No. 20-1661

United States Court of Appeals for the Sixth Circuit

JOSEPH KISHORE AND NORISSA SANTA CRUZ,

Plaintiffs—Appellants,

v.

GRETCHEN WHITMER, JOCELYN BENSON AND JONATHAN BRATER

Defendants—Appellees.

On Interlocutory Appeal from the U.S. District Court for the Eastern District of Michigan,
No. 2:20-cv-11605-SFC

APPELLANTS' OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), Appellants Joseph Kishore and Norissa Santa Cruz respectfully request oral argument. This appeal raises important and pressing constitutional concerns, with far-reaching implications for Appellants and millions of voters in Michigan and across the country. Oral argument would aid the decisional process in this case.

INTRODUCTION

This case presents a challenge to Michigan's ballot access requirements for independent candidates for president and vice president as applied in the context of the COVID-19 pandemic. Plaintiffs and Appellants Joseph Kishore Tanniru ("Kishore") and Norissa Santa Cruz ("Santa Cruz"), the candidates of the Socialist Equality Party ("SEP"), contend that any effort to comply with the requirement that they gather and submit thousands of physical signatures would have constituted a grave risk to the health and lives of their supporters. Under these unique and unprecedented circumstances, Michigan's ballot access laws operate as an unconstitutional restriction on their core democratic rights and an effective bar to their participation in the November elections. Unless this Court intervenes, these core democratic and constitutional rights of Kishore and Santa Cruz and their supporters will be violated, as their campaign will be effectively excluded from the ballot in a critical election year.

The decision of the district court below denying the Appellants' application for preliminary injunctive relief is fundamentally wrong. Specifically, the district court failed to correctly apply this Court's recent decisions in *Esshaki v. Whitmer*, 2020 WL 2185553 (6th Cir. May 5, 2020) and *SawariMedia LLC v. Whitmer*, 2020 WL 3603684, (6th Cir. July 2, 2020), which subjected signature-gathering requirements for ballot access to strict scrutiny in the context of the pandemic. The

district court instead purported to apply "intermediate scrutiny." Within that framework, the district court erroneously determined that Appellants could not establish the requisite degree of "diligence" because Appellants made the supposed "choice" not to expose their supporters to the risk of serious illness and death.

"The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *American Party of Texas v. White*, 415 U.S. 767, 783 (1974). The district court's July 8, 2020 decision effectively ignores this requirement by glossing over the dangers posed by the COVID-19 pandemic, thereby downplaying the risk to Kishore and Santa Cruz and their supporters. The reality is that in the past four months at least 6,300 people have died of coronavirus and over 75,000 have tested positive in Michigan alone. Recently, on July 16, Michigan witnessed 926 confirmed or probable positive cases, the highest single-day total since May. New positive tests have increased over 10-fold in the last four weeks. At a press briefing held by the Michigan Department of Health and Human Services on July 10, the state's Chief Medical Executive, Dr. Joneigh Khaldun, said, "What this implies is that we are also seeing increases in cases because there's true spread of the disease. So right now, the data is not looking good."[1] Michigan has among the highest rates of deaths per 100,000 people, at 62.8.[2] Nationwide, in the days since

[1] https://www.youtube.com/c/MichiganHHS/videos
[2] https://www.cdc.gov/covid-data-tracker/#cases

the district court issued its ruling, the country has witnessed the worst total positive cases since the disease struck North America, with a record 75,600 new positive tests on July 16 alone, more than double the figure on June 24.

Appellants' inability to access the ballot under these conditions is no fault of their own. Kishore and Santa Cruz announced their presidential campaign in late January, well before the start of the pandemic, and began organizing holding in-person meetings to gather support in February. Throughout the pandemic, they have opposed the bipartisan "back to work" and "back to school" campaigns, criticized the inadequacy of the official countermeasures, and warned of the dangers posed by the disease. Consistent with these political positions, Appellants cancelled physical campaign activity in early March because they declined to risk the health and safety of their supporters and of the public at large by attempting to gather physical signatures.

The current version of Michigan's ballot access regime for independent presidential candidates was struck down as unconstitutional in *Graveline v. Benson*, 2019 WL 7049801 (E.D. Mich. Dec. 22, 2019). An interim order in that case would permit Michigan to require Appellants to submit 12,000 (instead of the statutory 30,000). Appellants would have to contact a large multiple of that number of people in order to meet the requirement. Gathering the requisite signatures would have required Appellants to ignore social distancing as to

hundreds of thousands of people, violating the state's own restrictions in the midst of the worst health crisis in the state's history.

The health dangers are compounded by the difficulty in making contact with sufficient numbers of people on account of the general lockdown and the prohibition on public gatherings. Even more importantly, requiring Appellants to physically approach potential voters would have forced them to violate their own deeply-held political convictions and alienate their existing supporters by contributing to the spread of the disease. Here the Appellants acted conscientiously in abstaining from physical petition gathering, ensuring that not a single person became infected as a result of their campaign, and they should not be faulted for that.

The state ballot access requirements, in combination with the deadly pandemic, the state's stay-at-home orders and ongoing restrictions on close contact operate together to severely burden the Appellants First and Fourteenth Amendment rights, as candidates and as voters. Since the harm to Appellants will become irreparable after the ballots are printed without their names on them, preliminary injunctive relief is appropriate and necessary. Appellees Gretchen Whitmer, Jocelyn Benson, and Jonathan Brater, who are Michigan state officials, should be ordered either to place the Appellants on the ballot or to provide them

with a procedure for gaining access that does not involve a risk of death or serious illness.

JURISDICTION

This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a) because it is an appeal of an order denying preliminary injunctive relief based upon Appellants' constitutional challenge to Michigan's ballot access regulations, as applied during the coronavirus. Appellants' original complaint was based upon rights protected by the United States Constitution and the Civil Rights Act, 42 U.S.C. § 1983; the district court's jurisdiction was based upon 28 U.S.C. § 1331. Kishore and Santa Cruz timely appealed by filing their notice of appeal within 30 days of the district court's order of July 8, 2020 as provided by Fed. R. App. P. 4(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying the request for preliminary injunctive relief by Appellants, who are seeking access to the Michigan statewide ballot as independent candidates for United States president and vice president in the November 2020 elections, under conditions where the state's ballot access requirements are effectively impossible for them to meet in light of the COVID-19 pandemic and the state's countermeasures to it.

STATEMENT OF FACTS

A. APPELLANTS' CASE BELOW

1. Appellants established that they launched their campaign in January but were prevented from gathering signatures by the pandemic and the state's countermeasures to it.

On January 21, 2020, Kishore and Santa Cruz timely filed their statement of candidacy with the Federal Election Commission ("FEC"). Kishore Decl., R. 3-1, Page ID#56 at ¶ 2. Shortly thereafter, they announced their campaign on the World Socialist Web Site (wsws.org), the internet voice of the SEP.[3] *Id*. at ¶ 3.

After announcing their campaigns, Appellants' staff of campaign volunteers began organizing a series of meetings in Michigan to launch the campaign. *Id*. The first public campaign event at the University of Michigan, in Ann Arbor, on February 24. *Id.* Three days later, on February 27, a second public campaign meeting was held at Wayne State University in Detroit. These events were promoted widely at both campuses and also at workplaces and public locations in the surrounding areas. *Id*.

In early March, Appellant Kishore traveled to California, where campaign volunteers had organized three public campaign meetings at the University of

[3] A video announcing the launch of the campaign can be viewed at socialism2020.org.

