

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN COMMON SENSE PARTY,
LIBERTARIAN PARTY OF MICHIGAN,
GORDON BLOEM, P. JOSEPH HAAS, ROGER
MARTIN, and RACHEL GROSS,

Case No. 26-000106-MZ
Hon. Michael F. Gadola

Plaintiffs,

v

JOCELYN BENSON, in her Official Capacity
as Secretary of State, and JONATHAN BRATER,
in his Official Capacity as Director of the
Bureau of Elections,

Defendants.

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Bureau of Elections,

Defendants.

**PLAINTIFFS' 8/27/26 BRIEF IN OPPOSITION
TO DEFENDANTS' 8/7/26 MOTION FOR
SUMMARY DISPOSITION**

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INTRODUCTION

In 1895, the Legislature prohibited candidates from being nominated for office by multiple political parties. In the decades preceding the adoption of that law, new and minor parties had used the practice of cross-nomination (or “fusion voting”) to give voters an opportunity to join together, articulate positions that were not represented by the major parties, and cast effective votes to advance those positions. When the Legislature banned the practice in 1895, it did so precisely to squash the emergence of these new and minor parties that threatened major-party dominance.

The effects were just as intended—and they continue to this day. A voter who finds no home in the two major parties faces three impossible options: Vote for a major party, even though it does not represent the voter’s views; vote for the minor party that represents the voter, with no hope of winning the election (and a substantial risk of throwing the election to the major-party candidate who represents the position the voter likes *least*); or do not vote. The result is that new and minor parties cannot grow and provide a vehicle for representation—even as voters increasingly find themselves unrepresented within the two major parties. The ban on fusion voting thus seriously interferes with, and imposes a burden on, an individual voter’s right to vote, in violation of the Fundamental Right to Vote Amendment the People added to the Constitution in 2022. Const 1963, Art 2, § 4(1)(a). The fusion ban gives major parties an “unfair advantage” over minor ones, in violation of the Constitution’s Purity of Elections Clause, *Socialist Workers Party v Secy of State*, 412 Mich 571, 598-599; 317 NW2d 1 (1982). See Const 1963, Art 2, § 4(2). And it infringes the constitutionally protected freedoms of expression and association, See Const 1963, Art 1, §§ 3, 5, in various ways: By limiting the ability of voters to join together in new and minor parties to participate in the political process; by preventing those parties, their chosen candidates, and their preferred major-party partners from associating with each other on the ballot; and by preventing candidates who wish to run under multiple party lines, and parties who wish to

nominate candidates also nominated by other parties, from communicating their connections to voters at the crucial moment.

The Michigan Supreme Court upheld the fusion ban against a Purity of Elections Clause challenge in 1895. See *Todd v Board of Election Commissioners*, 104 Mich. 474; 62 N.W. 564 (1895). But the law has changed dramatically since then. In 2022, the People adopted the Fundamental Right to Vote Amendment, which for the first time added to our Constitution an explicit guarantee of “[t]he fundamental right to vote,” along with an express prohibition of any practice “which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening” that right. Const 1963, Art 2, § 4(1)(a). In 1982, the Michigan Supreme Court made clear that the Purity of Elections Clause asks “whether the election procedure created affords an unfair advantage to one party or its candidates over a rival party or its candidates,” *Socialist Workers Party*, 412 Mich at 598-599—a test the Court did not apply at the time of *Todd*. And *Todd* long predates the modern jurisprudence of freedom of expression and freedom of association.

This case is thus emphatically *not* an “example of litigants trying to solve a policy question through judicial declaration.” Br 1.¹ Rather, it is an example of a statute that violates rights established in the Michigan Constitution and specifically recognized in the Michigan Supreme Court’s cases. The Court should deny Defendants’ motion for summary disposition. And because there are no disputed facts, the Court should render judgment for Plaintiffs under MCR 2.116(I)(2). See MCR 2.116(C)(10) (judgment appropriate when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law”).

¹ In this brief, “Br __” refers to pages in the Brief in Support of Defendants’ Motion for Summary Disposition. “COC Cplt __” refers to pages in the complaint filed in the Court of Claims in this matter. “Cir Ct Cplt __” refers to pages in the complaint filed in the Ingham County Circuit Court in this matter. “[Name] Rpt __” refers to pages in the sworn expert reports filed by the named experts, attached and incorporated by reference in the complaints.

STATEMENT OF FACTS

A. The Michigan Fusion Ban

Fusion is an electoral practice in which more than one political party may nominate the same candidate for an office, enabling that candidate to appear on the ballot on multiple party lines. Fusion voting became firmly established in Michigan during the last three decades of the Nineteenth Century. Michigan's parties and voters used fusion nominations to effect cross-party alliances with significant electoral and policy consequences. In 1882, Democrat Josiah W. Begole was elected governor on the Democratic-Greenback Labor fusion ticket, interrupting an almost unbroken Republican rule that began in 1854. Disch-Goodman Rpt 4–5; COC Cplt ¶ 29; Cir Ct Cplt ¶ 32. In 1884, fusionist candidates won seven of Michigan's eleven congressional seats, and in the spring election of 1886 the Fusionists defeated Supreme Court Justice Thomas M. Cooley in his campaign for reelection. COC Cplt ¶ 30; Cir Ct Cplt ¶ 33. Fusion likewise played a central role in legislative elections. Disch-Goodman Rpt 17; COC Cplt ¶ 30; Cir Ct Cplt ¶ 33

Fusion did not merely break Republican control; it empowered new parties, which held the balance of power in a closely contested electorate. COC Cplt ¶ 31; Cir Ct Cplt ¶ 34. Their inclusion in governing coalitions made new policy goals achievable: Governor Begole established a Bureau of Labor Statistics, advanced women's suffrage, and reduced interest and railroad rates—all high-priority Greenback reforms. Disch-Goodman Rpt 5; COC Cplt ¶ 32; Cir Ct Cplt ¶ 35. And in the 1891–1892 session the Legislature adopted ground-breaking democratic reforms including the secret ballot. Disch-Goodman Rpt 1–2; COC Cplt ¶ 28 (second); Cir Ct Cplt ¶ 31.

