UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT

Case No. 20-2481

LIBERTARIAN PARTY OF PENNSYLVANIA, et al,

Plaintiffs-Appellants,

- v. -

TOM WOLF, et al.,

Defendants-Appellees.

APPEAL FROM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLANTS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents important First Amendment issues and Appellants believe that oral argument may be useful to this Court. Still, Appellants also recognize that the deadlines imposed because of the onset of the 2020 general election season and the need for a timely resolution of this case justifies dispensing with oral argument in the discretion of the Court.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants initiated this action on May 14, 2020, when they filed their Verified Complaint asserting claims for the violation of their First and Fourteenth Amendment rights. (Doc. No. 1).[1] The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, because the case arises under the Constitution of the United States and 42 U.S.C. § 1983.

On May 19, 2020, Plaintiffs-Appellants filed a Motion for Temporary Restraining Order and/or Preliminary Injunction. (Doc. No. 3.) The District Court denied that motion by its opinion and order entered on July 14, 2020. (Doc. Nos. 57, 58.) Plaintiffs-Appellants filed their notice of appeal on July 16, 2020. (Doc. No. 63.)

This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), because the order appealed from denied Plaintiffs-Appellants' motion for a preliminary injunction.

[1] Docket citations refer to the District Court docket. Pursuant to Federal Rule of Appellate Procedure 30(c) and Local Rule 30.4, and due to the emergency nature of this appeal, Plaintiffs-Appellants respectfully request leave to file a deferred appendix.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erroneously applied a "litmus test" to find that the burden on Plaintiffs-Appellants' First and Fourteenth Amendment rights was less than severe, solely because the challenged executive orders and statutory provisions did not "virtually exclude[]" Plaintiffs-Appellants from Pennsylvania's 2020 general election ballot?

   See Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, R.3, at Pages 13-17; Plaintiffs' Reply to Response in Opposition to Plaintiffs' Motion for Emergency Relief, R.31, at Pages 2-14; Plaintiffs' Proposed Findings of Fact and Conclusions of Law, R.44, at Pages 28-33.

2. Whether the District Court erred by disregarding Plaintiffs-Appellants' claim that the challenged orders and provisions violated their right to petition by making in-person petitioning unlawful for at least 74 days of the statutory petitioning period?

   See Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, R.3, at Pages 13-17; Plaintiffs' Reply to Response in Opposition to Plaintiffs' Motion for Emergency Relief, R.31, at Pages 2-14; Plaintiffs' Proposed Findings of Fact and Conclusions of Law, R.44, at Pages 28-33.

3. Whether the District Court erred by finding as a matter of law that COVID-19's and the Governor's emergency orders' interruption of Plaintiffs' signature collection efforts and ability to qualify for Pennsylvania's November 3, 2020 general ballot did not violate the First and Fourteenth Amendments.

   See Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, R.3, at Pages 13-17; Plaintiffs' Reply

to Response in Opposition to Plaintiffs' Motion for Emergency Relief, R.31, at Pages 2-14; Plaintiffs' Proposed Findings of Fact and Conclusions of Law, R.44, at Pages 28-33.

4. Whether the District Court erred in refusing to require that Pennsylvania adjust its ballot access requirements during the COVID-19 crisis because of the Governor's emergency orders' interference with Plaintiffs' signature collection efforts needed to qualify their candidates for the November 3, 2020 general election ballot.

See Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, R.3, at Pages 13-17; Plaintiffs' Reply to Response in Opposition to Plaintiffs' Motion for Emergency Relief, R.31, at Pages 2-14; Plaintiffs' Proposed Findings of Fact and Conclusions of Law, R.44, at Pages 28-33.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case and proceeding has not been before this court previously. It is related to a case previously decided by the District Court, in which the District Court held that Pennsylvania's nomination paper signature requirements and challenge procedures were unconstitutional as applied. *See Constitution Party of Pa. v. Cortes*, 116 F. Supp. 3d 486 (E.D. Pa. 2015). This Court affirmed. *See Constitution Party of Pa. v. Aichele*, 824 F.3d 386 (3rd Cir. 2016). On remand, the District Court entered an order establishing new signature requirements that remain in effect until the Legislature enacts remedial legislation. *See* Order, *Constitution Party of*

Pa. v. Aichele, No. 12-2726, Doc. No. 115 (E.D. Pa. February 1, 2018) (attached to Plaintiffs' Verified Complaint as Exhibit A).