California, Berkeley on March 3, at the University of California, Los Angeles on March 4, and at a public library in San Diego on March 5. *Id*. at ¶ 4.

The campaign was cut short by the pandemic. Shortly after Kishore returned from California, Appellants decided to suspend all subsequent public events, including future plans for ballot gathering initiatives, in order to protect volunteers, staff and the public at large from spreading the coronavirus. This decision resulted in the cancellation of a series of meetings scheduled in Michigan, Florida, Illinois and Massachusetts. *Id*.

In mid-March, state governors began imposing states of emergency and stay-at-home orders, making it impossible for staff and campaign volunteers to organize in-person campaign meetings or collect physical signatures for ballot access. *Id*. at Page ID #57 at ¶ 5.

Under Michigan statutory election law, to appear on the general election ballot Appellants are required to file a nominating petition with the Michigan Secretary of State's office at 4 p.m. on the 110th day before the general election. MCL §168.590c(2). This year's deadline was July 16, 2020—110 days before November 3. The statute indicates that the petition must include a minimum of 30,000 and up to 60,000 signatures of qualified and registered voters in the State of Michigan. MCL §168.544f. Signatures must be gathered within a 180-day period.

MCL § 168.590b(3). The petition must also be signed by 100 registered voters in each of at least half of Michigan's 14 congressional districts. MCL § 168.590b(4).

On March 10, 2020, Governor Whitmer issued Executive Order 2020-4 declaring a state of emergency across Michigan. *Id.* at ¶ 7. On April 1, 2020, Governor Whitmer issued Executive Order 2020-33, declaring both a state of emergency and a state of disaster across Michigan. *Id.* On March 23, 2020, Governor Whitmer issued Executive Order 2020-21 ("Stay-at-Home Order") requiring all individuals to "stay at home or at their place of residence"; banning non-essential work, business, and public and private gatherings; and mandating that individuals not go within six feet of each other outside of their homes. *Id.* The Stay-at-Home Order made it a misdemeanor to violate these prohibitions. *Id.* The order was extended on April 9, May 7 and May 22.

Appellant designated a campaign volunteer to contact Appellee Benson and Appellee Brater in May. On May 6 and May 8, 2020, volunteer Anoop Singh Ghuman called Appellees and was told by officials speaking on behalf of Appellee Brater that no changes would be made to the petition gathering requirements. Ghuman declared that during a telephone discussion with a man named "David" at the Bureau of Elections, "I asked whether the 30,000 signature requirement for independent candidates has changed" and "whether there is a pending lawsuit that may change these rules," and "David informed me that there were no changes of

any of the requirements. Nobody mentioned any case called 'Graveline.' Nobody told me that the signature requirement had been lowered from 30,000 to 12,000." Ghuman Affidavit, R. 15-1, Page ID #3.

Though Appellees finally admitted after this lawsuit was filed that *Graveline v. Benson*, *supra*, had lowered the signature requirement to 12,000 on an interim basis, this was not disclosed by Appellees' representatives in May.

Conceding the danger posed by in-person physical voting during the pandemic, on May 19, Appellee Benson announced that all voting in the August primary and November general election will take place by mail-in ballot. According to a news release, Appellee Benson said the purpose was to "ensure[ ] that no Michigander has to choose between their health and their right to vote." Motion for TRO/PI, R. 3, Page ID #9.

Shortly after announcing plans to reopen business in early June, Appellee Whitmer was forced to backtrack due to the resurgence of the virus in the state. On July 1, she issued Executive Order 2020-143, which banned indoor service at bars. The signing statement for that order reads:

> Our progress in suppressing COVID-19, however, appears to have stalled out. Over the past week, every region in Michigan has seen an uptick in new cases, and daily case counts now exceed 20 cases per million in the Grand Rapids, Lansing, and Kalamazoo regions. A relatively large proportion of these new cases are occurring among young people: nearly one quarter of diagnoses in June were in people aged 20 to 29, up from roughly 16% in

May. That shift aligns with national trends.[4]

On July 9, Appellee Whitmer held a press conference focused on the increasing spread of the coronavirus in Michigan in June and July.[5] She said, "We cannot afford to let our guard down. We cannot afford to play fast and loose with the rules." "If we let our guard down, we could see a rapid increase in cases and deaths here in Michigan… We've got to all work together to protect one another."

On July 10, Appellee Whitmer issued Executive Order 2020-147, which again stressed the resurgence of the disease, noting, "Research confirms that a big part of the reason is spotty compliance with my requirement, issued in prior orders, that individuals wear face coverings in public spaces."[6] The order "requires any business that is open to the public to refuse entry or service to people who refuse to wear a face covering." *Id*.

These restrictions and the resurging virus effectively prohibited, and continue to prohibit, Appellants and their supporters from gathering the signatures required to obtain ballot access in the November general election. Kishore Decl., R. 3-1, Page ID #58 at ¶ 8. Unless this Court intervenes, Michigan election law in

[4] https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-533435--,00.html

[5] https://www.youtube.com/watch?v=b9oBIvEeTV4

[6] https://content.govdelivery.com/attachments/MIEOG/2020/07/10/file_attachments/1492866/EO%202020-147%20Emerg%20order%20-%20Masks.pdf

conjunction with the pandemic and the Stay-at-Home Orders will effectively bar Appellants from getting on the ballot, exclude their views from the electoral process, and suppress the socialist vote. *Id.*

2. The Socialist Equality Party has a long, rich history in the state.

The Socialist Equality Party is a well-established political force in the state of Michigan with a long history. *Id.*, Page ID #60 at ¶13. The SEP's predecessor, the Workers League, moved its national headquarters to Southeast Michigan in 1978. *Id.* The party headquarters have remained in Michigan since then. *Id.*

The movement's publication, the World Socialist Web Site, is read by over 1.5 million people each month, with many thousands of regular readers in Michigan. *Id.*

The SEP has achieved statewide ballot access in Michigan on numerous occasions, most recently in 1996. *Id.*, Page ID #58 at ¶ 9. Its level of political support and potential pool of election volunteers have grown substantially since then. *Id.*

The SEP has engaged in numerous high-profile political campaigns and initiatives in Michigan. In the past three decades, these campaigns and initiatives include a public inquiry into a deadly September 25, 1993 fire on Mack Avenue in Detroit caused by utility shutoffs,[7] an inquiry into a March 2010 house fire on

[7] https://www.wsws.org/en/articles/2010/03/mack-m09.html

Dexter Avenue in Detroit also caused by utility shutoffs,[8] a broader campaign against utility shutoffs in Detroit from 2010-12,[9] a campaign, including a rally attended by hundreds of people, against the plan to sell artwork at the Detroit Institute of Arts in 2013,[10] a public inquiry into the Detroit bankruptcy in 2014,[11] a campaign against water shutoffs and against the poisoning of the water in Flint Michigan,[12] and most recently, a campaign and series of public meetings and demonstrations against the shutdown of Detroit area auto factories in 2018-2019.[13]

The SEP and its predecessor, the Workers League, have contested every presidential election since 1984, with the exception of 2000. In the past three decades, it has regularly contested state and federal elections in Michigan. In 2018, Niles Niemuth ran as the SEP's candidate for U.S. Congress in Michigan's 12th congressional district, winning 2,213 votes. In 2009, D'Artagnan Collier was the party's candidate for Mayor of Detroit, winning 1,265 votes. In 2006, Jerome White ran as the party's candidate for the 12th congressional district, winning 1,862 votes. In 1996, Martin McLaughlin ran as the SEP's candidate for U.S. Senate, winning 5,975 votes. That same year, the SEP won statewide ballot access, successfully securing the signatures required. In 1994, the SEP's predecessor, the

[8] https://www.wsws.org/en/articles/2010/02/dext-f25.html
[9] https://www.wsws.org/en/articles/2011/03/caus-m14.html
[10] https://www.wsws.org/en/articles/2013/10/05/demo-o05.html
[11] https://www.wsws.org/en/articles/2014/02/17/inqu-f17.html
[12] https://www.wsws.org/en/articles/2016/02/01/wsws-f01.html
[13] https://www.wsws.org/en/articles/2018/12/13/whit-d13.html

Workers League, ran McLaughlin as the party's candidate in the Michigan gubernatorial election, winning 9,477 votes. Kishore Decl., R. 3-1, Page ID #58-59 at ¶ 10. In these campaigns, the SEP conducted its signature gathering in the late spring and summer.

