summary Judgment	08/15/2019	R. 28	300-462
MSJ Ex A, Affidavit of Sally Williams	08/15/2019	R. 28-2	351-364

MSJ Ex B, Statement of Organization	08/15/2019	R. 28-3	365-369
MSJ Ex C, Republican Nomination	08/15/2019	R. 28-4	370-372
MSJ Ex D, Winger Report & CV	08/15/2019	R. 28-5	372-381
MSJ Ex E, Albright CV	08/15/2019	R. 28-6	382-388
MSJ Ex F, Albright Report	08/15/2019	R. 28-7	389-397
MSJ Ex G, Kelly Report	08/15/2019	R. 28-8	398-414
MSJ Ex H, Winger Rebuttal and CV	08/15/2019	R. 28-9	415-439
MSJ Ex I, Kelly Rebuttal	08/15/2019	R. 28-10	440-443
MSJ Ex J, 2018 Michigan Election Deadlines	08/15/2019	R. 28-11	444-462
Plaintiffs' Motion Summary Judgment	08/15/2019	R. 30	466-554
Defendants' Response to Plaintiffs' Motion Summary Judgment	09/05/2019	R. 31	555-590
Plaintiffs' Brief in Opposition to Defendants' Motion Summary Judgment	09/05/2019	R. 33	594-640
Defendants' Reply Support of Motion Summary Judgment	09/19/2019	R. 34	641-739
Plaintiffs' Surreply	10/15/2019	R. 41	856-864

Order Denying Defendants' Motion and Granting Plaintiffs' Motion	12/22/2019	R. 42	865-911
Defendants' Motion to Alter or Amend Court's Findings	01/21/2020	R. 45	1033-1049
Attorney General Dana Nessel's Motion Intervene	01/21/2020	R. 46	1050-1073
Plaintiffs' Brief Opposition Defendants' Motion to Alter or Amend	01/28/2020	R. 49	1203-1214
Order Denying Defendants' Motion to Alter or Amend	03/19/2020	R. 52	1222-1227
Order Re Attorney General Nessel's Motion Intervene	03/19/2020	R. 53	1228-1230
Attorney General Nessel's Supplemental Brief	03/30/2020	R. 54	1231-1241
Plaintiffs' Opposition to Nessel's Motion Intervene	04/15/2020	R. 55	1242-1251
Notice of Appeal	04/20/2020	R. 57	1383-1385
Attorney General Dana Nessel Reply	04/23/2020	R. 59	1387-1394
Order Granting Attorney General's Motion to Intervene	05/01/2020	R. 61	1445-1449