These successes threatened the dominance of the Republican Party in the State. And the Party acted aggressively to avert the threat. When Republicans took control of the Legislature in 1893, they sought to unseat legislators who had been elected on fusion tickets and ultimately to

ban the practice. Disch-Goodman Rpt 22; COC Cplt ¶ 40; Cir Ct Cplt ¶ 43. One Republican legislator was explicit about the partisan motivation: “We don’t propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us.” Disch-Goodman Rpt 22–23; COC Cplt ¶ 41; Cir Ct Cplt ¶ 44. The 1893 effort to ban fusion failed by three votes. Disch-Goodman Rpt 24; COC Cplt ¶ 42; Cir Ct Cplt ¶ 45.

When Republicans returned to the Legislature with an overwhelming majority two years later, they succeeded in banning fusion. COC Cplt ¶ 39; Cir Ct Cplt ¶ 42. They were motivated by the success that fusion candidates had recently achieved in legislative and statewide elections, as well as the threat fusion posed to them in an 1895 special congressional election in Western Michigan. In that election, Republican Lieutenant Governor Alfred Milnes faced Albert Todd, running on a fusion ticket endorsed by the Democratic Party, the People’s Party, the Free Silver Party, and the Prohibition party. COC Cplt ¶ 43; Cir Ct Cplt ¶ 46.

Contemporaneous observers recognized the stakes. The Kalamazoo Weekly Telegraph wrote that the statute “practically disfranchised every citizen not a member of the party in power,” compelling them either to “lose their vote” or “unite in one organization,” with the effect that “there could be only two parties at one time.” COC Cplt ¶ 46; Cir Ct Cplt ¶ 49. The Detroit Evening News called it “the law providing for the extinction and effacement of all parties but the Democratic and Republican.” *Id.*

The Legislature adopted the fusion ban, but the Michigan Supreme Court held that it could not be applied retroactively to the 1895 election, in which Todd prevailed. *Todd v Bd of Election Comm’rs*, 104 Mich 474, 477; 62 NW 564 (1895). But the Court held that the ban could properly be applied to future elections, see *id.*, and Todd narrowly lost his bid for re-election. COC Cplt ¶ 45; Cir Ct Cplt ¶ 48.

The State has maintained its ban on fusion ever since. That ban now appears in a connected set of statutes barring multiple parties from listing the same candidates under their ballot lines. MCL 168.691–168.695; COC Cplt ¶ 47; Cir Ct Cplt ¶ 50.

B. The Effect of the Fusion Ban on Minor Parties and Voters

Michigan’s fusion ban continues to have the effect of entrenching the two dominant parties by dramatically raising barriers to competition. Without fusion, minor parties cannot participate in winning coalitions, demonstrate their electoral contribution, or maintain the voter support necessary to survive as ongoing organizations. Drutman Rpt 11; COC Cplt ¶ 34; Cir Ct Cplt ¶ 37. Although new parties can form as a formal matter, fusion bans place them in an impossible strategic bind: In a first-past-the-post system, every vote cast for a minor party either is wasted on a candidate who cannot win or functions as a spoiler aiding the candidate their supporters most oppose. Drutman Rpt 14; COC Cplt ¶¶ 35, 53–55; Cir Ct Cplt ¶¶ 38, 56–58. The result is to squelch the discrete views new and minor parties express, to raise enormous barriers to those parties in organizing to express those views, and to deprive voters of consequential choices at the ballot box. Drutman Rpt 12; COC Cplt ¶¶ 36, 56; Cir Ct Cplt ¶¶ 39, 59. Fusion, by contrast, would give voters a clear way to signal opposition to hyper-partisan fighting, allow partisans uncomfortable with their own party’s direction to register that view without defecting, re-empower a political center that currently lacks institutional representation, and sustain the third parties that make such moderation possible. Drutman Rpt 10–11; COC Cplt ¶¶ 57–59; Cir Ct Cplt ¶¶ 60–62.

C. This Litigation

Plaintiffs are two political parties—the Michigan Common Sense Party and the Libertarian Party of Michigan—as well as three registered voters (one who affiliates with the Democratic Party, one who affiliates with the Republican Party, and one who affiliates with no party), and one

Democratic Party candidate for office.² Plaintiffs filed this litigation to challenge the fusion ban on four distinct grounds: that the ban violates the Fundamental Right to Vote Amendment added to the Michigan Constitution in 2022, Const 1963, Art 2, § 4(1); that the ban violates the Michigan Constitution’s Purity of Elections Clause, *id.* Art 2, § 4(2); that the ban violates the Michigan Constitution’s guarantee of freedom of association, *id.* Art 1 §§ 3, 5; and that the ban violates the Michigan Constitution’s guarantee of freedom of speech and expression, *id.* Art 1 § 5. Because claims under the Fundamental Right to Vote Amendment must be brought in the Circuit Court, *id.* Art 2 § 4(1)(a), Plaintiffs brought their claim under that Amendment in the Circuit Court for Ingham County, and their remaining claims in this Court. On July 15, 2026, this Court consolidated the two cases.

STANDARD OF REVIEW

Defendants move for summary disposition under MCR 2.116(C)(8). To succeed in that motion, Defendants must show that Plaintiffs’ “claim is so clearly unenforceable that no factual development could possibly justify recovery.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). For purposes of that motion, “a trial court must accept all factual allegations as true.” *Id.*

For the reasons we explain below, this Court should not merely deny Defendants’ motion for summary disposition under MCR 2.116(C)(8). Because there are no genuine issues of material fact, the Court should also render judgment for the Plaintiffs under MCR 2.116(C)(10) and (I)(2). To prevail on that request, we must show that “the proffered evidence fails to establish a genuine issue regarding any material fact.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

² At the time the complaints were filed, this candidate, Rachel Gross, was running in the Democratic Party primary for District 78 in the Michigan House of Representatives. COC Cplt ¶ 14; Cir Ct Cplt ¶ 16. In the August 4 primary election, she was selected as her party’s nominee and is currently standing for the general election.