Due to the importance of the 2020 presidential elections and the growth of popular interest in socialist politics, Appellants planned a more ambitious ballot access initiative nationwide than in recent years. *Id*., Page ID #59 at ¶ 11.

In 2018, in just one congressional district (Michigan's 12th district), campaign volunteers for the Socialist Equality Party's congressional candidate, Niles Niemuth, submitted 6,000 signatures. The Socialist Equality Party did not begin gathering signatures until June, but easily succeeded in meeting the requirement. Had Appellants been able to run a ballot drive statewide this year, the total number of required signatures was certainly well within their reach, especially in light of a rapid leftward shift in the population and the growing popularity of socialism. *Id*. at ¶ 12.

B. APPELLEES' CASE BELOW

In the litigation below, the Appellees downplayed the dangers posed by the coronavirus pandemic and minimized the danger posed by the signature gathering requirements to Appellants and the public. Appellees' position in this lawsuit

contradicted their other public statements regarding the danger of the virus and the necessity of strict compliance with social distancing mandates.

Appellees argued that Appellants made no effort to collect signatures in "late spring," despite the fact that this is precisely when Michigan was a global hotspot of the pandemic and its hospitals were filling up with patients. Response Brief, R. 10, Page ID #147. Appellees argued, "none of the early Executive Orders expressly prohibited petition circulation" and that "From March 10, 2020, the date the Governor first declared an emergency, to the present, Plaintiffs could have been circulating petitions and collecting signatures." *Id*. at Page ID #147-48.

Appellees argued Appellants should have mailed voters signature sheets to be "picked up by Plaintiffs or their volunteers," despite the fact that it was illegal for Appellants and their supporters to leave their homes. *Id*. at Page ID #148. Appellees argued that if it was dangerous for Appellants to deploy volunteers with underlying health issues, they should have "recruited otherwise healthy individuals to circulate petitions." *Id*. at Page ID #152.

Appellees also argued that Appellants should have gathered signatures "anytime in 2019 or even earlier," suggesting that signatures should have been gathered in 2018 or prior years. *Id*. at Page ID #142. (Emphasis added). Appellees chastised Appellants for failing to telephone the Bureau of Elections to "ask questions regarding the petition circulation process," which Appellants had in

fact done. *Id.* at Page ID #148, n. 22. *See* Affidavit of Campaign Volunteer Anoop Singh Ghuman.

At a hearing regarding the Appellants' application for the preliminary injunction on July 2, Appellees' counsel conceded that in the 180 days before the July 16 deadline, there were only "pockets of that time in there where certainly petition circulation and collection were not hindered in any way." Transcript, R. 18, Page ID #248. During March and April, Appellees' counsel argued that signature gathering "still could be done." *Id.* "[A]ll through this time, there were avenues for signature collection." *Id*. at Page ID #249. Appellees counsel suggested that Appellants merely "might have to do things a little bit differently right now." *Id*. For example, Appellees argued that Appellants should "gather in the Upper Peninsula and northern Michigan" during the peak of the virus, although that would have been dangerous and also illegal. *Id*. Ultimately, counsel for Appellees argued "that's your choice not to participate when you can," though she stated "I'm not saying it's not a good choice for you." *Id*. at Page ID #250.

Notably, Appellees accepted that "based on Plaintiffs' complaint, that they did not intend to begin collecting signatures until late Spring or early Summer," though they argued that the supposed "burden is self-imposed as they have wasted a majority of their 180-day-circulation period." *Id*. at Page ID #152-53.

Appellee Whitmer has made a number of public statements that flatly contradict the arguments made by her attorneys. Regarding Appellees' suggestion that it would have been safe for Appellants to send young supporters out to gather signatures, at a March 23 press conference Whitmer said:

> Young people, I'm talking to you now. You're not immune from this. You can get this virus. And in fact, 40% of the hospitalizations and positive cases are among people 20 to 49… The fact of the matter is, in America, we are seeing severe consequences in our younger people in ways that they haven't seen in other parts of the world.[14]

As for Appellees' argument that conditions are safe now, Appellee Whitmer's own statements underscore the danger of gathering signatures in June. On June 25, she warned in a Tweet of an "alarming rise in #COVID19 cases... Be vigilant. Be Smart. Be Safe."[1] Another June 25 Tweet alerted Michiganders, "We cannot let our guard down" and quoted Michigan's Chief Medical Executive Dr. Joneigh Khaldun, who said, "Now is not the time to celebrate or turn our focus away from COVID-19. If anything, we must get more aggressive."[15]

C. THE DISTRICT COURT'S JULY 8, 2020 ORDER

District Court Judge Sean F. Cox issued an order denying Appellants' motion for a preliminary injunction on July 8, 2020. The district court declined to apply strict scrutiny, instead applying "intermediate scrutiny." The district court

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[14] https://www.wzzm13.com/article/news/local/michigan/young-people-coronavirus-whitmer/69-f4636398-5178-4a83-b60c-a6799039d09f

[15] Available at: https://twitter.com/GovWhitmer/status/1276228222661939202 and https://twitter.com/MichiganHHS/status/1276239586952384517

stated that Appellants had not demonstrated the requisite "diligence," and that because they could not make this showing, they could not establish that their constitutional rights as candidates had been violated.

In the "background" section of its decision, the district court made no reference to the virus' death toll or to the rapid spread of the disease throughout the state. The district court failed to acknowledge the objective risk of death as to Appellants, their supporters, and the general public, referencing only "health" concerns. Order, R. 17, Page ID #228. During the hearing, the district court remarked that it was personally opposed to at least one of the state's countermeasures, stating: "Much to my chagrin, the governor orders all gyms closed in the state of Michigan." Transcript, R. 18, Page ID #238.

The district court found that the state's interests in "administering its ballot-access requirements" outweighed the burden to Appellants during the coronavirus pandemic. Order, R. 17, at Page ID #230.

The district court found Appellants should have gathered signatures before the pandemic: "Plaintiffs have likewise offered no explanation as to why no signatures in support of Kishore's candidacy were gathered during the month of January," though they had in fact explained that it was not their practice to attempt to do so during the winter months when voters are not paying attention to the general election. *Id*. at Page ID #224.

The district court also ruled Appellants "were not prohibited from gathering signatures during that time period [March], because "the earlier executive orders…did not prohibit petition circulation and included the Constitutional Exemption Language." *Id*. at Page ID #225.

The district court ruled that Appellants could have relied on the mail to gather signatures. *Id*. at Page ID #226.

