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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH KISHORE, Socialist Equality Party candidate for U.S. President; and **NORISSA SANTA CRUZ**, Socialist Equality Party candidate for U.S. Vice President,

Plaintiffs,

v.

GAVIN NEWSOM, Governor of California; and **ALEX PADILLA**, Secretary of State of California, in their official capacities,

Defendants.

Case No.: 2:20-cv-05859

Hon. Dolly M. Gee

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: July 20, 2020
Hearing Time: 2:00 p.m.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUTION

Defendants contend that the Plaintiffs' request that the Court affirm their basic constitutional and democratic rights to participate in the upcoming presidential election will cause "frustration of the democratic process." But it is Defendants who are frustrating the democratic process—by insisting on the enforcement of ballot access requirements that are effectively impossible for Plaintiffs to comply with without endangering the safety and lives of their supporters and the public at large.

Defendants state that "Plaintiffs could have begun signature gathering no later than May 1, 2020;" that Plaintiffs had "14 weeks out of the 15-week period to collect signatures in person;" and that Plaintiffs should have deployed "66 signature gatherers [circulators], working five days a week for 15 weeks, to obtain the requisite number of signatures," which is nearly 200,000. *See* Opp., at 9, 17, 12, n. 9.

Defendants suggest that Plaintiffs could collect the signatures "by mail, email, or other electronic means" (Opp., at 11), attempting to obscure from the Court the fact that California law requires the "circulators" of the "nomination papers" to attest under oath that they personally physically witnessed the signature of each and every one of the "nominator" registered voters required to sign the petition. *See* Cal. Elections Code § 8409 (setting forth the format of the circulator's affidavit). This necessarily means the circulators must be in close physical proximity to each and every one of the nominators in order to observe them signing and certify under oath that they have done so.

It is of no concrete import whatsoever that the circulators (Defendants suggest that Plaintiffs should employ 66 of these) could themselves also sign the nomination papers and have a mobile notary meet them at home, which is all that Defendants can propose by way of avoiding the necessity of in-person signature gathering. In other words, if 66 circulators sign the petitions as nominators and have the petitions

notarized by mobile notaries, then 196,898 of the 196,964 signatures still remain to be collected.

The cold fact is that Plaintiffs' circulators would have to physically approach a multiple of 200,000 individuals to obtain the sufficient number of signatures. On top of that, there is a vastly reduced pool of potential signers under present conditions, given that large numbers of people rightly fear contracting COVID-19 from contact with others. Compounding this difficulty are the Defendants' own entirely justified restrictions on public gatherings and activities, which are intended to combat the spread of infection. These conditions do, in fact, render it effectively impossible for Plaintiffs to comply with the state's signature requirements.

At the same time, contradicting their position that obtaining these signatures is in any way practical, Defendants' own submissions confirm that efforts to obtain these signatures would violate the state's own pandemic directives. When on June 5, 2020, Defendants for the first time advised the public that "permissible election-related activities" include "collection of signatures to qualify candidates … for the ballot," they at the same time admonished that persons engaging in such activity must "of course … adhere to physical distancing and other applicable health care directives." *See* Quirarte Decl., ¶ 9, Ex. 3 (emphasis added). Thus, even after June 5, 2020, it remained impossible for physical signature gathering to take place on any substantial scale. The conclusion is inescapable that the state recognizes that the candidates' circulators and many hundreds of thousands of prospective nominators would risk serious illness and even death in any attempt to comply with the state's ballot access regime.

This state of affairs cannot pass constitutional muster, especially given that a presidential election is at stake. This Court would be acting well within its power in granting Plaintiffs the injunctive relief sought here—and indeed it must do so to if Plaintiffs' core democratic and constitutional rights are to be given any substantial effect.

II. DISCUSSION

A. The state's requirements as applied to the unique situation of the pandemic are not politically neutral.

The state claims that its requirements are "generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the process." *See* Opp., at 8. However true that may or may not be in an abstract sense, it is certainly not true as applied to Plaintiffs in the concrete and immediate context of the unprecedented health crisis presented by the surging pandemic.

This is confirmed by a hypothetical illustration. Suppose a state were to impose new requirements for marriage licenses. According to these new requirements, registered Democrats and Republicans can order their marriage licenses by submitting a simple form. However, registered independents are required to run through a mine field in order to obtain a marriage license. Such requirements would not be upheld as "generally applicable," "evenhanded," or "politically neutral."