STATEMENT OF THE CASE

The COVID-19 pandemic has given rise to an extraordinary set of circumstances in Pennsylvania and nationwide. In an effort to contain the virus and protect the public health, the Commonwealth of Pennsylvania has implemented several emergency measures that, although perhaps reasonable in light of the public health crisis, make it impossible for Plaintiffs and other citizens to comply with the statutory procedures they must follow to participate in Pennsylvania's electoral processes.[2]

As voters, petition circulators, candidates and political bodies in Pennsylvania, Plaintiffs are required by law to obtain voters' signatures on nomination papers to qualify their respective candidates for

[2] Pennsylvania's in-person petitioning requirements and signature requirements are prescribed by 25 Pa. Stat. Ann. §§ 2911, as modified by an order of the District Court for the Eastern District of Pennsylvania. *See* Order, *Constitution Party of Pa. v. Aichele*, No. 12-2726, Doc. No. 115 (E.D. Pa. February 1, 2018) (attached as Exhibit B). Pennsylvania's statutory petitioning period, including its filing deadline, is prescribed by Pa. Stat. Ann. § 2913(b)-(c). Pursuant thereto, the 2020 petition period began on February 19 and ends on August 3.

placement on Pennsylvania's November 3, 2020 general election ballot. Under the emergency measures in place during a substantial portion of the statutory petitioning period, however, Plaintiffs were legally prohibited or severely restricted from attempting to comply with these requirements.

On March 6, 2020, Governor Wolf proclaimed the existence of a disaster emergency throughout the Commonwealth pursuant to 35 Pa. C.S. § 7301(c). *See* "Proclamation of Disaster Emergency" (March 6, 2020), available at https://www.governor.pa.gov/wpcontent/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf (accessed May 13, 2020). Thereafter, Governor Wolf issued a number of executive orders that imposed sweeping restrictions on virtually every aspect of citizens' daily life and activities. By an order entered on March 19, 2020, which took effect on March 21, 2020, Governor Wolf required the closure of all "non-life sustaining businesses" – including "political" organizations – and provided for "enforcement actions" to be taken against businesses that fail to comply. *See* "Order of the Governor of Pennsylvania Regarding the Closure of All Businesses that are not Life Sustaining" (March 19, 2020).

On March 23, 2020, Governor Wolf issued a "stay at home" order effective until April 6, 2020, which required that "all individuals" residing in several counties across the Commonwealth "stay at home except as needed to access, support, or provide life sustaining business, emergency, or government services," and that individuals who leave their homes "must employ social distancing practices as defined by the Centers for Disease Control and Prevention." The order further provided that "gatherings of individuals outside of the home are generally prohibited except as may be required to access, support or provide life sustaining services." *See* "Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home" (March 23, 2020). Several subsequent orders applied the terms of the Governor's stay at home order to several more counties. Then, on April 1, 2020, Governor Wolf entered a statewide "stay at home" order, to remain in effect until April 30, 2020. *See* "Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home" (April 1, 2020).

On April 22, 2020, Governor Wolf instituted a process to "reopen Pennsylvania," to commence on May 8, 2020, pursuant to which each county in the Commonwealth would be designated as in a "red," "yellow"

or "green" phase. Counties in red phase remained under the stay at home order until at least June 4, 2020; in yellow phase counties, the stay at home order was lifted but "large gatherings of more than 25" remained prohibited, indoor recreation, personal care facilities and all entertainment facilities remained closed, and restaurants and bars were limited to carry-out only service.

Further, social distancing – maintaining at least six feet from other individuals – is required in yellow phase counties. On May 19, 2020, when Plaintiffs filed their Motion for Temporary Restraining Order and/or Preliminary Injunction in the District Court, (Doc. No. 3), all counties in Pennsylvania were designated as red phase or yellow phase. Petitioning to qualify candidates and Political Bodies for Pennsylvania's November 3, 2020 general election ballot is not defined as an "essential" activity under Governor Wolf's stay at home orders. Moreover, even in yellow phase counties, mandatory social distancing means that in-person petitioning remained a prohibited activity.

Consequently, the public health emergency caused by COVID-19 and the various executive orders issued by Governor Wolf either prohibited or severely restricted Plaintiffs-Appellants' right to circulate

nomination papers throughout Pennsylvania for a substantial portion of the statutory petitioning period. As the Governor's website cautions, law enforcement is authorized to enforce the Governor's orders, and "citations are possible for violators…." And even if the legal prohibitions – including mandatory social distancing requirements – are lifted prior to the August 3, 2020 filing deadline, Plaintiffs-Appellants' ability to comply with Pennsylvania's petitioning requirements will remain heavily burdened by the unacceptable risk to the public health posed by personal contact with large numbers of people during a pandemic.

On March 30, 2020 and March 31, 2020, respectively, Plaintiffs-Appellants Green Party of Pennsylvania ("GPPA") and Libertarian Party of Pennsylvania ("LPPA") sent Governor Wolf and Secretary Boockvar urgent written requests for relief from Pennsylvania's petitioning requirements as applied to them in the 2020 election cycle. (Verified Complaint Ex. B, Ex. C.) Plaintiff Constitution Party of Pennsylvania ("CPPA") did the same on April 20, 2020. (Verified Complaint Ex. D.) Receiving no response, on April 29, 2020 Plaintiff LPPA sent Governor Wolf and Secretary Boockvar another letter reiterating its urgent request for relief, and Plaintiff GPPA did so on April 30, 2020. (Verified

Complaint Ex. E, Ex. F.) On May 4, 2020 – five weeks after initially making their urgent requests – Plaintiffs LPPA and GPPA received a letter from Timothy Gates, Chief Counsel of the Governor's Office of General Counsel, advising that his office is "currently reviewing this matter," and that "we will be in touch soon." (Verified Complaint Ex. G.)