The district court incorrectly stated that bars in the state of Michigan were open when they had in fact been shut again on July 1. *Id*. at Page ID #212.

The district court found that Appellants should have gathered signatures from a supposedly safe distance and used sterilized writing instruments. *Id*. at Page ID #227.

The court acknowledged that "Plaintiffs have made a conscientious choice not to attempt to gather signatures both before any executive orders were issued, and after the restrictions in the Stay-at-Home Order were lifted," but nevertheless concluded, "that is their own choice" and "Plaintiffs' voluntary decisions cannot be attributed to the state." *Id*. at Page ID #227-28.

As for the remaining preliminary injunction factors, the district found no significant harm to Appellants, but ruled that "serious and irreparable harm" will result to Michigan if they do not follow their "lawfully enacted ballot-access regulations." *Id*. at Page ID #230. The district court did not acknowledge that the

statute in question was found unconstitutional in *Graveline v. Benson*, *supra*, and was therefore not "lawfully enacted." The district court claimed that the public interest is served by "giving effect to the will of the people" and enforcing the statute that the *Graveline* court held to be unconstitutional. *Id*.

STATEMENT OF THE CASE

Appellants Joseph Kishore and Norissa Santa Cruz brought suit pursuant to 42 U.S.C. §1983 on June 18, 2020 in the U.S. District Court for the Eastern District of Michigan. In their complaint, Appellants asserted that Appellees' decision to enforce MCL §§ 168.544f, 168.590b(4) and 168.590c(2) are unconstitutional as applied during the coronavirus pandemic, invoking Appellants' First and Fourteenth Amendment rights as candidates and also violates Appellant Kishore's First and Fourteenth Amendment rights as a registered Michigan voter.

Alongside their brief in support of their request for a preliminary injunction, Appellants submitted affidavits from Appellant Kishore together with affidavits from Henrietta Freeman, a Detroit public schoolteacher; Greg Near, a retired Michigan Opera Theater Orchestra musician; and Florlisa Stebbins, a prominent activist with respect to the Flint water crisis. The latter three witnesses represent a cross-section of voters who would be disenfranchised by the exclusion of the Socialist Equality Party from the ballot.

In addition, Appellants submitted an affidavit from Helen Halyard, a former presidential candidate, veteran campaigner, and leading Socialist Equality Party member. In previous campaigns, she has been able to gather an average of 20 to 30 signatures per hour in an area where a sufficient number of people are congregating or moving. Halyard Decl., R. 3-2, Page ID #85 at ¶ 5. However, she declared:

> In light of the coronavirus pandemic and my underlying health conditions, which include hypertension and kidney disease, it is currently impossible for me to participate in signature gathering efforts. I would be risking my life to try to gather signatures under these conditions.

Id. at ¶ 6. Finally, Appellants submitted the declaration of ballot access expert Richard Winger, who noted that Michigan has among the earliest deadlines for independent and minor party presidential candidates filing for general election ballot access. Winger Decl., R. 3-6, Page ID #97 at ¶ 3.

In opposition Appellees argued Appellants should have gathered signatures before, during and after Appellee Gretchen Whitmer imposed a state of emergency and stay-at-home orders. On July 2, 2020, Judge Sean F. Cox held a hearing on the application for a preliminary injunction. On July 8, 2020, Judge Cox denied the application. Appellants filed their notice of appeal on July 13, 2020.

SUMMARY OF ARGUMENT

Whether Appellants' have a likelihood of success on the merits is before this Court *de novo*. Strict scrutiny applies because Appellants' fundamental rights are severely burdened by the state's decision to impose its signature requirement, geographic requirement and deadline for presidential ballot access during the coronavirus pandemic. The statutes in question were already held unconstitutional as written in *Graveline v. Benson*.

A review of the past six months show Appellants were forced to abstain from signature gathering because doing so would have caused death and alienated their supporters. The U.S. Constitution protects them from "deciding" between exercising their rights and saving their lives and the lives of their supporters and voters.

Esshaki v. Whitmer, *SawariMedia LLC v. Whitmer*, and *Thompson v. DeWine* are good law. Here, this Court has held that Michigan's restrictions impose a severe constitutional burden and that strict scrutiny applies in that state. There is no distinction between diligence there and here, because the earlier deadlines in those cases meant almost the entirety of the signature-gathering period took place *before* the coronavirus pandemic, unlike here. It would further violate the Equal Protection Clause for this Court to apply one set of rules to the Republican and Democratic primary candidates (and ballot initiative advocates)

and another set of rules to independent socialist candidates for U.S. President and Vice President.

The district court also abused discretion in wrongly deciding the remaining three preliminary injunction factors tend against Appellants. There are less restrictive (and less deadly) ways to test whether a party has a significant modicum of support.

STANDARD OF REVIEW

Whether the district court correctly balanced the four injunction factors is reviewed for abuse of discretion. *Certified Restoration Dry Cleaning Network LLC v. Tenke Corp*, 511 F.3d 535, 541 (6th Cir. 2007). However: "Under this standard, [the appellate court] reviews the district court's legal conclusions *de novo* and its factual findings for clear error. The district court's determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed *de novo*." *Id*. at 540.

ARGUMENT

A. APPELLANTS SHOWED A LIKELIHOOD OF SUCCESS ON THE MERITS

In determining whether to issue a preliminary injunction, four factors are considered: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is

not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Id.* (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000); *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). "When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

As indicated above, the district court's determination of the Appellants' likelihood of success is reviewed de novo, and the remaining factors for abuse of discretion. *Certified Restoration Dry Cleaning Network LLC*, 511 F.3d at 541.

1. Appellants Are Severely Burdened By the Combination of the Deadly Impact of the Pandemic, the Unconstitutional Ballot Access Laws and the State Restrictions on Interpersonal Interaction Such That Strict Scrutiny Should Be Applied

While acknowledging that this Court's *Esshaki* and *SawariMedia* decisions had subjected signature-gathering requirements for ballot access to strict scrutiny in the context of the pandemic, the district court purported to apply "intermediate scrutiny." Since the pandemic and the state's countermeasures constituted a severe

restriction on Appellants' ability to comply with the state's ballot access laws, this was the wrong standard to apply.

"The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *American Party of Texas*, 415 U.S. at 783. "The State must provide a *feasible* opportunity for new political organizations and their candidates to appear on the ballot." *Storer v. Brown*, 415 U.S. 724, 746 (1974). Under the *Anderson-Burdick* test as applied in this circuit, the first and most important element in determining the magnitude of the burden is to measure the "evidence of the real impact the restriction has on the process." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006).

Given the real impact of the State's restrictions in the time of the coronavirus pandemic, the reality is that there was no feasible opportunity for Appellants to gain ballot access. Appellees pretended that Appellants had a free "choice" whether or not to seek ballot access. By this logic, the victim of a robbery at gunpoint freely decides to surrender his wallet to his assailer and makes the "choice" to hand over his watch and cell phone, too. Appellees' argument is simply at odds with the objective reality of the pandemic.

Appellees insisted that some fraction of the required number of signatures should have been gathered before the pandemic, and that the failure to do so constituted a lack of "diligence." But this skirts the question of whether the

whether the restriction is "severe." The issue is not whether the circumstances and state action burden Appellants by preventing them from gathering some signatures, it is whether they are burdened by being unable to gather all the signatures required to meet the deadline.