As this brief is being filed, the COVID-19 pandemic is raging out of control in California. On Monday, July 13, 2020, Defendant Newsom himself issued an order rolling back the state's efforts to "re-open" and reinstating emergency limitations, listing numerous categories of businesses that ordered to cease indoor and outdoor operations. In the two weeks preceding the filing of this brief, the governor's office reported 111,495 new cases and 1,137 new deaths in the state—more deaths in two weeks than many countries have recorded over the entire span of the pandemic. Over the same period, the state's hospitals reported a 26.3 percent increase in COVID-related hospitalizations.[1]

[1] *See* https://covid19.ca.gov/roadmap-counties/

Defendants' ballot access requirements for independent presidential candidates, which do not apply to Democrats or Republicans, would require Plaintiffs and their supporters to run through the equivalent of a mine field, risking serious illness and death. It seems hardly necessary to argue that the right to life, protected by the Fifth and Fourteenth Amendments to the U.S. Constitution (and Article I of the California Constitution) should be paramount. Whatever interests the state may have in avoiding ballot "clutter" and "voter confusion," these interests cannot be served by requiring independent candidates and their supporters to engage in activity that would involve substantial risk to human life.

B. On the merits, the Court applying strict scrutiny does not need to consider whether Plaintiffs were "reasonably diligent;" but no "reasonably diligent" candidate could comply with Defendants' ballot access requirements anyway.

Defendants acknowledge the bipartite *Anderson-Burdick* standard for ballot access cases, pursuant to which applicable standard will depend on whether the state's requirements impose a "severe burden" or "severe restriction" on the candidate. When the asserted rights are subject to "severe restrictions," the law must be "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In cases of a lesser burden on the asserted electoral rights, constitutionality is "measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (citation omitted); *see Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012).

Plaintiffs' position, based on the *Esshaki v. Whitmer* case, is that the burden placed on them in the context of the pandemic is "severe," such that strict scrutiny will apply and the Court does not need to reach the question of whether a "reasonably diligent" candidate could comply with the requirements. As the district

court in *Esshaki* reasoned, "[u]nder these unique historical circumstances," the pandemic and the state's countermeasures operated "in tandem to impose a severe burden on Plaintiff's ability to seek elected office, in violation of his First and Fourteenth Amendment rights to freedom of speech, freedom of association, equal protection, and due process of the law." 2020 WL 1910154 at *1 (E.D. Mich. Apr. 20, 2020) (emphasis added). Since the burden was severe, the court proceeded directly to apply strict scrutiny.

The Defendants' efforts to distinguish *Esshaki* are discussed further below, but Plaintiffs submit that they should prevail regardless of the standard being applied, since no "reasonably diligent" candidate could comply with the requirements anyway.

Defendants contend that it "cannot be contested that successful signature-gathering campaigns are 'impossible' under the current circumstances with reasonable diligence." Opp., at 13. In support of this position, Defendants point to ballot initiative proponents who have submitted hundreds of thousands of signatures in recent months.

Attorney Rachelle Delucchi declares, for example, that a table submitted along with her declaration shows that a proponent of a ballot access initiative submitted a total of 910,293 signatures between late May and early June to qualify this initiative for the November election." Delucchi Decl., ¶ 15. Defendants cite this evidence in support of the statement that "[e]ven in light of the ongoing pandemic and the state and local orders, other electioneering efforts have carried on." Opp., at 13. But this is misleading: the signatures on these ballot propositions were submitted in late May and early June. The declarant fails to indicate when they were collected. Because Defendants chose to omit the dates on which these signatures were collected, Defendants' evidence is simply irrelevant and not probative.

In fact, the specific ballot initiative highlighted by Defendants, titled "1877: Adjusts Limitations In Medical Negligence Cases," went through a series of

amendments in late 2019, and the Attorney General prepared a title and summary of the chief purpose and points of the proposed measure, dated December 2, 2019. Winger Decl., ¶ 2; Exhibit A. Therefore, the period of time within which signatures could be gathered was the 180 days from December 2, 2019 (Elections Code §§ 336, 9014(a)) to June 1, 2020 (Elections Code §§ 9014, 9030(a)). Winger Decl., ¶ 3.[2]

Each of the ballot access propositions referenced by Mrs. Delucchi is easily distinguished by the fact that the signature gathering period began well before the COVID-19 pandemic. Initiative 1879 was circulated for signatures between December 17, 2019 and June 15, 2020, as was Initiative 1880. Winger Decl., ¶ 5. Initiative 1882 was circulated between December 30, 2019 and June 29, 2020. *Id*. Defendants have chosen to omit the dates on which the signatures were actually collected, and they make no showing that any substantial fraction were gathered after April 27, 2020.