ARGUMENT

The fusion ban violates the Michigan Constitution in multiple respects. It seriously interferes with, and imposes a burden on, an individual voter's right to vote, in violation of the Fundamental Right to Vote Amendment. See Const 1963, Art 2, § 4(1)(a). The fusion ban gives major parties an "unfair advantage" over minor ones, in violation of the Purity of Elections Clause, *Socialist Workers Party*, 412 Mich at 598-599. See Const 1963, Art 2, § 4(2). And it infringes the protected freedoms of expression and association, See Const 1963, Art 1, §§ 3, 5, in various ways: by limiting the ability of voters to join together in new and minor parties; by preventing those parties, their chosen candidates, and their preferred major-party partners from associating with each other on the ballot; and by preventing candidates who wish to run under multiple party lines, and parties who wish to nominate candidates also nominated by other parties, from communicating their connections to voters at the crucial moment.

Denying these claims, Defendants principally rely on two cases. The first is the Michigan Supreme Court's 1895 decision in *Todd, supra*. The second is the U.S. Supreme Court's 1996 decision in *Timmons v Twin Cities Area New Party*, 520 US 351 (1996). *Todd* rejected a state-law Purity of Elections Clause challenge to Michigan's fusion ban; *Timmons* rejected a federal-law First Amendment challenge to Minnesota's fusion ban.

Neither case provides a sufficient basis to reject Plaintiffs' challenge to Michigan's fusion ban today. *Todd* did not specifically consider the effects of the fusion ban on new and minor parties. But in *Socialist Workers Party*, 412 Mich at 598-599, the Michigan Supreme Court specifically focused its Purity of Elections Clause analysis on the effects of a voting procedure on minor parties. *Socialist Workers* said the key question is "whether the election procedure created affords an unfair advantage to one party or its candidates over a rival party or its candidates." *Id.*

Affording an unfair advantage to major parties is precisely what the fusion ban does.

The Michigan Supreme Court’s case law is not the only thing that has changed since *Todd*. In 2022, the People added to our Constitution an explicit guarantee of “[t]he fundamental right to vote,” along with an express prohibition of any practice “which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening” that right. Const 1963, Art 2, § 4(1)(a). Defendants assert that the 2022 Fundamental Right to Vote Amendment merely codified the voting practices that existed when the people adopted it, but that is simply false. To the contrary, the 2022 amendment expressly changed the standard of review applied to voting restrictions and thus made clear that the Michigan courts had previously given too little protection to the right to vote. That change, which long post-dates *Todd*, provides an independent reason why *Todd* is no longer good law. Under the analysis required by the Fundamental Right to Vote Amendment, the fusion ban’s burdens on the right to vote make it unconstitutional.

Finally, Defendants are incorrect to suggest that this Court should simply follow the U.S. Supreme Court’s decision in *Timmons* when interpreting the distinct state constitutional protections of freedom of speech and association. Just last month, the Michigan Supreme Court emphasized that this State’s courts must not merely defer to federal interpretations of the U.S. Constitution but must “independently analyze our state Constitution to ensure that our citizens are receiving the measure of the protections that they created, which protections may or may not extend beyond those set forth by the federal Constitution.” *People v Jennings*, No. 165764, 2026 WL 2140256, at *18 (Mich, July 24, 2026) (internal quotation marks omitted).

A. The Fusion Ban Deprives Voters Who Do Not Affiliate with Major Parties of an Effective Vote, Thus Denying, Abridging, Interfering With, Or Unreasonably Burdening the Right to Vote

In 2022, the People of Michigan added express language to our state Constitution that established a fundamental right to vote (Const 1963, Art 2, § 4(1)(a)):

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(a) The fundamental right to vote, including but not limited to the right, once registered, to vote a secret ballot in all elections. No person shall: (1) enact or use any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engage in any harassing, threatening, or intimidating conduct; or (3) use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.

As we allege—and as the Disch-Goodman report demonstrates—the fusion ban as originally enacted had the “intent” to deny, abridge, interfere with, or unreasonably burden the right to vote. The whole point of the ban was to keep voters who adhered to minor parties from effectively joining with voters who adhered to other parties to oust the then-dominant Republicans—and to reverse the gains those voters had made by engaging in fusion.

But intent is not a necessary element of a Fundamental Right to Vote claim under the Michigan Constitution. A law is independently unconstitutional under the 2022 amendment if it has the “effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.” Const 1963, Art 2, § 4(1)(a). And the fusion ban plainly has such an effect. If voters aligned with a new or minor party wish to vote only for the candidates of that party, and the State prohibits that party from cross-nominating a major party candidate, then their vote is wasted and ineffective. Individuals who affiliate with minor parties must choose between voting for the candidates of their party and wasting their votes, or abandoning the party they support if they wish to cast an effective, non-wasted vote. A voter cannot constitutionally be forced to choose between her state constitutional right to cast an effective, non-wasted vote and her state constitutional right to associate with a political party. Fusion voting avoids that unconstitutional coercion.

Defendants make a perfunctory effort to assert (Br 23) that votes cast for a minor party are “not wasted” because they are “cast and tabulated with every other vote.” As we allege, though—

and as the Drutman Report demonstrates—in a first-past-the-post system the *best-case* scenario for minor-party votes is that they will be wasted. At best, they cannot affect the outcome of the election (which is what it means for a vote to be “wasted” rather than “not tabulated”). And often, votes for new and minor parties will be “spoilers” that will deliver the election to the major-party candidate the voter prefers least. Forcing a voter who adheres to a minor party to cast a vote that *at best* cannot advance the interests or political positions that led them to adhere to that party—and will in many cases subvert those very interests and positions—is a major burden on that voter, and it is one that is “unreasonabl[e]” under the Fundamental Right to Vote Amendment.