Under conditions of the coronavirus pandemic, the U.S. Constitution does not require that Appellants try and fail—and risk death and serious illness in the process—in order to establish reasonable diligence and a severe burden. No doubt Appellants could have gathered some signatures, but some signatures does not equal some ballot access. Had Appellants been opportunistic in their preparations for this lawsuit, they might have sent their campaigners out to interact with voters in the days before filing and gathered a few hundred signatures to show the court they tried. According to Appellees' logic, this would have established diligence, but it would have amounted in reality to an empty and futile gesture, since in no event could they have come close to the 12,000 requirement. And to have made any such futile attempt would have placed the lives and health of their supporters and of the public dangerously at risk. Appellants did not abstain from gathering signatures because they did not feel like it, but for actions in the public interest that should be commended. They cannot be penalized for their conscientiousness.

Appellants' rights are also severely burdened because upholding Michigan's requirements would force them to publicly risk infecting some 200,000 voters—the

very people who Appellants hope to convince to vote for them. In light of the political positions consistently espoused by Appellants throughout their campaign, this would require that Appellants nakedly contradict their political principles and act in a highly hypocritical and selfish manner, thereby undermining their campaign and alienating potential supporters.[16]

Consider the following hypothetical interaction:

> Kishore campaigner: "Excuse me, I am a volunteer with Joseph Kishore's presidential campaign. He is a socialist running for president to warn the working class of the dangers posed by the coronavirus. He believes the back-to-work campaign is premature and that the two major parties are protecting the interests of the corporations by forcing workers back on the job where they can contract the virus. Will you sign a petition to put us on the ballot?"
>
> Michigan voter: "If you care so much about my safety, why are you standing so close to me and spreading your droplets all over me?"
>
> Kishore campaigner: "Because we have to gather 12,000 signatures to get on the ballot."
>
> Michigan voter: "So you are willing to sacrifice my health and the health of tens of thousands of others just to get your own candidate on the ballot? I will not vote for someone so selfish. If you think socialists are better than the two parties, why don't I see any Democrat or Republican candidate violating social distancing by shoving a clipboard in my face?"[17]

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[16] As early as January 28, 2020, the *World Socialist Web Site* warned: "The outbreak has exposed the enormous vulnerability of contemporary society to new strains of infectious disease, dangers for which no capitalist government has adequately prepared."

[17] The district court held the oral argument on the Appellants' application for a preliminary injunction by video, presumably because the district court did not want

Appellees' position therefore puts Appellants in an impossible situation. Either Appellants abstain from gathering signatures and struggle to show they were severely burdened, or they do gather signatures and they expose themselves as hypocrites and opportunists who do not adhere in their actions to the principles they espouse. The government cannot force independent candidates to risk their lives, sacrifice their principles and alienate their potential supporters as the only potential route to the ballot.

2. *SawariMedia LLC v. Whitmer, Esshaki v. Whitmer* and *Thompson v. DeWine* Show Strict Scrutiny Applies Here

This Circuit has already held that the combination of Michigan's restrictions and Michigan's election laws pose a severe burden on similarly situated challengers. This Circuit so held for Eric Esshaki, a Republican primary candidate, and a number of Democratic Party intervenors running for local office in the Democratic Primary. It would be inconsistent for this Circuit to apply strict scrutiny to local Democratic and Republican primary candidates but intermediate scrutiny to an independent socialist running for president in the national general election.

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to risk infection as to courthouse staff. The Appellants' decision not to risk contagion as to their campaign volunteers and supporters is no less reasonable.

First, though Appellees claim *Thompson* supports intermediate scrutiny here, this Circuit in *Thompson* held that *Esshaki* was rightly decided and that strict scrutiny is appropriate in Michigan due to the language of the executive orders. And *Esshaki* was rightly decided. Additionally, in *SawariMedia LLC*, Judge Leitman cited *Thompson*'s reference to Ohio's express exemption for "petition or referendum circulators," which it ruled was "vitally important here." *SawariMedia LLC v. Whitmer*, 2020 WL 3097266 at *16 (E.D. Mich. June 11, 2020) (quoting *Thompson*, 2020 WL 2702483, at *3).

Appellees argued below that the lack of signatures in this case is dispositive, citing the fact that in *Esshaki* the plaintiffs were "in the middle of their signature gathering efforts at the time the March 23 Stay-at-Home Order was issued." Response Brief, R. 10, Page ID #149. This is a red herring, which ignores the critical fact that the filing deadline in *Esshaki* was April 21, so signature gathering would naturally have started far earlier in that case.

This argument flips reality on its head. Appellees and the district court have ignored that the burden on Appellants here is far greater—not less—than on the plaintiffs in *Esshaki* and other cases with earlier deadlines. In those cases, plaintiffs from the two major parties had months and months without a pandemic in which they could collect signatures, and by the time the pandemic struck, they were left with only a small percentage of signatures to gather—in *Esshaki's* case,

just several hundred remained. Here, almost the entirety of the 180-day period either took place during the inhospitable winter or under conditions of the ongoing, deadly pandemic. And through no fault of their own, Appellants believed they still had 30,000 signatures to gather when they weighed whether success was possible and safe given the pandemic. It plainly defies all logic to reference the earlier deadline in *Esshaki* as a factor cutting against Appellants here. If *Esshaki* remains good law—and it does—then Appellants must prevail.

Here, the virus struck five months before the deadline, and the first stay-at-home order came four months before the deadline. The ability of independent presidential candidates to petition in the warm summer months when the public is paying closer attention to the upcoming election is well established in case law. Appellants cannot be penalized for failing to have a time machine with which they could have predicted the pandemic by six months or more.

Moreover, and importantly, this is a presidential election where the state's regulatory interest is at a minimum and the constitutional burden is at a maximum. It is improper to apply the same constitutional standard to marijuana initiatives as to independent candidates for the highest offices in the land. In *Lawrence v. Blackwell*, the Sixth Circuit rejected an initiative gatherer's reference to *Anderson*:

> Plaintiff's citation of the *Anderson* case to support its argument is also inapplicable because that case involved a presidential election. The Supreme Court held that a state has less of an interest in regulating a national election

> than one which takes place solely within its borders such as the congressional election at issue here.

430 F.3d 368, 375 (6th Cir. 2005). Moreover, in *Thompson*, this Circuit referenced *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring), explaining, "[I]nitiatives and referenda . . . are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." By contrast, in *Anderson*, the Supreme Court explained:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State."

460 U.S. 780, 794-95 (1983) (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)). This Court should therefore adopt strict scrutiny, so as not to expressly or implicitly overturn *Esshaki*, *SawariMedia* and *Thompson.*

3. Appellants Exercised Reasonable Diligence By Conscientiously Abstaining from Signature Gathering During the Pandemic

As to the question of "reasonable diligence," Appellants submit that the "facts on the ground" are that no reasonably diligent candidates can or would comply with Michigan's requirements under conditions of the coronavirus pandemic. Put differently, Appellants submit that they exercised "reasonable diligence" by conscientiously abstaining from signature gathering during the pandemic.

i. Appellants Could Not Have Foreseen the Pandemic and Reasonably Did Not to Collect Signatures in Wintertime

Requiring Appellants to have gathered signatures in the winter is nonsensical. There is nothing in the election code which states candidates must gather signatures in February or March to establish diligence in advance of the July deadline. Appellees effectively seek to use this litigation to re-write the statute, already found unconstitutional in *Graveline*, to create new deadlines and new burdens for independent candidates. Had Appellants known such deadlines existed, they certainly would have gathered enough signatures in January and February to keep their ballot access campaign viable. But they had not even announced their campaign until the end of January.