The requirements for ballot initiatives therefore stand in sharp contrast to the signature-gathering requirements imposed upon Plaintiffs, with which Plaintiffs could not have possibly attempted to comply until after the pandemic was already in full swing. *See* Opp., at 9.

And as to Initiative 1877, upon closer examination, Defendants' example of "other electioneering efforts" that supposedly "have carried on" turns out to be the complete opposite. The proponents of this ballot access measure have apparently decided to aim for putting the referendum on the 2022 ballot instead of the year

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[2] Under the above Elections Code provisions, supporters of ballot initiatives are given a maximum of 180 days to collect signatures, starting from when the attorney general's office provides a ballot title after reviewing the initiative's language. Regardless of when the circulation period begins, signatures for an initiative must be verified at least 131 days before the next general election to appear on that election's ballot.

2020, in light of the pandemic.[3] Mrs. Delucchi does not include Initiative 1877 on her list of initiatives that have qualified for the November 2020 ballot. *See* Delucchi Decl., ¶ 19.

Defendants also suggest that Plaintiffs should have gathered signatures "by mail or email, or other electronic means" (Opp., at 3) or on "social media" (Opp., at 11). These phrases are similarly misleading. California has not, in fact, developed any procedures for electronic signature gathering. Winger Decl., ¶ 7. On April 29, 2020, for example, Massachusetts became the first state to allow campaigns to collect electronic signatures and remote signatures. *Id*. California has not implemented any such measures. *Id*.

When Defendants refer to "electronic means" they are apparently referring to the hypothetical procedure that a campaigner could mail or email the document to a prospective signer, who could sign the document, pay a mobile notary to come witness the signature, and then mail it to county election officials. *See* Delucchi Decl., Ex 2.

Since Defendants place such emphasis on the "use of mobile notaries" (Opp., at 11), it is worth pointing out that Defendants' own exhibit states: "California Law does not provide the authority for California notaries public to perform a remote online notarization. The personal appearance of the document signer is required before the notary public." Delucchi Decl., Ex. 2 (emphasis added). In San Francisco, mobile notary fees range from $55 to $115 per signature, depending on the

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[3] The *San Francisco Chronicle* reported on May 1, 2020: "Worried about the effect the coronavirus pandemic may have on the November elections, backers will delay until 2022 an initiative that would raise the dollar limit for damages awarded in medical malpractice lawsuits." Winger Decl., ¶ 6; Exhibit B (" 'We've been agonizing over this for a month and a half, ever since we finished collecting signatures' [Consumer Watchdog president Jamie Court] said . . . . Court said his group now plans to wait until late May to file, purposely avoiding the 2020 ballot.").

geographic zone. Winger Decl., ¶ 9. At a hypothetical average rate of $100 per notarized signature, the cost of notarizing nearly 200,000 signatures would be on the order of $20 million, not including postage to and from nominator. Even making the assumption that Plaintiffs' campaigners could somehow identify and email 200,000 voters willing to sign as nominators without campaigning in public spaces, the financial burden of such a proposal reveals the tenuous if not preposterous character of Defendants' position.

In *SawariMedia LLC v. Whitmer*, another recent voting rights case addressing COVID-19 conditions, the district court rejected the sort of arguments the Defendants make here regarding the availability of a mail campaign, citing the language of *Esshaki*:

> [T]he unforeseen nature of such an expense here surely magnifies its burden: no candidate, at the time they initially declared for office, could have anticipated that at the end of March, just when in-person signature collecting might be expected to be ramping up, there would arise the sudden need to switch to a mail-only signature campaign.

SawariMedia LLC v. Whitmer, No. 20-CV-11246, 2020 WL 3097266, at *10 (E.D. Mich. June 11, 2020). Not only would the financial cost be "more than incidental," but "the efficacy of a mail-based campaign is unproven and questionable at best." *Id*. at *11.

> Such a mail-only signature gathering campaign assumes both a fully operational postal service and a public willing to walk to the mailbox, open physical envelopes, sign a petition, and deposit the envelope back into a mailbox or make a trip to the Post Office. Today, sadly, ample reasons exist to question the plausibility of each of those assumptions. For one, the United States Postal Service has itself been affected by the COVID-19 virus: As of April 7, 2020, more than 386 postal workers have tested positive for the virus nationwide and mail delays have been confirmed in Southeast Michigan. Media reports extensively discuss the risks of contracting COVID-19 from mail, suggesting, at least anecdotally, that the issue may be of widespread public concern or even fear. Getting voters to return signatures by mail in normal times is difficult. In these unprecedented circumstances, the efficacy of a mail-only signature gathering campaign is simply an unknown. Forcing candidates—through little fault of their own—to rely on the mails as their only means of obtaining signatures presents a formidable obstacle of unknown dimension.