Indeed, even before the people adopted that amendment, the Michigan Supreme Court held ballot access restrictions unconstitutional when they denied effective choices to voters and thus left them “a Hobson’s choice and not an expression of political preference, the bedrock of self-governance.” *Socialist Workers Party*, 412 Mich at 588. The fusion ban leaves Michigan voters who do not find themselves represented in either of the two major parties with just such a “Hobson’s choice.” Now that the people have given such broad, express protection to the fundamental right to vote in the constitutional text, the fusion ban is plainly unconstitutional.

Defendants’ principal response is to suggest that the Fundamental Right to Vote Amendment was merely meant to freeze in place the protections that the Legislature had already adopted, except where the people *specifically* identified practices they wished to newly codify. See Br 22 (finding it “extraordinary” to suggest that the Fundamental Right to Vote Amendment overrode the fusion ban “without any express statement,” when the Amendment “explicitly and specifically reserved” some very particular rights such as free postage for absentee ballots).

Defendants’ position rests on a plain misreading of the Fundamental Right to Vote Amendment. For one thing, the constitutional text itself specifically rejects Defendants’ clear

statement rule. Far from suggesting that the amendment protects only those practices expressly identified, Article 2, Section 4, Subsection 1—the portion of the Constitution that contains the “fundamental right to vote” language—explicitly provides that “[t]his subsection shall be liberally construed in favor of voters’ rights in order to effectuate its purposes.” Const 1963, Art 2, § 4(1).³

Moreover, by adding an express “fundamental right to vote” to the Michigan Constitution, and by bolstering that right with a broad prohibition of practices that might intrude on that right, the 2022 Amendment marks a sharp break from prior cases. The Amendment’s text is extremely broad. It does not merely prohibit “denying” or “abridging” the right to vote. Cf. US Const, Amdt 15 § 1 (right to vote “shall not be denied or abridged” on the basis of race); *id.*, Amdt 19 (right to vote “shall not be denied or abridged” on the basis of sex); *id.*, Amdt 24 § 1 (right to vote in elections for federal office “shall not be denied or abridged” on the basis of failure to pay poll tax); *id.*, Amdt 26 § 1 (right to vote for those 18 or older “shall not be denied or abridged” on the basis of age). And it does not merely prohibit intentional restrictions. Cf. *Louisiana v Callais*, 146 S Ct 1131, 1155; 224 L Ed 2d 604 (2026) (Fifteenth Amendment requires intentional discrimination). Rather, by its plain text, the 2022 amendment prohibits “any means whatsoever” that have either “the intent or effect” of “denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.”

Taken together, these constitutional changes clearly overturn the deferential scrutiny state courts had previously applied to voting restrictions. Prior to the Fundamental Right to Vote Amendment, the Michigan Supreme Court had adopted “the ‘flexible test’ articulated in *Burdick* [*v Takushi*, 504 US 428 (1992),] when resolving an equal protection challenge to an election law under the Michigan Constitution.” *In re Request for Advisory Opinion Regarding Constitutionality*

³ The people added this liberal-construction language in 2018, again long postdating the cases upholding a fusion ban.

of 2005 PA 71, 479 Mich 1, 35; 740 NW2d 444 (2007). Defendants’ arguments in support of the fusion ban rest heavily on the *Burdick* test (or “*Anderson-Burdick* test,” named after *Burdick* and *Anderson v Celebrezze*, 460 US 780 (1983)). See Br 14, 15, 16, 19. As Defendants note (Br 16-19), the Supreme Court’s decision upholding Minnesota’s fusion ban in *Timmons*, *supra*, itself applied the *Anderson-Burdick* test.

Under the *Anderson-Burdick* test, “[a] court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the [voting] rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *In re Request for Advisory Opinion*, 479 Mich at 21 (quoting *Burdick*, 504 US at 434). Subsequent decisions emphasize that *Anderson-Burdick* is a balancing test. See *Michigan Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 257; 964 NW2d 816 (2020) (“Our Supreme Court has described the *Burdick* test as balancing between protecting the citizens’ right to vote and protecting against fraudulent voting.”).

But the Fundamental Right to Vote Amendment plainly rejects the *Anderson-Burdick* balancing test. It does so, most notably, by declaring the right to vote to be a “fundamental right.” Const 1963, Art 2, § 4(1)(a). As the Michigan Supreme Court has emphasized, laws that impinge on a fundamental right trigger “strict scrutiny”—and not mere interest balancing—under the Michigan Constitution. *Phillips v Mirac, Inc*, 470 Mich 415, 432; 685 NW2d 174 (2004).

Notably, the dissenters in *In re Request for Advisory Opinion*—the case that had adopted *Anderson-Burdick* as a matter of state law—specifically called out the majority for failing to treat voting as a fundamental right protected by the Michigan Constitution. See *In re Request for*

Advisory Opinion, 479 Mich at 79 (Cavanagh, J., dissenting) (“The constitution demands that the government vigorously protect our citizens’ fundamental right to vote.”); *id.* at 110 (Kelly, J., dissenting) (“The right to vote is fundamental, and the strict scrutiny test must be applied to any statute that infringes on it.”). By emphasizing that the right to vote is indeed “fundamental,” the 2022 Amendment endorsed the position of the dissenters, rather than the majority. It underscored the change by expansively prohibiting impermissible denials, abridgments, interferences, or burdens that are effected by “any means whatsoever.” Const 1963, Art 2, § 4(1)(a).

If that weren’t enough, the specific voting practices guaranteed by the Fundamental Right to Vote Amendment demonstrate that the amendment overrides the *Anderson-Burdick* test. Courts applying that test had held that a voter identification rule was constitutional even without an affidavit alternative, see *Lee v Virginia State Bd of Elections*, 843 F3d 592 (CA 4, 2016); *Common Cause/Georgia v Billups*, 554 F3d 1340 (CA 11, 2009), but the Fundamental Right to Vote Amendment makes clear that such an alternative is constitutionally required, see Const 1963, art 2, § 4(1)(g). Courts applying the *Anderson-Burdick* test have rejected claims that the state must pay for postage for absentee ballots, *Black Voters Matter Fund v Raffensperger*, 478 F Supp 3d 1278, 1323–24 (ND Ga, 2020), *aff’d sub nom. Black Voters Matter Fund v Secretary of State for Georgia*, 11 F4th 1227 (CA 11, 2021), but the Fundamental Right to Vote Amendment makes clear that state postage payments are constitutionally required, see Const 1963, art 2, § 4(1)(i). And courts applying *Anderson-Burdick* have held that states need not allow any early voting at all, much less a particular number of days, see *Luft v Evers*, 963 F3d 665, 674 (CA 7, 2020), but the Fundamental Right to Vote Amendment specifically requires at least nine consecutive days of early voting, see Const 1963, art 2, § 4(1)(m). These specific provisions are flatly inconsistent with any suggestion that the People merely carried forward the existing *Anderson-Burdick* test.