Moreover, Appellants, like most independent candidates running in a Michigan general election, do not collect signatures in the dead of winter when they have the ability to collect signatures during the summer. Appellants' political party, the Socialist Equality Party, has a practice of deploying its volunteers in the summer months, when young people are out of school and when large gatherings are common at county fairs, farmers markets, and other outdoor events. In the summer of 2018, the Socialist Equality Party gathered 6,000 signatures in a span of roughly four weeks, placing their candidate, Niles Niemuth, on the ballot for Congress in the 12th Congressional District. When Appellants announced their current candidacies in January 2020, they measured the growing support for socialism and envisioned an aggressive ballot access campaign.

This plan was eminently reasonable and cannot disqualify them from ballot access. In *SawariMedia LLC* and *Esshaki*, the courts' rulings rested in part on the material consideration that, "warmer spring weather [that] would accommodate outdoor activities [would] be more conducive to large social gatherings and door to door canvassing." *SawariMedia LLC*, 2020 WL 3097266, at *23 (quoting *Esshaki*, 2020 WL 1910154, at *4). In *Graveline*, the plaintiff did not begin gathering signatures until June, and the court saw no problem as to his diligence. The court ruled, "All told, Michigan's system works to disadvantage independent candidates alone by requiring them to seek a significant number of signatures from an

electorate that is not yet politically energized." 2019 WL 7049801, at *36. In *Goldman-Frankie v. Austin*, 727 F.2d 603 (6th Cir. 1984), the candidate did not even file a declaration of candidacy until May 26 for a November election.[18] The Democratic and Republican parties will not nominate their candidates until the August conventions. Michigan's Democratic and Republican primary for local and statewide offices is not until August 4.

Appellants called off what were reasonable plans as a matter of law only when the virus broke out, which it did with a vengeance. Appellants were then forced to cancel all public events, after determining they could not be responsible for spreading the disease and risking the lives of their supporters and the general public.

Appellees fault Appellants for failing to foresee the coronavirus pandemic, but proffer no reason why Appellants should have done so. The charge is not a little ironic, considering that Appellee Whitmer also failed to foresee the seriousness of the pandemic and admitted to the *New York Times* that she delayed enforcing a life-saving lockdown because "several pro-business groups, including Michigan's Chamber of Commerce—a powerful force in state and national

[18] The district court scolds Appellants for waiting "three months" after the pandemic struck to file their lawsuit. In *Goldman-Frankie*, the plaintiff waited until July 16 to file her lawsuit but the Eastern District of Michigan saw no problem and relief issued. 603 F.2d at 605.

politics—were publicly pressing Whitmer to keep the state open."[19] As a result of the delay, within 48 hours "Michigan's caseload doubled to more than 1,000."

The position of Appellees that Appellants' failure to obtain signatures in January or February means they were not reasonably diligent amounts to nothing more than speculation as to what would have or might have happened but for the pandemic. Appellants should not be faulted for failing to predict that the pandemic would prevent them from gathering signatures over the summer. Indeed, the objective fact, evidenced in the record, that Appellants' campaign contacted the Michigan Bureau of Elections in May to ask whether the state had made any changes to their regulations, undermines Appellees' implied argument that Appellants never really intended to seek ballot access.

Appellees' argument also runs contrary to the principal Supreme Court decisions related to ballot access. In *Anderson*, the Court struck down a March filing deadline as prohibitively early for independent candidates; such a deadline is effectively what Appellees seek to establish by retroactively (and without notice to Appellants) writing into the statute new deadlines about signature gathering from January to March:

> An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time.

[19] https://www.nytimes.com/2020/06/25/magazine/gretchen-whitmer-coronavirus-michigan.html

> Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidates.

Id. at 790. Moreover, the Court explained that "Candidates and supporters within the major parties thus have the political advantage of continued flexibility; for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage because of the competitive nature of the electoral process." *Id*. at 791. The *Anderson* Court further found:

> If the State's filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognize in *Williams* v. *Rhodes*, "[s]ince the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected `group' will rarely if ever be a cohesive or identifiable group until a few months before the election." Indeed, several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions during the summer.

Id. at 791-92. Appellees here actually exceed the requirements struck down in *Anderson* and *Williams v. Rhodes*, 393 U.S. 23 (1968). In their briefing Appellees even argued that "Plaintiffs could have begun circulating a qualifying petition anytime in 2019 or even earlier." Response Brief, R. 10, Page ID #142.

In sum, the sworn affidavits supplied here by Appellants show that their plan for a national ballot access campaign in the summer was fully consistent with

common knowledge and practice given that this is when independent candidates for general elections gather signatures. Appellees instead rely on pure, unfounded speculation. Appellants did not have a crystal ball that allowed them to gather signatures in anticipation that the summer months would be off limits for public campaign activity. The conclusion is inescapable that the fact that they did not begin gathering signatures in the cold months of January or February or "anytime in 2019 or even earlier" does not and cannot show a lack of reasonable diligence.

ii. From March to June, Michigan Was a Global Coronavirus Hotspot and It Was Illegal to Gather Signatures

From March to June—half the six-month window to gather signatures—signature gathering was illegal and physically impossible. Appellants could not gather signatures from March 10, when Appellee Whitmer imposed a state of emergency through Executive Order 2020-4. At this point, Michiganders abandoned public spaces to protect themselves, making signature gathering physically impossible. Almost every day, Appellee Whitmer took additional steps to restrict access to the public spaces where Appellants could have gathered signatures. On March 23, Appellee Whitmer signed Executive Order 2020-21, the Stay-at-Home Order, which was extended until the beginning of June. The hospitals were overcrowded and Michiganders were dying by the dozens each day.

Maintaining social distancing, following the law and sheltering in place were not free "choices," they became matters of life or death.

Appellees argument that Appellants should have physically campaigned during this time would effectively have required Appellants to break the law and risk death. Appellees argue that the Stay-at-Home Order did not *really* prohibit petition gathering. This argument was swiftly dispelled in *SawariMedia LLC*, where Judge Leitman explained that "in sharp contrast" to the Ohio stay-at-home orders at issue in *Thompson v. Dewine*, "Governor Whitmer's initial Stay-at-Home Order and the April 9, April 24, and May 1, 2020, extensions of that order…did not include any language exempting any constitutionally protected activity, much less language specifically exempting petition circulating." *SawariMedia LLC,* 2020 WL 3097266, at *20. Even the later orders extending the Stay-at-Home Order that did attempt to include some exemption language made it "far from clear that the language permitted citizens to gather petition signatures." *Id*. at *21. Because the language was not "clear," Judge Leitman found a severe burden had been imposed on the plaintiff.

Esshaki and *SawariMedia LLC* require courts to address "The reality on the ground." *SawariMedia LLC*, 2020 WL 3097266, at *16, *Esshaki*, 2020 WL 1910154, at *6. Appellees' arguments run smack up against this Court's rulings in those two cases.

Here is the reality: if Appellants had attempted gathering signatures during this period, people would have become severely ill and even died, campaigners would have faced arrest for violating the law, and Appellants would not have been able to find significant numbers of people in public to physically get close to. And, if they had, it is more likely they would have been met with fearful looks and verbal objections to being approached before even having a chance to explain the petition campaign, or even threatened verbally or physically.

iii. Appellants were not required to pursue a mail campaign

Appellees' suggestions that Appellants could have pursued other means to collect signatures such as a mail-in signature campaign are beside the point, and would not have gotten Appellees anywhere near the 12,000 or 30,000 voter requirement. (Appellants relied on Appellees' telephonic statements in May that the requirement remained 30,000). For example, in *SawariMedia LLC*, citing *Esshaki,* Judge Leitman rebutted the arguments Appellees make here regarding the availability of a mail campaign, explaining:

> [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, 2020 WL 3097266, at *25, quoting *Esshaki*, 2020 WL 1910154, at *5. 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 *26.