On May 15, 2020, Plaintiffs filed this action. *See* Complaint, R.1. On May 19, 2020, Plaintiffs filed their Motion for Temporary Restraining Order and/or Preliminary Injunction. *See* R.3. Following a series of telephone conferences and hearings in which Plaintiffs-Appellants, Defendants-Appellees and Intervenor-Democratic Party presented argument and evidence, the District Court on July 14, 2020 entered its opinion and order denying Plaintiffs-Appellants' motion. The District Court concluded that because Plaintiffs-Appellants have a "possible way to access the ballot," Opinion at 22, their First Amendment rights were not violated. The burden imposed by the combination of the COVID-19 crisis, Pennsylvania's emergency safety orders, and Pennsylvania's strict enforcement of its petitioning requirements and filing deadline was not "severe," the District Court concluded, because:

> none of the stay at home orders precluded the plaintiffs from collecting signatures directly, which is the means for accessing the

> ballot. Furthermore, Pennsylvania began lifting its stay at home restrictions in May, with all counties in Pennsylvania having their stay at home orders lifted as of June 5, 2020. Additionally, plaintiffs had 33 days to collect signatures prior to the first stay at home order going into effect on March 23, 2020, and the plaintiffs have a full 60 days from June 5, 2020 to August 3, 2020, which is the deadline for signature collection, to meet the requirements imposed by the February 1, 2018 order.

Id. at 23. "Unlike in cases where district and circuit courts across the country have found there to be severe burdens, the stay at home orders at issue in this case are not in effect through the deadline for candidates to submit their papers for the ballot." *Id.* Thus, even though the Governor's orders prohibited Plaintiffs-Appellants from petitioning in-person in all or many Pennsylvania counties from March 23 until June 5 – a period of 74 days – and even though Plaintiffs-Appellants' right to petition remains restricted by the Governor's executive orders, the Court concluded that Plaintiffs-Appellants were not entitled to any relief whatsoever.

Relying heavily on *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020), where Ohio unlike Pennsylvania had never precluded circulators from collecting signatures, the Court stated "the eight-and-half-week period from the expiration of the stay at home orders in all counties in Pennsylvania to the signature collection deadline undermines the

plaintiffs' claims that they are excluded from the ballot and that it would be impossible as a practical matter for them to collect the required signatures in time." *Id.* at 23-24.

Relying on an improper legal standard borrowed from *Thompson* – a case that even the Sixth Circuit has more recently refused to follow, *see SawariMedia, LLC v. Whitmer*, 2020 WL 3097266, *15 (W.D. Mich., June 11, 2020), *stay denied*, 2020 WL 3603684 (6th Cir., July 2, 2020) – the District Court ruled that the weeks lost to Plaintiffs-Appellants because of COVID-19 and the Governor's emergency orders were irrelevant because Plaintiffs-Appellants were not "virtually excluded from the ballot." *Id.* at 24. The First Amendment was not violated -- even during the 74 days when Plaintiffs-Appellants were prohibited from engaging in in-person petitioning – and absolutely no relief would be forthcoming.

One day after the District Court entered its order, on July 16, 2020, Governor Wolf issued a new executive order, in response to the rising COVID-19 cases across that state, which effectively rolls back his "reopening" of Pennsylvania. The order was issued just 13 days after the Governor moved the last of Pennsylvania's counties to the "green" phase.

Among other things, the order requires all businesses to conduct their operations remotely, if possible; restaurant occupancy is limited to just 25% of stated fire code maximum occupancy for indoor dining; and indoor gatherings of more than 25 persons are prohibited. *See* Order of the Governor of the Commonwealth of Pennsylvania Directing Targeted Mitigation Measures, https://www.governor.pa.gov/wp-content/uploads/2020/07/20200715-TWW-targeted-mitigation-order.pdf.

STANDARD OF REVIEW

"When reviewing a district court's [denial] of a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision ... for an abuse of discretion." *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010). *See also Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). "Where, as here, 'First Amendment rights are at issue,'" this Court has "modified that standard." *Brown v. City of Pittsburgh*, 586 F.3d 263, 268 (3d Cir. 2009) (citation omitted). "Although [it] normally will not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error," this Court has concluded that it has "a constitutional duty to conduct an

independent examination of the record as a whole when a case presents a First Amendment claim." *Id.* at 268-69 (citation omitted).

Consequently, both the factual and legal conclusions supporting the District Court's resolution of the First Amendment issues raised in this matter are reviewed de novo by this Court.