And subsection 1’s “liberally construed” language makes clear that the changes effected by the amendment are not limited to the specific practices it explicitly identifies.

By declaring voting to be a “fundamental right,” the 2022 Amendment requires the State to justify interferences or burdens on that right under strict scrutiny. The State must “demonstrate” that the challenged rule is “precisely tailored” and “serve[s] a compelling governmental interest.” *Phillips*, 470 Mich at 432 (internal quotation marks omitted). Cf. *People v Burkman*, 513 Mich 300, 339; 15 NW3d 216 (2024) (applying strict scrutiny in a free speech case to hold that laws aiming to “preserv[e] the integrity of ... election processes” must “still be narrowly drawn to avoid chilling more speech than is necessary”) (internal quotation marks omitted).

Defendants cannot come close to satisfying that standard. Defendants point (Br 9) to *Todd*’s suggestion that a fusion ban avoids “corrupt deals between corrupt politicians.” 104 Mich at 487. But even *Todd* recognized that such a suggestion was speculative. See *id.* (noting that “[n]o fraud is charged in the present case” but finding the prospect sufficient to “afford[] an illustration of the opportunities for such trades which every good citizen condemns”). Such speculation cannot demonstrate a compelling interest under strict scrutiny. See *Nat’l Republican Senatorial Comm v Fed Election Comm*, 146 S Ct 2404, 2423 (2026) (speculation about corruption cannot justify restriction on political speech under strict scrutiny). To the extent that *Todd* suggested an agreement between parties to coordinate to achieve shared interests was itself impermissible corruption, that suggestion is inadmissible under current law, which recognizes that the essence of democracy is for different factions “to pull, haul, and trade to find common political ground.” *Johnson v De Grandy*, 512 US 997, 1020; 114 S Ct 2647 (1994). When parties coordinate so their “constituents” can successfully “support candidates who share their beliefs and interests,” they are helping to realize a “central feature of democracy.” *Nat’l Republican Senatorial*

Comm, 146 S Ct at 2418 (internal quotation marks omitted).

Even if there were a compelling interest in avoiding truly corrupt practices, such as fraud or bribery, here, a flat ban on fusion voting would be far too broad to be “precisely tailored” to that interest. After all, the State has the obvious alternative of specifically prohibiting fraud and bribery. See *Meyer v Grant*, 486 US 414, 426–27; 108 S Ct 1886 (1988) (availability of direct prohibitions on fraudulent or corrupt practices means that broader prohibition of political speech is not sufficiently tailored). As we specifically allege (COC Cplt ¶¶ 70, 79) a ban on fusion goes well beyond prohibiting fraudulent or corrupt practices.

By adopting the Fundamental Right to Vote Amendment, the People of Michigan rejected the *Anderson-Burdick* test under which the U.S. Supreme Court had previously upheld Minnesota’s ban on fusion voting. Under the standard established by the Michigan Constitution, the fusion ban had the “intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.” Const 1963, Art 2, § 4(1).

B. The Fusion Ban Affords an Unfair Advantage to the Two Major Parties, Thus Violating the Purity of Elections Clause

The Purity of Elections Clause appears in Article 2, Section 4(2) of the Michigan Constitution (emphasis added):

(2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the Legislature shall enact laws to regulate the time, place and manner of all nominations and elections, *to preserve the purity of elections*, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

In *Todd, supra*, the Court held that the 1895 fusion ban did not violate the Purity of Elections Clause of the 1850 Constitution. In reaching that decision, however, the Court focused virtually exclusively on the law’s effects on individual voters. This individual-voter focus is evident from the Court’s description of its standard of review: “If the effect of this act, as is

strenuously argued by the learned counsel for the relator, is to ‘subvert or impede the right to vote,’ it is clearly unconstitutional. If, on the contrary, if neither subverts nor impedes, but only regulates that right, it is constitutional.” *Todd*, 104 Mich at 480. And the Court concluded that the fusion ban did not subvert or impede the right to vote, because it imposed only a minimal burden on voters. In so concluding, the Court asked only whether voters would be able to identify where to place a mark for the candidates on the ballot whom they preferred:

To what extent is the voter impeded? If he belongs to the Democratic or Prohibition or People’s party, and desires to vote for a congressional candidate, he is required to make two crosses or marks instead of one. If he cannot read, he is certainly not impeded, because the parties sworn to assist him in preparing his ballot will readily inform him upon the subject, and mark it according to his wishes.

Id. at 484. The Court did briefly discuss the interests of candidates, but again it characterized their rights extremely narrowly. The “sole constitutional right guaranteed” a candidate, the Court said, was that the candidate’s name appear somewhere on the ballot so that “every voter has a reasonable opportunity to vote for him.” *Id.* at 487. And to the extent that the Court discussed political parties, it focused entirely on the law’s *formally* “general” framing. *Id.* The Court did not consider evidence that the fusion ban imposed uniquely harsh burdens on new and minor parties, nor that the law was specifically targeted at the parties that threatened Republican dominance of the State. To the contrary, the Court simply asserted, without evidence—and in conflict with the plain facts—that the ban “aims at no political party.” *Id.*

Subsequent case law interpreting the Purity of Elections Clause has fundamentally undermined the *Todd* Court’s analysis. Although *Todd* focused primarily on the interests of individual voters, and held that a candidate’s only right is to appear *somewhere* on the ballot, the Michigan Supreme Court in 1940 held that the Clause requires election officials to rotate the names of nonpartisan candidates on the ballot. *Elliott v. Secretary of State*, 295 Mich 245; 294 NW 171

(1940). “It is not consistent with fairness or purity of elections or the avoidance of misuse of elective franchise,” the Court held, “for election officials to prepare ballots in such a condition as will afford one candidate or nominee an unfair advantage over rival candidates or nominees.” *Id.* at 249–50. See also *Wells v Kent Co Bd of Election Comm’rs*, 382 Mich 112, 123; 168 NW2d 222 (1969) (describing one of the “primary goals” of the Clause as being “to achieve equality of treatment for all candidates whose names appear upon the ballot”).