Id. The same reasoning should apply here.

As to the allegation that "social media" could be used by Plaintiffs to campaign, Plaintiffs do indeed make use of social media. But they hasten to point out that, as a factual matter, they have been waging a campaign for years against censorship on these platforms. *See* Kishore Decl., ¶¶ 5-16. The private technology monopolies claim that they are not state actors, such that Plaintiffs' speech can be censored on these platforms without regard for First Amendment protections. For this reason, the exercise of Plaintiffs' core democratic and constitutional rights should not be made contingent on the whims and caprices of the private owners of the social media platforms.

Defendants rely on *De La Fuente v. Padilla*, 930 F.3d 1101, 1105-06 (9th Cir. 2019), which acknowledged that the "the number of signatures the Ballot Access Laws require may appear high" but otherwise upheld California's ballot access regime for independent presidential candidates against a constitutional challenge. *De La Fuente*'s reasoning has no application to the facts of this case. In 2019, a campaigner could stand outside a supermarket and collect signatures by holding brief conversations with voters. In 2020, a campaigner would risk death in doing so, both for the campaigner and for the prospective signer. Moreover, Defendants do not explain what to do about the fact that voters who are approached in public under present conditions are likely to walk away from the campaigner—or reprove the campaigner for violating social distancing norms.

Defendants' own exhibits establish a qualitatively more onerous burden on candidates than the regime that was upheld by the Ninth Circuit in 2019 in the *De La Fuente* case. In 2019, the process of gathering a signature consisted of a brief conversation in a grocery store parking lot taking no more than a minute with no threat of contagion. In 2020, Defendants' proposal would require each signer to (1) be contacted by a stranger over the internet or by phone and agree to support the campaign; (2) provide his or her postal address to receive the documents by mail, or

have a printer with which to print out the documents after they are emailed; (3) agree to arrange for a mobile notary, spend the time necessary to accomplish a notarized signature, and incur the cost of such notary (at $55 to $115 or more per signature); and (4) mail the document back to the campaigner or directly to elections officials. Winger Decl., ¶¶ 8-9. As a burden on the exercise of the constitutional rights of Plaintiffs and their supporters, this scenario is many orders of magnitude more onerous than the regime upheld in *De La Fuente*.

In the final analysis, Defendants' vision of a candidate fulfilling the 200,000-signature requirement in the year 2020 is simply a fantasy. Defendants cannot point to, and will not be able to point to, any independent candidate who is expected to fulfill these requirements. In fact, the only other similarly-situated candidate that Defendants mention is Constitution Party candidate Don Blankenship, who subsequent to Plaintiffs' complaint in this matter has filed a similar challenge. *See Blankenship v. Newsom*, No. 2:20-cv-4479 (N.D. Cal); Opp., at 22.

C. Ballot access is all or nothing; gathering "some" signatures would not have resulted in "some" ballot access.

Plaintiffs frankly acknowledge in their Complaint in this matter: "At this point, through no fault of their own, Plaintiffs have collected zero signatures towards the total." Compl., ¶ 32. It is Plaintiffs' position that it would be unconstitutional to enforce a requirement that Plaintiffs gather physical signatures under these pandemic conditions.

Defendants fault Plaintiffs for failing to "attempt" to gather some fraction of the required total number of signatures. Defendants write that "Plaintiffs have failed to demonstrate any diligence in attempting to gather the requisite number of signatures to secure an independent nomination to the general election ballot." Opp., at 10. This argument is a non-sequitur and contrary to all common sense. If Plaintiffs had gathered 5 percent of the required number of signatures, Defendants would not have printed their names on 5 percent of the ballots. Defendants will deny

ballot access unless all of the required signatures are gathered and validated. Moreover, in addition to being a pointless and futile exercise in light of the unfeasibility of gathering the required number, any such "attempt" would have created a pronounced risk to public health.

In contrast to *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 940 (11th Cir. 1983), cited at Opp., at 10, Plaintiffs and their supporters did not decline to undertake a petition drive because they viewed the signature requirement as simply too high, but because under conditions of the coronavirus pandemic, it would been dangerous and irresponsible to do so.