SUMMARY OF THE ARGUMENT

1. The Supreme Court has repeatedly emphasized that there is no litmus test for deciding the constitutionality of election laws. Instead, Courts must undertake a fact-intensive analysis and consider all the circumstances and laws together to determine whether a law can survive scrutiny. The District Court failed to do so here. It concluded that the burden on Plaintiffs-Appellants' First and Fourteenth Amendment rights was not severe, solely on the ground that the Governor's orders did not "virtually exclude" Plaintiffs-Appellants from the ballot. In so doing, the District Court disregarded the clear violation of Plaintiffs-Appellants' First Amendment right to petition during the 74 days when they were legally prohibited from engaging in in-person petitioning in all or parts of Pennsylvania. This was error.

2. Pennsylvania, Pennsylvania, the Nation and the World have experienced a deadly pandemic of proportions not seen for at least 100 years. States and Courts across the Country have accordingly adjusted virtually every facet of civil society. One thing Pennsylvania stubbornly refuses to adjust, however, is procedure by which Plaintiffs-Appellants must demonstrate the requisite modicum of support to qualify for the ballot. Despite the pandemic, Pennsylvania insists upon the strict enforcement of its in-person petitioning procedures and requirements, and further insists that such enforcement only imposes minimal burdens on Plaintiffs-Appellants' First and Fourteenth Amendment rights. All evidence to the contrary, the District Court nonetheless accepted that reasoning and declined to grant Plaintiffs-Appellees any relief.

Pennsylvania and the Court below are wrong. COVID-19 makes it unrealistic if not impossible for Plaintiffs-Appellants to petition in the old-fashioned way. Something has to give, either health and safety or Pennsylvania's strict enforcement of procedures and requirements that are manifestly unfit for application in the context of a pandemic. The Constitution dictates that it must be the latter. As Courts nationwide have recognized, less burdensome alternatives are available, and in the

context of the emergency circumstances presented here, the Constitution requires that Pennsylvania adopt them.

3. The Supreme Court, this Court, and the Court below have repeatedly recognized that Courts have the power to correct constitutional violations. And Courts nationwide have overwhelmingly recognized that the emergency circumstances from which this case arises demand relief. In declining to grant relief here, the District Court stands nearly alone, a stark outlier among the federal and state courts that have decided COVID-19-related ballot access cases. Without this Court's intervention, therefore, Pennsylvania will be among a vanishingly small minority of states that failed to take action to vindicate the First and Fourteenth Amendment rights of their citizens during this pandemic. Voters throughout the Commonwealth will suffer, as they will be deprived of the right to cast their votes effectively and forced instead to choose between the nominees of just two parties. This Court can and should remedy that harm. The District Court's order should be vacated, and this Court should grant Plaintiffs-Appellants appropriate relief.

ARGUMENT

I. The District Court's Order Should Be Vacated Because It Improperly Applies a Litmus Test to Deny Plaintiffs-Appellants Relief, in Clear Violation of Supreme Court Precedent.

The District Court's reliance on a "virtual exclusion" test to measure the severity of the burden imposed on Plaintiffs' First and Fourteenth Amendment rights is a clear violation of Supreme Court precedent. The Court has repeatedly emphasized that lower courts must not apply such "litmus tests" in reviewing the constitutionality of ballot access cases, but rather must conduct a fact-intensive analysis of the record. Here, the District Court concluded that the burden on Plaintiffs-Appellants' First and Fourteenth Amendment rights was not severe solely on the basis that the Governors' orders did not "virtually exclude" them from the ballot. This was error.

A. The Principle That Ballot Access Cases Cannot Be Decided Based on a Litmus Test Is Foundational.

Nearly 45 years ago, the Supreme Court made clear that ballot access cases cannot be decided by applying a "litmus-paper test" that neatly separates unconstitutional statutory schemes from those that pass muster. *Storer v. Brown*, 415 U.S. 724, 730 (1974). Decisions in such

cases, the Court explained, are "a matter of degree," and require careful consideration of "the facts and circumstances behind the law." *Id.* (citations omitted). The "inevitable question for judgment" is whether "a reasonably diligent … candidate [can] be expected to satisfy" the statutory requirements. *Id.* at 742. Consequently, there is no simple rule that can act as a "substitute for the hard judgments that must be made" based on the record in each case. *Id.* at 730.

Time and again, the Supreme Court has reaffirmed that proper adjudication of ballot access cases requires a fact-intensive and fact-specific analysis of each particular case. As the Court observed, "No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *see also Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1616 (2008); *Burson v. Freeman*, 504 US 191, 210-11 (1992); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 US 182, 192 (1989); *Tashjian v. Republican Party of CT.*, 479 U.S. 208, 214 (1986); *Munro v. Socialist Workers Party*, 479 US 189, 193 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *Clements v. Fashing*, 457 U.S. 957, 963

(1982). This principle is, in short, foundational to the Supreme Court's ballot access jurisprudence.