And where *Todd* failed to consider the effect of the antifusion laws on new and minor parties, the Michigan Supreme Court in 1982 specifically invalidated a statute that imposed stricter ballot access requirements on “new” political parties. See *Socialist Workers Party, supra*. Holding that the statute violated the Purity of Elections Clause, *Socialist Workers Party* pointed to its effect on minor parties:

[T]his procedure forces a “new” party to divert scarce resources and time from its political message to voter education campaigns solely designed to teach the electorate to associate its issues and the names of its candidates with the name of a political party for which voters must cast their ballots. By contrast, political parties entitled to automatic general election ballot placement, and their candidates, face no similar burdens. All energies and resources may be concentrated on candidate and issue identification.

Socialist Workers Party, 412 Mich at 599. The court held that the statute was “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.” *Id.* at 599-600.⁴

Under the principles established in *Socialist Workers*, the fusion ban violates the Purity of Elections Clause by “afford[ing] an unfair advantage to one party or its candidates over a rival party or its candidates.” *Id.* at 598–599. Paragraphs 39 to 46 of the Court of Claims complaint

⁴ Defendants note (Br 10-11) that the Michigan Supreme Court relied on *Todd* in both *Wells, supra*, and *Dearborn Twp Clerk v Jones*, 335 Mich 658 (1953). But both of these cases predated *Socialist Workers*, which made clear that laws granting an unfair advantage to major parties over minor parties violate the Purity of Elections Clause.

allege, and the Disch-Goodman Report demonstrates, that giving such an unfair advantage to the major parties over new and minor parties—and giving that advantage to the Republican Party specifically—was the original motivation for the law. As in other states that banned fusion, Michigan’s dominant “lawmakers realized that they could spare themselves the inconvenience of competing with minor parties in the political arena; instead, they could enact new electoral laws that would themselves systematically weaken and undermine minor parties and amplify the existing major-party advantages.” Jeff Berryhill & Ian Gavigan, *Fusion Voting and A Case Study in Restrictive Two-Party Politics*, 76 Rutgers U.L. Rev. 913, 917 (2024). And the ban continues to have a devastating effect on new and minor parties. As the Drutman Report demonstrates, the ban imposes near-insuperable barriers to those parties organizing and maintaining themselves.

Defendants assert (Br 8) that an improper legislative motive is “ordinarily not a consideration in assessing the constitutionality of a statute.” Given the massively disparate effects the fusion ban continues to have on new and minor parties, the ban violates the *Socialist Workers* principle irrespective of the motive with which the Legislature adopted it. In any event, the Michigan Supreme Court has held that an improper legislative motive can violate the Purity of Elections Clause—notably in *Wells, supra*—a case on which Defendants themselves rely. In *Wells*, 382 Mich at 126, the Court held that a statute allowing incumbent Municipal Court judges to list their current office on the ballot when they ran for District Court judgeships violated the Purity of Elections Clause because it concluded that the statute was “an attempt by the legislature to place its own evaluation on the qualification of candidates for office” which perforce “invades the elector’s prerogative and duty to use his criteria in the selection of the candidate of his choice.”

Defendants also suggest (Br 8) that the motive of the 1895 Legislature was somehow cleansed by subsequent laws carrying the fusion ban forward. But the subsequent enactments did

not change the fundamental fact that “the original enactment was motivated by a desire to discriminate against” new and minor parties, “and the section continues to this day to have that effect.” *Hunter v Underwood*, 471 US 222, 233; 105 S Ct 1916 (1985). The clear intent of the 1895 Legislature’s action, with continuing effects today, thus also denies “fairness and evenhandedness in the election laws of this state” in violation of the Purity of Elections Clause. *Socialist Workers Party*, 412 Mich at 598.

Defendants cavil about those effects. They assert (Br 7) that “the complaint does little to demonstrate how any of the challenged laws grant any advantage to ‘one party over another’” and suggest that the complaint lacks “a clear statement about which party [Plaintiffs] allege is presently being advantaged over another. But we have been entirely clear about which parties obtain an unfair advantage from the fusion ban and how those parties obtain that advantage. Paragraph 55 of the Court of Claims complaint specifically alleges that “[t]he fusion ban makes it functionally impossible for voters to maintain viable new and minor parties.” Paragraph 69 specifically alleges that the fusion ban gives an “unfair advantage to the major parties over new and minor parties” and “continues to make it impossible for many new and minor parties to obtain and retain voter support and viability.”

These allegations are amply supported by the sworn expert reports incorporated by reference in the complaint. The Drutman Report shows that, absent fusion, a vote for a new or minor party is nearly always a wasted vote—or, worse, a spoiler vote—in our first-past-the-post electoral system. Voters have no reason to cast a ballot for a new or minor party if it won’t help a candidate they prefer to win—and they certainly have no reason to cast such a ballot if doing so will ensure a victory for the major-party candidate they most dislike. Fusion allows voters to support candidates who have a chance at winning while also supporting the new or minor party

that best fits their views. Contrary to Defendants’ suggestion (Br 7) that such votes themselves will be wasted because “the minor party is simply a different label for the same major party candidate,” the Drutman Report demonstrates that drawing votes away from the major parties to a new, minor party line will help to build those minor parties. The result may be ultimately to enable the new parties to prevail with their own candidates, or it may be to encourage one major party or the other to adopt policies advocated by the increasingly powerful minor parties. The Disch-Goodman Report demonstrates that both of these results occurred in Michigan before the state banned fusion, and the Drutman Report demonstrates that both would be possible if the Court were to invalidate the current fusion ban.