D. Defendants fail to distinguish the *Esshaki* case.

According to Defendants, the *Esshaki* case is "inapplicable because, as a decision by an out-of-circuit court, it did not apply the Ninth Circuit reasonable-diligence analysis set out in *Nadar* and *Angle*." Opp., at 16-17. This is a remarkable argument for Defendants to make, since Defendants' own brief relies on out-of-circuit decisions in *Libertarian Party of Fla., supra,* and *Murray v. Cuomo* No. 1:20-CV-03571-MKV, 2020 WL 2521449 (S.D.N.Y. May 18, 2020).

Defendants go on to attempt to distinguish the *Esshaki* case by pointing out that signature gathering was already underway in Michigan at the time that the pandemic and the state's countermeasures brought signature-gathering to a halt. In contrast, in Plaintiffs' case, the pandemic and the state's countermeasures cover the entire signature-gathering period. This is indeed a fact that distinguishes *Esshaki* from this case, and it only makes signature-gathering by Plaintiffs and their supporters that much more impossible and the consequent burden on Plaintiffs all that more severe. The plaintiff in *Esshaki* could have, hypothetically, gathered the signatures before the pandemic; Plaintiffs could not have done so. If the burden was "severe" in *Esshaki*, warranting strict scrutiny, it is only more "severe" here.

One theme in Defendants' brief, and a ground on which they attempt to distinguish the *Esshaki* case, is that signature-gathering in California was

supposedly prohibited only for one week. In support of this claim, Defendants point to a handful of vague orders and statements that they contend indicate that signature-gathering by Plaintiffs and supporters would have been exempt from the general lockdown. These hardly support Defendants' position.

One document is dated March 28, 2020 and titled, "Advisory Memorandum On Identification Of Essential Critical Infrastructure Workers During Covid-19 Response." Chang Decl., Ex. 4. This document was issued by the Department of Homeland Security Cybersecurity & Infrastructure Security Agency, and states with emphasis: "This list is advisory in nature. It is not, nor should it be considered, a federal directive or standard." Chang Decl., Ex. 4, *1. On the twelfth page, the document lists the following workers as critical infrastructure workers: "Elections personnel to include both public and private sector elections support." Chang Decl., Ex. 4, *12. This document does not define "elections personnel" or "elections support." The plain meaning of this language is a reference to governmental election workers and private persons who assist at polling stations. This document advances Defendants' argument not one whit.

The same is true as to the second document cited by Defendants: a March 22, 2020 list of categories of workers designated as "essential" under Defendant Newsom's March 19, 2020 Executive Order N-33-20, under a heading labeled, "Government Operations and other community-based essential functions" which includes the same undefined phrase "elections personnel." Chang Decl., Ex. 5.

Finally, Defendants point to a "Q&A" document posted online on May 1, 2020 indicating that "Elections are an essential activity" under a heading described as "protected activities." Quirarte Decl., ¶ 5. This document on its face does not reference signature-gathering. And at any rate, Plaintiffs never saw any of these documents before they were attached to Defendants' opposition. Kishore Decl., ¶¶ 2-4; Santa Cruz Decl., ¶¶ 2-4.

The document that Defendants believe triggers Plaintiffs' obligation to begin collecting signatures on May 1, 2020 merely consists of an online webpage that lists "permissible activity" as "the collection and dropoff of ballots, or other election-related activities." *See* Quirarte Decl., ¶ 5. Plaintiffs are not "elections personnel" and were not engaged in "the collection and dropoff of ballots," so there is little to reassure them and their supporters against the threat of criminal prosecution.

Indeed, if Plaintiffs had seen the documents, a reasonable inference would have been that this language is a reference to the "elections personnel" mentioned in the earlier documents. In sum, the uploading of these vague phrases to an obscure Q&A web page never viewed by Plaintiffs is not sufficient to trigger an obligation for Plaintiffs to begin collecting signatures. Only on June 5, 2020 did the cited web page specify collecting signatures as an exempt category of activity, and even then, it was accompanied by inconsistent and contradictory language about physical distancing.

Most importantly, none of this has any bearing on whether signature-gathering was safe. At most, these documents could have provided a defense in the event of criminal prosecution for that activity. But as stated by Mrs. Kuzay, she not only would have risked criminal prosecution in gathering signatures, she would have risked her own health as well as spreading the deadly infection to others. *See* Kuzay Decl., ¶¶ 5-6. For these reasons, Plaintiffs did not have "14 weeks out of the 15-week period to collect signatures in person," but zero weeks, and Defendants are not able to distinguish the *Esshaki* case on this basis.