The Court has therefore established an analytic framework that governs constitutional review of ballot access cases, pursuant to which a reviewing court:

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. This framework, the Court explained, establishes a "flexible standard," according to which "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged restriction burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. Under this standard, "reasonable, nondiscriminatory restrictions" are subject to less exacting review, whereas laws that impose "severe" burdens are subject to strict scrutiny. *See id.* (citations omitted). But in every case, "However slight

[the] burden may appear ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 128 S.Ct. at 1616 (citation and quotation marks omitted).

Lower courts, including this Court, have duly followed what has come to be known as the *Anderson-Burdick* analysis, with its careful focus on the "character and magnitude" of the plaintiff's alleged injury, as balanced against the "precise interests" the state asserts to justify the challenged regulations, the "legitimacy and strength of each of those interests," and the extent to which they "make it necessary" to burden plaintiff's constitutional rights. *Anderson*, 460 U.S. at 789. "Much of the action takes place at the first stage of *Anderson's* balancing inquiry," the Seventh Circuit has observed, because the severity of the burden imposed is what determines whether strict scrutiny or a less demanding level of review applies. *Stone v. Board of Election Com'rs for City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014) (citing *Burdick*, 504 U.S. at 534). Even so, the *Anderson-Burdick* analysis "can only take us so far," because "there is no 'litmus test for measuring the severity of a burden that a state law imposes,' either." *Id.* (quoting *Crawford*, 128 S.Ct. at 1616).

B. The District Court Improperly Applied a Litmus Test to Measure the Severity of the Burden on Plaintiffs-Appellants' First and Fourteenth Amendment Rights.

The District Circuit erred by grafting onto the *Anderson-Burdick* analysis a singular litmus test – "virtual exclusion" – for assessing the severity of the burden imposed on Plaintiffs-Appellants' First and Fourteenth Amendment rights. So long as there is some unencumbered time to collect signatures, the District Court reasoned, candidates are not "virtually" excluded and thus suffer no First Amendment injury. The District Court's adoption of this improper legal standard led it to ignore the severity of the burdens imposed by the Governor's orders closing the Commonwealth, the additional orders restricting people's activities, and the continuing prohibitions across the Commonwealth of public gatherings, all of which combined to impose a severe burden on Plaintiffs-Appellants' First and Fourteenth Amendment rights. Rather than consider all of these facts together, the District Court wrongly focused on a single factor: whether circulators could still "possibly" collect signatures.

The District Court's application of a "virtual exclusion" test for measuring severity under *Anderson-Burdick*, to the exclusion of all other

factors, is in clear violation of Supreme Court precedent. *See Storer*, 415 U.S. at 730; *Crawford,* 553 U.S. at 191. "When the government makes it more difficult to engage in … [a petitioning campaign], it imposes an especially significant First Amendment burden." *McCullen v. Coakley*, 573 U.S. 464, 489 (2014). Under Supreme Court precedent, therefore, the District Court was required to assess the additional burden imposed by Pennsylvania's COVID-19-related prohibitions and restrictions on petitioning, rather than disregarding them if they did not amount to "virtual exclusion" from the ballot.

The District Court placed great weight on the asserted availability of possible alternative petitioning methods during the extensive period when in-person petitioning was prohibited. It considered the possibility that circulators *might* be able to collect signatures via email or U.S. Mail to be extremely important. But even if that were true – and the evidence in the record demonstrates that such "alternatives" are not viable – it remains uncontested that Plaintiffs-Appellants' right to engage in in-person petitioning has been prohibited or severely restricted since the onset of the COVID-19 pandemic. The District Court's failure to grant relief from the heavy burdens these restrictions imposed, solely on the

ground that the restrictions did not amount to a "virtual exclusion" from the ballot, violates the Supreme Court's directives in *Storer* and *Crawford*, which are essential to a proper application of the *Anderson-Burdick* analysis.

Furthermore, because the District Court improperly applied its "virtual exclusion" litmus test, it entirely disregarded the clear and uncontested violation of Plaintiffs-Appellants' First Amendment right to petition. Unlike non-COVID-19 ballot access cases, this one involves executive orders that the District Court itself acknowledged prohibited, then severely restricted, Plaintiffs-Appellants from engaging in petitioning. Based on these facts alone, Plaintiffs have sustained injury to their First Amendment rights. "Petition circulation … is 'core political speech,' because it involves 'interactive communication concerning political change.'" *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). First Amendment protection is therefore "at its zenith" with respect to Plaintiffs-Appellants' right to circulate petitions in support of their respective candidates. *Id.* Here, the violation of Plaintiffs-Appellants' right to petition could not be more clear: under the

Governor's orders, it was unlawful for Plaintiffs-Appellants to engage in in-person petitioning for no fewer than 74 days of the statutory petitioning period. Plaintiffs-Appellants are entitled to redress for that violation of their First Amendment rights, and it was error for the District Court to deny them any relief whatsoever.