Defendants offer no evidence of their own to rebut the sworn testimony in the Drutman and Disch-Goodman Reports. They simply assert that the allegations in the complaint are insufficient. But the allegations are plainly sufficient to defeat a motion for summary disposition under MCR 2.116(C)(8). And the failure of Defendants to provide any evidence to the contrary demonstrates there is no genuine issue of material fact on this question. Plaintiffs are entitled to judgment as a matter of law under MCR 2.116(C)(10). There is no question that the fusion ban “affords an unfair advantage to one party or its candidates over a rival party or its candidates.” *Socialist Workers*, 412 Mich at 598-599. The ban violates the Purity of Elections Clause.

C. The Fusion Ban Infringes Plaintiffs’ Freedom of Expression and Association

The Michigan Constitution contains several provisions protecting freedom of expression and freedom of association. Article 1, Section 5 provides that “[e]very person may freely speak, write, express and publish his views on all subjects,” and that “no law shall be enacted to restrain or abridge the liberty of speech or of the press.” Article 1, Section 3 provides that “[t]he people have the right peaceably to assemble, to consult for the common good, to instruct their

representatives and to petition the government for redress of grievances.”

These two sections appear in the 1963 Constitution’s Declaration of Rights, “the bedrock upon which all else in the constitution may be built.” *Jennings*, 2026 WL 2140256, at *16 n.15 (internal quotation marks omitted). Their language goes significantly beyond the parallel language in the First Amendment to the U.S. Constitution. Notably, Article 1, Section 3 includes language expressly guaranteeing the people the right to “consult for the common good”—language that does not appear in the First Amendment.⁵ The inclusion of that language in the Michigan Constitution demonstrates the importance of the freedom to associate for political purposes as a bedrock principle underlying our State’s fundamental charter. See also Const 1963, Art 1, § 1 (“All political power is inherent in the people.”).

The fusion ban abridges free speech and association in a variety of ways. Political parties are the quintessential form of expressive association and “consult[ation] for the common good.” Voters join together in political parties to “articulate policy positions and platforms; select candidates through a primary or caucus process; and then support the election of those candidates in general election campaigns.” *Nat’l Republican Senatorial Comm*, 146 S Ct at 2416. Professor Pildes explains:

Parties have a brand and stand for certain values, interests, and policies. As political scientists recognize, this party brand is critical for making voters more informed about the range of candidates they are asked to vote for, from the national government to state legislatures and governors. The party “cue” is the most important heuristic voters use to decide for whom to vote and who to hold accountable when they are dissatisfied with government’s performance.

Richard Pildes, *Should the First Amendment Provide Greater Protection for Political Parties Than*

⁵ Congress deleted similar “consult for their common good” language from Madison’s original draft of the First Amendment before adopting it and sending it to the states for ratification. See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale LJ 1652, 1716–22 (2021).

for Other Groups?, Election Law Blog (Dec. 11, 2025), <https://electionlawblog.org/2025/should-the-first-amendment-provide-greater-protection-for-political-parties-than-for-other-groups/>.

Crucially, “[t]he ability of a party to coordinate on political messaging with its candidates furthers all of these unique functions parties play in the democratic process.” *Id.*

As we have shown, the fusion ban had the intent, and has the continuing effect, of depriving new and minor political parties of the opportunity to flourish. It thus directly impairs the associational rights of those parties and of the individual voters who would like to join together in them. As with the ballot access restrictions invalidated in *Socialist Workers*, 412 Mich at 588, the fusion ban ensures that a new or minor party will not be “an effective device for advancing the ideas or political aspirations of its adherents” and will thus “operate to deter membership and participation in the excluded political association.”

In addition, the fusion ban restricts political parties from associating with each other by nominating the same candidates. When more than one party wishes to nominate the same candidate, and the candidate agrees, the ban restricts the second party from associating with the candidate and the candidate from associating with the party. And the fusion ban prohibits both candidates and parties from communicating to voters their association on the ballot—“the most crucial stage in the election process,” when voters are most likely to be paying attention. *Cook v Gralike*, 531 US 510, 525; 121 S Ct 1029; 149 L Ed 2d 44 (2001) (internal quotation marks omitted). See also *id.* at 532 (Rehnquist, C.J., concurring) (noting that the ballot is “the last thing the voter sees before he makes his choice”).

Noting that the U.S. Supreme Court rejected a First Amendment challenge to Minnesota’s fusion ban in *Timmons*, *supra*, Defendants contend (Br 13-19) that the speech and association guarantees in the Michigan Constitution go no further than the similar guarantees under the federal

Constitution. That is wrong. Although some cases of the Michigan Court of Appeals have treated the Michigan Constitution’s protections as “coterminous” with those of the First Amendment, e.g., *Michigan Up & Out of Poverty Now Coalition v State*, 210 Mich App 162, 168; 533 NW2d 339 (1995), they have not addressed the precise speech and association claims at issue here.

More important, those cases rest on an analysis the Michigan Supreme Court decisively rejected in *Jennings, supra*. Those cases held that state constitutional law should follow federal constitutional law absent “compelling reason for interpreting the Michigan Constitution more broadly than the federal constitution.” *Michigan Up & Out of Poverty Now Coalition*, 210 Mich App at 169. *Jennings* rejected that “compelling reason” standard (2026 WL 2140256, at *18):

This Court’s solemn duty is to faithfully interpret our state Constitution “consistently with our oath of office and our structure of constitutional federalism.” [*People v*] *Tanner*, 496 Mich [199], 223 n16; 853 NW2d 653 [(2014)]. In so doing, we may respectfully consider federal interpretations but need not treat such authorities as presumptively correct unless the history of the particular state provision—or the federal Supremacy Clause—demands as much. This Court must instead, from the outset, “independently analyze our state Constitution to ensure that our citizens are receiving the measure of the protections that they created, which protections may or may not extend beyond those set forth by the federal Constitution.” *Id.* at 222 n15.