Defendants rely on *Common Sense Party v. Padilla*, No. 2:20-cv-01091-MCE-EFB, 2020 WL 3491041 (E.D. Cal. 2020) (Opp., at 13). In that case, the plaintiff Common Sense Party was required to gather approximately 68,000 voter registrations, but only managed to gather 5,519 by October 1, 2019; 9,819 by January 3, 2020; and 10,859 by February 18, 2020. *Id.*, *5. On these facts, the district court concluded that the fact that the plaintiff had gathered only 15,010 by

June 9, 2020 was not the result of the pandemic, since the Plaintiff had plenty of time prior to the pandemic to gather the signatures.

The *Common Sense Party* case, like the case of *Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020), are distinguished by the fact the plaintiffs in those cases had a meaningful opportunity to gather signatures before the onset of the pandemic. Plaintiffs' case here is different in that the statutory signature-gathering period did not open until late April, well after the pandemic had developed into an unprecedented worldwide crisis.

While *Common Sense Party* and *Thompson* are easily distinguished on their facts, Plaintiffs submit that these two decisions are also poorly reasoned and unpersuasive. Both of these decisions coincided with the misguided and premature efforts to "re-open" the economy, during which time the dangers posed by the COVID-19 disease were being minimized. *See Common Sense Party v. Padilla*, 2020 WL 3491041, at *6 (". . . even now when much of California is re-opened . . ."); *Thompson*, 959 F.3d at 809 (citing the Ohio Department of Health "Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order"). These "re-opening" efforts have now backfired and resulted in a national catastrophe. With the death toll spiraling over 140,000 nationally and over 7,200 in California, and in light of Defendant Newsom's own order reversing course on July 13, 2020, it is clear that this ill-conceived "re-opening" has been overtaken and superseded by events.

The Ninth Circuit's evolving views on these questions are suggested by an order earlier this month denying a stay of the district court's award of injunctive relief in *Idaho v. Little*, No. 20-35584 [Doc. No. 14, *1] (July 9, 2020). The district court in that case had granted ballot access relief to an Idaho statewide initiative, due to the health crisis, ordering the state to extend the deadline and permit signatures to be gathered electronically (District Court Case No. 1:20-cv-00268). The Ninth Circuit panel refused to stay the injunction, over a dissent claiming that

the plaintiffs had not been "diligent" and that the order permitting electronic signatures violated the separation of powers. *Idaho*, No. 20-35584 [Doc. No. 14, **3-4].

E. There is no objective basis to find that Plaintiffs do not meet the test for a "bare modicum of voter support."

Defendants point to the state's interests in the conduct of the elections, which involve a determination of whether a candidate enjoys a "bare modicum of voter support." Opp., at 19. But Defendants overstate their case when they claim that Plaintiffs have not demonstrated "even a bare modicum of voter support" and did not make "any effort to solicit such support." Opp., at 2 (emphasis added). This statement requires Defendants to ignore all of the declarations that were submitted along with this motion, as well as the factual evidence of the Plaintiffs' campaign activities in the state before the pandemic.

The Plaintiffs are not just "anyone," as Defendants suggest. They are candidates who have secured the nomination of a well-established political party with a long history and a widely-read political newspaper. Defendants do not dispute that Plaintiffs timely filed their statements of candidacy with the federal election commission, or that Plaintiffs and their supporters organized and held three campaign meetings in California in the space of several days in March. This shows that prior to the signature-gathering period, the Plaintiffs were diligently soliciting and winning support—in California and around the country.

Contrary to the Defendants' speculative suggestions, the Plaintiffs belong to a well-ordered and professional party that could deploy dozens of signature-gatherers throughout the state on any given day. Santa Cruz Decl., ¶ 5. Plaintiffs are ready to satisfy any of the Defendants' ballot access requirements besides the signature requirements, and they have 55 electors pledged to serve. Santa Cruz Decl., ¶ 6.

By launching their campaign in January and holding meetings throughout the state, Plaintiffs were working early and diligently to recruit additional support for

their campaign. Santa Cruz Decl., ¶ 7. In other words, Plaintiffs expected to conduct their campaign not only with their existing supporters as of January 2020, but with supporters that they would win over in the course of the campaign. Santa Cruz Decl., ¶ 8.

It is undisputed that the pandemic cut these efforts short. Plaintiffs cancelled planned meetings around the country for safety reasons. These are the facts. Against this objective evidence, Defendants can only offer their own speculation about what could have, should have, or might have (or might not have) happened but for the pandemic.