II. Even the Sixth Circuit Has Declined to Adopt *Thompson's* Reasoning.

The District Court's reliance on the "virtual exclusion" standard from *Thompson* is not even supported by the Sixth Circuit's own precedent. In fact, a subsequent Panel of the Sixth Circuit expressly declined to apply *Thompson's* "virtual exclusion" standard in a case involving Michigan's COVID-19-related restrictions on petitioning for initiatives. *See SawariMedia, LLC v. Whitmer*, 2020 WL 3097266 (W.D. Mich., June 11, 2020), *stay denied*, __ F.3d __, 2020 WL 3603684 (6th Cir., July 2, 2020)

In *SawariMedia*, Michigan's in-person petitioning requirements and deadlines were much like those in Ohio and Pennsylvania. The collection dates in Michigan extended between the filing of the initiative, which was January 16, 2020, and May 27, 2020. *Id.* at *1-*2. Thus, the circulators had about eighteen weeks to collect signatures. And just like

in Ohio and Pennsylvania, COVID-19 intervened in the middle of the collection period in Michigan, stealing valuable collection time from both the Michigan and Ohio circulators.

Notwithstanding these similarities, the District Court in *SawariMedia* refused to follow the Court's conclusion in *Thompson*. It concluded that Michigan's emergency orders did not, unlike Ohio, include a clear, express exception for signature collection. *Id.* at *15. The District Court recognized that Ohio's circulator exemption had proved "vitally important" to the Sixth Circuit's decision and resulted in the Sixth Circuit's finding that "Ohio's stay-at-home orders did not impose a severe burden on the plaintiffs' First Amendment rights." *Id.* at * 8. By contrast, because Michigan's orders did not have that exception, they did burden the circulators' First Amendment rights by preventing them from collecting signatures in the usual in-person way for several weeks. Even though the circulators had from January 16, 2020 until March 23, 2020 to collect signatures unencumbered by the emergency safety orders, the fact that they lost time from March 23, 2020 until Michigan's mid-May re-opening warranted relief.

The *SawariMedia* Court directed the Michigan Defendants to propose a remedy, which they did on June 15, 2020. Their proposal refused to adjust either Michigan's signature requirements or its in-person petitioning requirement, *see* State Defendants Notice of Proposed Remedy, No. 20-11246, Doc. No. 18, at PAGEID # 260, and was rejected by the District Court as "contraven[ing] the terms of the Court's injunction." *SawariMedia*, Status Conference Order, No. 20-11246, Doc. No. 22, at PAGEID # 289.

Michigan appealed and asked the Sixth Circuit to stay the District Court's preliminary injunction under *Thompson*. The Sixth Circuit declined. *See SawariMedia, LLC v. Whitmer*, 2020 WL 3097266 (W.D. Mich., June 11, 2020), *stay denied*, __ F.3d __, 2020 WL 3603684 (6th Cir., July 2, 2020). It stated that *Thompson*'s result rests "almost entirely … on differences between Michigan's and Ohio's stay-at-home orders." *SawariMedia*, 2020 WL 3603684, at *2. Because Michigan's orders in conjunction with the COVID-19 crisis did interfere with part of the signature collection time in Michigan, judicial relief was warranted under the First Amendment. *See id.*

III. A Strong Majority of Courts Have Recognized that State's COVID-19-Related Restrictions on Petitioning Require Relief Under the First Amendment.

Applying a proper *Anderson-Burdick* analysis rather than the District Court's improper "virtual exclusion" litmus test, a strong majority of Sister Circuits (including the Sixth discussed above) have ruled that COVID-19's interference in petitioning efforts requires relief, regardless of the exact terms of emergency shelter orders. In *Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), *appeal pending sub nom.*, *Libertarian Party of Illinois v. Cadigan*, No. 20-1961 (7th Cir., filed June 6, 2020), the State Elections Board attempted to use *Thompson* to stay a month-old order directing it to relax signature collection requirements that were nearly identical to those in Ohio. The Seventh Circuit denied the Board's request. *See Libertarian Party of Illinois v. Cadigan*, __ Fed. Appx. __, 2020 WL 3421662 (7th Cir., June 21, 2020).

In doing so, the Seventh Circuit recognized the "the serious safety concerns and substantial limitations on public gatherings that animated the parties' initial agreement and persist despite some loosening of restrictions in recent weeks." *Id.* Regardless of the precise legal

restrictions put in place, the Seventh Circuit recognized "serious safety concerns and substantial limitations on public gatherings." Those same twin concerns are present in Pennsylvania; public gatherings are even more restricted and safety is at risk.

The Seventh Circuit's decision in *Cadigan* reflects a growing understanding that COVID-19 is not going away, morbidity rates and mortalities continue to rise, and that state-imposed restrictions are restricting people from engaging in petitioning and other constitutionally protected activities in the usual pre-pandemic ways. In stark contrast to the District Court's decision here, courts nationwide have reached the near-unanimous conclusion that such circumstances warrant relief. While a minority of Courts have ruled that the First Amendment was not necessarily violated in the context of collecting signatures for initiatives,[3] few have joined the District Court's conclusion that candidates have not suffered constitutional injury.