The question, *Jennings* makes clear, is whether “the history and circumstances surrounding the adoption of” a particular state constitutional provision reflect an intent to incorporate the coordinate federal constitutional provision. *Id.* And even if the people in 1963 intended “to incorporate some *then-existing* federal protections into” the state Constitution, such an intent does not “translate[] to eternal ‘lockstepping’ with federal jurisprudence, no matter the novelty or unforeseeable nature of subsequent federal interpretations.” *Id.* at *20.

That is particularly important for provisions of the Declaration of Rights, including the guarantees of free expression and free association in Article 1, Sections 3 and 5. James Pollock, Chair of the 1961 Constitutional Convention’s committee on the Declaration of Rights, Suffrage,

and Election, explained to the Convention that the committee had acted based on the belief that “it is good constitutional practice for the Michigan constitution to continue the incorporation of the fundamental guarantees of liberty in our declaration of rights even when the federal government appears to have gone very far in guaranteeing the rights in question against state action.” 1 Record of the 1961-62 Constitutional Convention at 466. Harold Norris, Vice Chair of that committee, specifically discussed the provision that would become Article 1, Section 5. Explaining why the new provision added protections for “expres[sion]” and not just “spe[ech],” he noted an intention to move beyond prior interpretations of the First Amendment—“in terms of the experience of the state and the nation, much would be gained and Michigan would be taking a forward step in advancing the concept of freedom of expression by using the word ‘express.’” *Id.* at 476.

As the textual differences between the Michigan Constitution and the First Amendment demonstrate,⁶ and as the discussion at the 1961 Constitutional Convention confirms, our State’s constitutional guarantees of speech and association are not limited to those recognized in federal jurisprudence. They certainly should not be controlled by the U.S. Supreme Court’s decision in *Timmons*, which was decided more than three decades *after* the 1963 Constitution. See *Jennings*, 2026 WL 2140256, at *20. As the dissent in *Timmons* demonstrated, the Supreme Court’s decision was faulty in several respects: It failed to appreciate the nature of the burdens a fusion ban imposes on new and minor parties and the voters who adhere to them, *Timmons*, 520 US at 371–74 (Stevens, J., dissenting); it impermissibly justified those burdens based on “imaginative theoretical sources

⁶ In addition to the specific protection of the right to “consult for the common good,” the Michigan Constitution, unlike the federal Constitution specifically incorporates political parties into elections and governance. See Const 1963, Art 2, § 4(1)(c) (creating a state constitutional right to straight party voting, unique among the states); *id.*, Art 2, § 7 (requiring political party balance on all boards of canvassers); *id.*, Art 5, § 21 (requiring candidates for Lt. governor, attorney general, and secretary of state to be nominated at political party conventions); *id.*, Art 5, § 28 (requiring partisan balance on the State Transportation Commission); *id.*, Art 5, § 29 (same on Civil Rights Commission). By explicitly recognizing the importance of political parties as a vehicle for expressive association, these provisions underscore that the protection of the associational rights of parties and their members is broader under the Michigan Constitution than under the First Amendment.

of voter confusion”—such as the “farfetched” and “entirely hypothetical” possibility “that members of the major parties will begin to create dozens of minor parties with detailed, issue-oriented titles for the sole purpose of nominating candidates under those titles”—that found no support in actual practice, *id.* at 375–76⁷; and it rested on the entirely unsupported notion that a fusion ban would “promote[] political stability,” *Timmons*, 520 US at 377 (Stevens, J., dissenting).⁸

The *Timmons* majority opinion has also been subject to sustained scholarly criticism. As Professor Hasen argued, the interests the majority asserted in protecting against voter confusion and partisan manipulation were empirically flimsy, and the interest it asserted in protecting the two major parties was undemocratic. See Hasen, *supra*. Professors Issacharoff and Pildes highlighted *Timmons*’s threat to democracy. They note that

antifusion laws are not the product of what could be considered ‘natural monopolies’ enjoyed by the two major parties as a by-product of a [first-past-the-post] electoral system. Rather, they are self-conscious devices that go above and beyond the advantages directly accruing to the two parties by virtue of the single-member geographical district. Antifusion laws further entrench the two dominant parties by dramatically raising additional barriers to competition.

Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups Of The Democratic Process*, 50 Stan L Rev 643, 685 (1998). Professor Muller highlights the harms to the expressive rights of candidates and parties. He argues that “the expressive element of communicating to voters the relationship between the candidate and the party at the most crucial stage of the process merits more protection than *Timmons* gave it under the *Burdick* balancing test.

⁷ In an influential critique of *Timmons* published in the immediate wake of the decision, the nation’s leading election law scholar found it “difficult to accept” these hypothesized possibilities “as sufficiently weighty to overcome even a relatively minor burden on the New Party’s associational rights.” Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup Ct Rev 331, 339 (1997).

⁸ The Drutman Report demonstrates that the assumption that fusion bans promote political stability, entirely unsupported by the Court in *Timmons*, has been decisively *disproven* since then. These newly discovered facts make *Timmons* even less worthy of endorsement as a matter of Michigan constitutional law.

Derek T. Muller, *Ballot Speech*, 58 Ariz L Rev 693, 748 (2016).

Defendants merely quote the faulty assertions in the *Timmons* majority (Br 16-19), but they do not address any of these substantial criticisms of that opinion. For the reasons we have discussed, this Court should not regard *Timmons*'s interpretation of the federal Constitution as in any way binding in addressing the lawfulness of the fusion ban under Michigan's Constitution. Rather, reflecting the very significant differences in language between the First Amendment and our State's Constitution, it should heed the arguments of the *Timmons* dissenters and of scholars like Professors Hasen, Issacharoff, Pildes, and Muller. Whether or not *Timmons* was correct as a matter of federal constitutional law, Michigan's fusion ban impermissibly intrudes on rights of speech and association guaranteed by the People of Michigan in 1963.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion for summary disposition and render judgment for Plaintiffs.

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Dated: August 27, 2026

Proof of Service

The undersigned certifies that on August 27, 2026, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
 Elizabeth M. Rhodes