> 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 claim that Appellees here had a valid alternative means to ballot access through a write-in campaign likewise fails to pass muster. The U.S. Supreme Court dispelled this argument in *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974).

The main mechanism for Appellants to gather signatures was taken from them by Appellees during the months leading up to the July 16 deadline. Especially during the period where the Stay-at-Home Order was in place, Appellants' abstention from signature gathering was reasonable and cannot support a finding of lack of diligence.

iv. Appellants Conscientiously Have Continued to Abstain From Signature Gathering From June to Present, As the Virus Continues to Spread and Surge

Appellants reasonably continue to follow the social distancing laws and requirements, and have conscientiously continued to abstain from signature gathering, even after the Stay-at-Home Order was lifted.

In *SawariMedia LLC v. Whitmer*, Judge Leitman explained, again citing *Esshaki*, that even requiring Plaintiffs to gather signatures after the stay-at-home order had been lifted "both defies good sense and flies in the face of all other guidance that the State was offering to citizens at the time." *SawariMedia LLC*, 2020 WL 3097266, at *24 (quoting *Esshaki v. Whitmer*, 2020 WL 1910154, at *5). "Prudence at the time counsels in favor of doing just the opposite," Judge Leitman wrote. *Id*. at *25. "Plaintiffs should be commended for putting the public health of Michiganders above their own self-interest and desire to collect the required number of signatures, not denigrated for making that conscientious choice." *Id*.[20]

[20] *See also Fair Maps Nevada v. Cegavske*, 2020 WL 2798018, at *13 (D. Nev. May 29, 2020) ("The Court does not find the fact Plaintiffs stopped collecting signatures in early March—after the COVID-19 outbreak started in Nevada, but before the Stay at Home Order went into effect—weighs against finding diligence here. Forcing circulators to go out to collect signatures during the COVID-19 pandemic is unreasonable and unwise.")

Similarly here, Plaintiffs cannot be penalized for following the law and protecting the public and their campaigners, both during and after the stay-at-home orders.

As Judge Leitman explained:

> Michiganders are subject to continuing restrictions by Governor Whitmer that will substantially inhibit Plaintiffs' ability to collect signatures. For instance, while Governor Whitmer has now rescinded the Stay-at-Home Order, the executive orders that remain in place still prohibit indoor gatherings of more than 50 people and outdoor gatherings of more than 250 people. Such gatherings are the prime locations where petition seekers ordinarily gather signatures. The current orders also restrict the capacity of retail establishments, arcades, bowling alleys, public swimming pools, concert spaces, race tracks, sports arenas, and other public spaces. And the orders further provide that "[w]ork that can be performed remotely (i.e., without the worker leaving his or her home or place of residence) should be performed remotely." These orders, taken together, substantially limit the number of people who would ordinarily be in public for recreational and/or employment purposes, and they thus create a significant barrier to signature collection.

Id. at *11-12. (Emphasis added).

The virus continues to spread in Michigan. At a June 30 press conference[21], Appellee Whitmer warned:

- "We have got to continue to do what we know prevents the spread of Covid-19 because just one person who lets their guard down can infect countless others…We can't let our guard down… We cannot play fast and loose with the rules."

- "Covid19 is still very present in the state of Michigan. The virus has not changed. It is on every single one of us to do our part to protect one another."

[21] All quotations can be found here: https://www.youtube.com/watch?v=v_pe3UFsmu4

- "We have to look no further than the rising cases in states across the country."

Dr. Joneigh Khaldun stated at the same press conference:

- "There is likely community spread in some areas of the state."
- "Eighty percent of hospital beds are occupied."
- "Everyone, including young people, need to understand they are not immune to the disease…Young people themselves can still get very sick from covid19 and can even die from covid19. I implore everyone, please take this seriously. Socially distance, wear a mask, avoid large crowds, take responsibility for your own health and the health of the community. This is not a joke."
- "The disease can spread like wildfire in our community."

Appellee Whitmer tells the public one thing while her lawyers tell Appellants and this Court the opposite. Appellants have followed and continue to diligently following Appellees' own warnings and advice in making the conscientious choice not to "play fast and loose with the rules."

4. Appellees' Enforcement of the Ballot Access Laws During the Pandemic and their Statements to Appellants in May 2020 Constitute State Action

The absence of "state action" is not a ground to deny relief to Appellants. In *Esshaki* and *SawariMedia*, the court explained it was "state action" that "pulled the rug out from under the ability to collect signatures" and resulted in Plaintiffs facing "virtual exclusion from the ballot." *SawariMedia LLC*, 2020 WL 3097266, at *19,

27. (Quoting *Esshaki*, 2020 WL 1910154, at *6). There is additional state action here where Appellees dishonestly failed to tell Appellants in May that a federal court had struck down the petition requirements as unconstitutional last December. Appellees told Appellants that there was no change to the 30,000 signature requirement. Appellants reasonably relied on this information in determining that any effort to gather signatures would be futile, even as they continued to try to determine their options in May.

5. The State Has Less Deadly Ways to Test "Significant Modicum of Support," and Appellants Have Established Such Support

Appellees wrongly argued below that any method for testing significant modicum of support aside from mass signature gathering would create "voter confusion, ballot overcrowding, and frivolous candidacies." Response Brief, R. 10, Page ID #157-58. That is not the law in the Eastern District of Michigan; nor is it remotely convincing.

Hall v. Austin is instructive and remains good law. There, the court considered a challenge filed by candidates of the Stalinist Communist Party:

> Reviewing the candidacies of Hall and Davis in light of the *Briscoe* decision, the Court easily concludes that "there is reason to assume" that Hall and Davis have "the requisite degree of community support." This is not to say that Hall and Davis have support approaching that of Senator McCarthy. Hall and Davis have never held public office; nor have they approached the substantial and significant popular vote total of Senator McCarthy's presidential candidacy. But Hall and Davis are nationally-known and world-renowned public figures. Hall has twice before been a presidential aspirant

> on the ballot in many states. Particularly persuasive is the fact that Hall and Davis have already succeeded in qualifying on the ballot in some states for the 1980 election.

495 F. Supp. 782, 790 (E.D. Mich. 1980). The test laid out in *Hall v. Austin* can be understood as follows. As a threshold matter, the question (1) is: Is the candidate frivolous? (2) Does the applicant espouse a serious political program and address important issues pertaining to race, economics and government? (3) Does the applicant have a long history in attempting ballot access within the jurisdiction and without? (4) Will the applicant "assure that the electorate is better informed as to crucial issues and alternative positions which the voter may accept, reject or utilize for comparison? This is the meaning and strength of democracy and the formula for its perpetuation and growth." *Id.* at 791. And (5), "Finally, the Court must take note of the Michigan legislature's continuing failure to correct the unconstitutional aspects of the Michigan election laws." *Id*. This Court therefore does not need to invent any new standards or violate the rights of the Michigan legislature in order to determine whether Appellants have a significant modicum of support. The facts here cannot be disputed that they satisfy these criteria.