[3] *See*, *e.g.*, *Thompson v. DeWine*, 959 F.3d 804 (6th Cir., May 26, 2020) (vacating stay in initiative case); *Morgan v. White*, 2020 WL 2526484,* 3 (N.D. Ill., May 18, 2020), *aff'd*, 2020 WL 3818059 (7th Cir., July 8, 2020).

In another Sixth Circuit decision, for example, the Court affirmed the District Court's conclusion that Michigan's signature collection requirements and deadline for candidates violated the First Amendment:

> the district court properly applied the *Anderson-Burdick* test, which applies strict scrutiny to a State's law that severely burdens ballot access and intermediate scrutiny to a law that imposes lesser burdens. The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored *to the present circumstances*. Thus, the State's strict application of the ballot-access provisions is unconstitutional as applied here.

Esshaki v. Whitmer, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *stay denied in part*, __ Fed. App'x __, 2020 WL 2185553, *1 (6th Cir., May 5, 2020) (Citations omitted and emphasis original).

On remand, the District Court, acting on the Sixth Circuit's instructions, advised the State that the simplest way to proceed was for it to implement what the District Court had ordered, which is exactly what Michigan did. *See* Richard Winger, *Michigan Secretary of State*

Now Agrees to 50% Cut in Number of Primary Petition Signatures, Ballot Access News, May 8, 2020.[4]

In *Reclaim Idaho v. Little*, 2020WL3490216 (D. Idaho, June 26, 2020), *stay denied*, No. 20-35584 (9th Cir., July 14, 2020), the Court invalidated Idaho's in-person signature collection requirement for initiatives and its deadline in light of the COVID-19 crisis. The District Court stated the plaintiff "has shown that the State refused to take executive action to ensure Reclaim Idaho could continue to safely gather signatures from March 16, 2020, when the request was made to both the Governor and the Secretary of State, through the end of the amended stay-at-home order, or April 30, 2020." *Id.* at *8. "[T]he Court finds the State's refusal to make reasonable accommodations inhibited [the plaintiff's] ability to place the Invest in Idaho initiative on the November 2020 general election ballot. As such, the Court finds Reclaim Idaho is

[4] https://ballot-access.org/2020/05/08/michigan-secretary-of-state-now-agrees-to-50-cut-in-number-of-primary-petitions/. The District Court then in *Esshaki*, 2020 WL 2556754, *4 (E.D. Mich., May 20, 2020), advised State officials that a two month extension of the deadline and 50% reduction in the number of needed signatures would solve the constitutional problem for additional candidates who hoped to join in that relief.

likely to succeed on the merits of its claims." *Id.* at *10. The Court thus gave the State a choice between "plac[ing] the initiative on the November 2020 ballot for voter consideration," *id.* *11, or "allow[ing] … an additional 48-days to gather signatures through online solicitation and submission." *Id.*

In *Acosta v. Restrepo*, 2020WL3495777, *5 (D. R.I., June 25, 2020), the Court found that Rhode Island's petitioning requirements violated the First Amendment as applied during the COVID-19 crisis and granted preliminary relief to candidates challenging Rhode Island's signature collection requirements for candidates stating, "the plaintiffs here all have demonstrated to the satisfaction of the Court that, due to their own health condition, or of the condition of those around them, the signature collection process would jeopardize their health and that of the public. The objecting defendants have put forth no compelling reason that the signature process should exist in its current form during the pandemic." The Court accordingly ordered the State to accept remotely collected signatures.

In *Fair Maps Nevada v. Cegavske*, 2020 WL 2798018 (D. Nev., May 29, 2020), the Court ordered relief for circulators of initiatives. It

observed that "[f]orcing circulators to go out to collect signatures during the COVID-19 pandemic is unreasonable and unwise." *Id.* at *13. "As a matter of common sense, COVID-19, the Stay at Home Order, and the Secretary's Denial Decision all significantly inhibit Plaintiffs' ability to get their Initiative on the November 2020 ballot." Id. at *14. The combination of COVID-19, the State's shelter orders, and the State's refusal to accommodate circulators, the Court concluded, "significantly inhibits Plaintiffs' ability to get their Initiative on the ballot …." *Id.* The Court accordingly enjoined the State's deadline. *Id.* at *16.

In *Miller v. Thurston*, 2020 WL 2617312, *4 (W.D. Ark., May 25, 2020), *stay denied*, 2020 WL 2850223 (W.D. Ark., June 2, 2020), *appeal filed*, No. 20-2095 (8th Cir., June 2, 2020), the District Court concluded that Arkansas's restrictions on petitioning violated the First Amendment:

> the in-person signing and sworn affidavit requirements (as well as any additional requirements necessarily contingent upon these requirements) substantially restrict political discussion. For those requirements, the Secretary of State has thus far failed to provide evidence or argument that would allow him at the merits stage to meet his burden under the heightened scrutiny the Court must apply, and so Plaintiffs have shown they are likely to succeed on the merits.