Signature-gathering is only one of many ways a state can make a determination as to whether a candidate possesses the required level of support. In Colorado, for example, an independent candidate can demonstrate the requisite degree of voter support by gathering physical signatures or by paying a $1,000 filing fee. Winger Decl., ¶ 10.

Defendants describe an apocalyptic scenario, wherein allowing the Plaintiffs onto the ballot would result in an "unmanageable and overcrowded ballot for the November presidential general election that would cause voter confusion and frustration of the democratic process." Opp., at 22. But this argument is significantly undermined by the fact that the state already has in place a Top Two Open Primary system for other candidates for federal office. As Mr. Winger explained in his original declaration, which is undisputed:

> Since 2012, California has implemented a Top Two Open Primary system, which means that all candidates running for state constitutional, U.S. Congressional, and state legislative offices are listed on a single statewide primary election ballot. Voters can vote for the candidate of their choice for these offices, regardless of how they are registered. The top two candidates, as determined by the voters, advance to the general election in November. This procedure, which has been in place since 2012, diminishes any concern that the state may assert as to a "cluttered" or "crowded" ballot. This open procedure, in which any candidate can participate by paying a filing fee, is also incongruous on its face with the large signature gathering total that the state requires as to independent candidates for president.

Winger Decl. (July 1, 2020), ¶ 6. In other words, the state of California allows any candidate to participate in these races by paying a filing fee, without regard for the danger of an "unmanageable and overcrowded ballot." These elections proceed in an orderly fashion, and the state has deemed that its interests are served by allowing free and open access in this manner.

As to ballot access for Plaintiffs, whatever interests the state may have in avoiding ballot "clutter" and "voter confusion," they are wholly overstated here.

First, there is no objective basis for Defendants' concern about an avalanche of candidates cascading onto the 2020 ballot. At this point Defendants can point to exactly two independent candidates: Plaintiffs and Don Blankenship. Adding a single presidential ticket to the ballot hardly threatens significant ballot clutter. Only five presidential tickets (Democrats, Republicans, Greens, Libertarians, and the Peace and Freedom Party candidates) were on the California presidential ballot in 2016 (and no independents). No candidates without voter support will be permitted to "clutter" the ballot.

Nor is there any plausible danger that an independent socialist candidate will be confused with other party candidates. As to the issue of "voter confusion," in his concurrence in *Williams v. Rhodes*, 393 U.S. 23 (1968), Justice John Marshall Harlan indicated that a ballot with eight candidates on it would carry no significant risk of such confusion: "Ohio law would permit as many as six additional party candidates to compete with the Democrats and Republicans . . . And with fundamental freedoms at stake, such an unlikely hypothesis cannot support an incursion upon protected rights, especially since the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion." *Williams*, 393 U.S. at 46; *see also* Winger Decl. (July 1, 2020), ¶ 5.

Defendants suggest with emphasis that if Plaintiffs prevail, "*anyone* . . . can seek to be placed on the ballot during the pandemic." Opp., at 2. No, not *anyone*. An independent presidential candidate wishing to access the ballot in California would

still have to demonstrate the requisite minimum degree of support, as Plaintiffs have.

As Plaintiffs indicated in a previously-filed brief, an important point of reference is the decision in *Hall v. Austin*, 495 F. Supp. 782, 784 (E.D. Mich. 1980). In that case, it was undisputed that Michigan had no statutory method by which independent candidates for president and vice-president could gain access to the Michigan general election ballot. The plaintiffs were Gus Hall and Angela Davis, the Communist Party's presidential and vice-presidential candidates, who sought ballot access as independent candidates.

The *Hall* case is a helpful reference point because California in the year 2020, like Michigan in the *Hall* case, is effectively failing to provide a means for independent presidential candidates to access the ballot. Here, California has one method, existing only on paper, which is for all practical purposes impossible to utilize under current conditions. In *Hall*, the district court acknowledged that the plaintiffs must still demonstrate the requisite degree of support to obtain the requested affirmative relief. The district court considered the appropriate factors and concluded that they met that standard: "Reviewing the candidacies of Hall and Davis . . . the Court easily concludes that 'there is reason to assume' that Hall and Davis have 'the requisite degree of community support.'" *Hall*, 495 F. Supp. at 790 (citations omitted).