The Court accordingly enjoined these in-person petitioning requirements and ordered the State to accept signatures that did not comply. *Id.* at *16.

In *Constitution Party of Virginia v. Virginia State Board of Elections*, No. 3:20cv-349, Doc. No. 51, at PAGEID # 891 (E.D. Va., July 15, 2020), the Court "conclude[d] that Virginia's signature requirements impose a substantial burden on the plaintiffs' First and Fourteenth Amendment rights as applied to this election cycle," and therefore extended the filing deadline to August 1, 2020, reduced the signature requirements for U.S. House and Senate candidates by 65%, and reduced the signature requirements for Presidential candidates by 50%. *Id.* at PAGEID # 892.

In *People Not Politicians v. Clarno*, 2020 WL 3960440, *7 (D. Oregon, July 13, 2020), the Court concluded that Oregon's strict enforcement of its petitioning requirements during the COVID-19 crisis violated the First Amendment and directed Oregon to "simply allow Plaintiffs on the ballot [or] [a]lternatively, … to reduce the signature threshold by 50%, which would equal 58,789 signatures, and allow Plaintiffs an extension until August 17." Applying *Anderson-Burdick* balancing, the Court refused to, per Oregon's suggestion, "suspend belief

in finding that because the Executive Orders did not explicitly ban petition gathering, Plaintiffs could somehow continue to solicit in-person signatures," *id.* at 4, found that "Plaintiffs faced pandemic-related regulations that severely diminished their chances of collecting the necessary signatures by July 2, 2020," *id.*, found that Oregon, "even when requested, refused to lower the threshold or alter the turn-in deadline," *id.*, and because of the lack of "an accommodation from Defendant" presented the circulators with "an impossible task" such that they "can now only get their initiative on the November 2020 ballot with an order of relief from this Court." *Id.* Oregon's "refus[al] to make reasonable accommodation, during the unprecedented time of the pandemic, reduced the total quantum of speech" and therefore violated the First Amendment. *Id.* at *5.

Many States, moreover, have taken steps voluntarily to relieve the burdens imposed by COVID-19 and governors' executive orders. *See*, *e.g.*, Connecticut Ex. Order No. 7LL, May 11, 2020 (described in *Gottlieb v. Lamont*, 2020 WL 3046205 (D. Conn., June 8, 2020); Jim Camden, *Candidates who are broke will get a break when filing to get names on the ballot*, Spokesman Review, May 6, 2020 (describing Governor Inslee's

statement in Washington that "[g]athering signatures during the COVID-19 pandemic 'runs contrary to recommended public health practice'");[5] Jonathan D. Salant, *No knocking on doors. Murphy orders political petition signatures be collected electronically*, NJ.COM, April 29, 2020 (describing New Jersey Governor's order directing initiative circulators not go door-to-door but to collect electronically).[6]

Further, election law experts have been sharply critical of the few cases in which Courts have refused relief to circulators of initiatives. *See*, *e.g.*, Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative in a Pandemic*, 2020 U. CHIC. L. REV. ONLINE (describing these minority decisions as "deeply problematic.").[7] With respect to the Sixth Circuit's decision in *Thompson*, Professor Hasen states that it is "very dismissive of the rights of direct democracy," and "portends bad things to come." Professor Hasen argues that the District Court in *Thompson*, which

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[5] https://www.spokesman.com/stories/2020/may/06/candidates-who-are-broke-will-get-a-break-when-fil/.

[6] https://www.nj.com/coronavirus/2020/04/no-knocking-on-doors-murphy-orders-political-petition-signatures-be-collected-electronically.html.

[7] https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-initiative-hasen/.

issued a preliminary injunction that the Sixth Circuit stayed, "was right to see that normal ballot qualification rules can impose a severe First Amendment burden on direct democracy participants under pandemic conditions," and "did a good job of trying to put the plaintiffs in the position they would have been in if there had been no pandemic."

Against this rapidly-growing body of authority, the District Court's decision stands nearly alone, a stark outlier in declining to grant relief under the emergency circumstances presented here.

CONCLUSION

The District Court's denial of preliminary relief under the extraordinary circumstances presented here was error. Accordingly, this Court should vacate the District Court's order and grant an injunction pending appeal to extend Pennsylvania's filing deadline, reduce its signature requirement and enjoin its strict in-person petitioning requirement.

Respectfully submitted,

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Plaintiffs-Appellees certify that they have prepared this document in 14-point Century font and that excluding the Caption, Signature Blocks and Certificates, the document includes 6,685 words.

s/Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I certify that on July 20, 2020 this Brief was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding. I further certify that on July 20, 2020 Defendants and Intervenor-Defendant were served through counsel, via email, to the following:

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