> Hall and Davis can hardly be compared to the defendants' examples of frivolous candidates who have attempted to qualify as independent candidates. They are earnest and experienced politicians who are recognized, interviewed and written about by the news media and invited to speak and participate by many organizations. They espouse a serious political program and address important issues pertaining to race, economics, and government. In short, there is no indication that the addition of Hall and Davis will in any way impair the ability of the electorate to make rational decisions at the polling booth. On the contrary, their participation as candidates may well assure that the electorate is better informed as to crucial issues and alternative positions which the voter may accept, reject or utilize for comparison. After all, this is the meaning and strength of democracy and the formula for its perpetuation and growth.

See Hall, 495 F. Supp at 792.

As to the issue of whether Plaintiffs have the requisite degree of community support, Plaintiffs submit that they have established that they do. As demonstrated by the declarations submitted together with this application, Plaintiffs Kishore and Santa Cruz are far from frivolous candidates. They are experienced politicians who are recognized throughout the country and who have each written extensively on a broad range of political issues. The political newspaper of their organization, the *World Socialist Web Site* (wsws.org) is the most widely read socialist newspaper on the internet, read by millions of people around the world. The declarations that were filed together with the application point to the political ideas that have won them support among teachers, health care workers, students, and other sections of the state's population.

As in the *Hall* case, the fact that Plaintiffs Kishore and Santa Cruz espouse a serious political program militates strongly in their favor. Just as in *Hall*, including their names on the ballot will not in any way impair the ability of the electorate to make rational decisions at the polling booth.

Indeed, placing these socialist candidates with their distinct program on the ballot will inform rather than confuse voters as to important issues, including those who otherwise might not vote. The fact that sample ballots are mailed to voters prior to election day further diminishes any concern about voter confusion, since voters will have an opportunity to research the candidates and their platforms in advance. There is no realistic threat that these avowedly socialist candidates will be confused with the other party candidates.

Concluding that it was "necessary to emphasize again that the rights at stake here . . . are crucial to our democracy," *Hall*, 495 F. Supp. at 792, the court in *Hall* ultimately awarded injunctive relief, ordering Michigan to place Hall and Davis on the ballot.

III. CONCLUSION

For the reasons above, the state's requirements impose a "severe burden" and a "severe restriction" on Plaintiffs, and as such strict scrutiny should apply. In the alternative, no "reasonably diligent" candidates would be able to fulfill the state's requirements anyway, so Plaintiffs should prevail regardless of what standard is applied.

As Plaintiff Santa Cruz has stated: "I think it is pure insanity that our campaign should be expected to collect some 200,000 signatures in the midst of a deadly pandemic, especially as cases continue to skyrocket in California and throughout the region." Santa Cruz Decl., ¶ 10. She explains:

> For my part, I would not be able to live with myself if, as a result of my decision, one of my supporters were to contract the virus and perish. I am appalled at the suggestion that we should have sent our supporters out to face a deadly virus when we could not ensure their safety. No responsible person in my position would have done so.

Id., ¶ 11.

It is not just a question of the circulators, who must be careful of themselves and of their families, but of the threat posed to the whole public—by these approaches to countless individual voters who would otherwise just be cautiously venturing out of their homes to try to get their groceries without bringing something deadly back to their families. Each rendezvous would be a lethal game of chance. Since vastly more people would have to be contacted than would ultimately sign, any attempt to comply with the state's requirements would be virtually certain to result directly in more cases of the virus, frustrating the valiant efforts of health care workers to contain the disease and treat the many victims. Indeed, the Plaintiffs are campaigning on criticisms of the official countermeasures to the pandemic as inadequate; the state would have them violate their deeply-held political convictions by forcing them to play a role in spreading the disease.

California will not be harmed by allowing Plaintiffs to exercise their constitutional rights. The requested relief is indeed extraordinary, but the conditions

are extraordinary. One certainly hopes that a pandemic on the scale of the current disaster will not occur again. At any rate, the requested relief is specific to the Plaintiffs, to this November ballot, and to the extraordinary circumstances of the COVID-19 pandemic.

Any discomfort or disruption that results from Plaintiffs' success in this lawsuit will be the fault of state officials, not Plaintiffs. The conduct of the elections is Defendant Padilla's affirmative responsibility. *See* Cal. Gov't Code § 12172.5. Nothing prevented the state from implementing, in response to the pandemic, an alternative procedure for ballot access. Instead, state officials in California sat on their hands for months and refused to change an administrative requirement that had become effectively impossible to fulfill. Since California refuses to provide a way for Plaintiffs to access the ballot, in violation of Plaintiffs' core democratic and constitutional rights, Plaintiffs have no choice but to petition this Court to grant the relief they request.

Respectfully Submitted,

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