Appellees complained below that any effort to require they follow the Constitution violates states' rights. This argument runs generally contrary to the Supremacy Clause, as well as well-settled Supreme Court precedent such as *Brown v. Board of Education*, 349 U.S. 294 (1955) (Brown II). The fact is that Michigan

is notorious for its unconstitutional ballot access requirements as to independent presidential candidates. While the district court in *Hall v. Austin* chastised the Michigan legislature's inability to remedy unconstitutional election code, the court in *Goldman-Frankie* noted four years later that "Michigan has, to date, failed to remedy the situation. This Court is therefore compelled to again declare, in absolute terms, that the Michigan election laws, so far as they foreclose independent candidates access to the ballot, are unconstitutional." *Goldman-Frankie*, 727 F.2d at 607.[22]

More than thirty years later, the district court in *Graveline v. Benson* repeated the admonition in striking down the statutory subsections at issue here: "Michigan's history is telling. The current Michigan statutory scheme was adopted in 1988. In the thirty years since, no independent candidate for statewide office has qualified for the ballot." 2019 WL 7049801, at *28. (Aside from Ralph Nader in 2004 and Ross Perot in 1992). The *Graveline* Court therefore concluded:

> The State says that "if the Court concludes that a permanent injunction is somehow warranted here, it should leave drafting a new signature requirement for independent candidates to the Michigan Legislature." The Court agrees that the responsibility to craft a new ballot access scheme for independent candidates for statewide office ultimately lies with the

[22] And in *McCarthy v. Briscoe*, 429 U.S. 1322, 1323 (1976) (Powell, Circuit Justice), the Court held: "The Texas legislature provided no means by which an independent Presidential candidate might demonstrate substantial voter support. Given this legislative default, the courts were free to determine on the existing record whether it would be appropriate to order Senator McCarthy's name added to the general election ballot as a remedy…" for violating his rights.

> Michigan Legislature. And, it is free to do so at any juncture.
>
> However, because 2020 is an election year and upon us, the Court feels compelled to make sure a procedure is in place now for independent candidates for statewide office to access the ballot. This will protect not only the rights of prospective independent candidates and those who wish to vote for them, but also the State itself and its citizens and voters. Indeed, having some ballot access requirements for independent statewide candidates - even if temporary - is better than the alternative of none.

Id. at *45. And yet, with the deadline days away, the legislature has failed to act. This is not a mistake but rather an intentional decision—state action—aimed at barring Appellants from the ballot. Appellees may not now hide behind the boogeyman of judicial overreach to continue forty years of unconstitutional behavior.

6. Allowing Appellants On the Ballot Will Not Produce Voter Confusion, Ballot Overcrowding or Frivolous Candidates

The likelihood that Appellants' presence on the ballot will cause confusion, ballot overcrowding or frivolous candidates is precisely zero.

As Justice Harlan wrote in his concurrence in *Williams v. Rhodes*: "The presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion." 393 U.S. at 43. Adding Joseph Kishore here as a presidential candidate and his vice-presidential running mate to the ballot by definition threatens no confusion, given the clear demarcation of them and their socialist program from the rest of the field.

Nor can Appellants be viewed as frivolous candidates. The long, continuous political history of the party whose program they seek to espouse placed in the record before this Court is undisputed. It reflects the utmost political seriousness on issues critical to the public.

Appellees here are evidently concerned that voters' fatigue with the two-party system in this swing state might lead voters to get so "confused" that they vote for a socialist. What many voters likely find most confusing is that their own political views find no expression in either of the two major party candidates. While polls constantly show wide support for universal healthcare (56 percent)[23], a path to citizenship for undocumented people (81 percent)[24], opposition to endless war (86 percent),[25] both presumptive nominees, Donald Trump and Joseph R. Biden, find themselves in opposition to the will of the majority of the population.

A June 30 Pew poll found profound voter dissatisfaction. 71 percent of Americans say they are "angry" over the state of the country, while 66 percent said they are "fearful" and just 17 percent said they are "proud."[26] While 87 percent said they are dissatisfied with the state of affairs leading up to this November's

[23] https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage/
[24] https://www.newsweek.com/more-80-americans-want-undocumented-immigrants-have-chance-become-us-citizens-1316889
[25] https://www.thenation.com/article/archive/new-poll-shows-public-overwhelmingly-opposed-to-endless-us-military-interventions/
[26] https://www.pewresearch.org/politics/2020/06/30/publics-mood-turns-grim-trump-trails-biden-on-most-personal-traits-major-issues/

election, only 37 percent said they felt Donald Trump would make a "good" or "great" president in his second term.[27] Just 28 percent said they believed Joseph R. Biden would be a "good" or "great" president.[28]

In Michigan, there is in fact growing support for socialist policies, as indicated by the fact that a self-described socialist, Bernard Sanders, won the 2016 Democratic Party primary in the state with 595,222 votes. In so far as Appellees argue that allowing Appellants on the ballot will result in "chaos," this is a tacit admission that the two-party duopoly has tenuous support in the population. As elaborated on below, allowing Appellants on the ballot is in the public interest because it gives the voters of Michigan a chance to support candidates who promote popular policies.

Finally, granting Appellants relief here in this unprecedented pandemic situation will not open the floodgates. Appellants bring a challenge to the State's requirements as applied *specifically to them*. In permitting Appellants here ballot access given their specific situation, and the seriousness of their and their party's campaign, there is no risk that the door will be opened to anyone who might suddenly say at the last minute "if Kishore and Santa Cruz are on the ballot I want on the ballot too." Likewise, it is highly unlikely that the unprecedented situation presented by the pandemic will be repeated in future presidential elections.

[27] Ibid.
[28] Ibid.

7. The District Court Failed to Consider the Burden to Appellant Kishore as a Voter and Appellants' Equal Protection Clause Argument

The words "voting rights," "Equal Protection Clause," "Democratic Party," "Republican Party," "Democrat" or "Republican" do not appear in the district court's decision. The district court made no reference to the affidavits provided by Appellants' supporters, who explain that their voting rights and associational rights will be violated if Appellants are kept from the ballot. Although this was one of the two claims for relief in Appellants complaint, the district court did not attempt to address the claim in his decision.

The Sixth Circuit recognized the rights of Republican primary voters to effectively cast their votes in *Esshaki*. To refuse this right to socialist voters would be inconsistent with equal protection. Again, there are many socialist-minded voters in Michigan who wish to vote for socialist candidates in the upcoming general election.

In *Anderson*, the Supreme Court wrote:

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and — of particular importance — against those voters whose political preferences lie outside the existing political parties. . . . By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.

Id. at 794.

In *Reynolds v. Sims*, the Supreme Court recognized, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 377 U.S. 533, 555 (1964). "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes,* 393 U.S. at 32. "The Supreme Court has also made it clear that when the right of association and the right to vote effectively are infringed, 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" *NAACP v. Button*, 371 U.S. 415, 438 (1963). No such interest exists here. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

As regards the Equal Protection Clause, the Republican Party's nominee will automatically appear on the ballot. The presumptive nominee of the party of the Appellants, Joseph R. Biden, has conducted his campaign largely from the safety of his own basement. He has not had to sacrifice his supporters to the coronavirus; and he will be nominated at the end of August at a virtual convention. In other

words, the major party candidates gain ballot access without having to face death or serious illness, while independent socialist candidates must brave the disease just so that voters can see their name on the ballot. This makes a mockery of equal protection. The district court simply ignored this argument and the constitutional concerns it implicates.

B. THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING THE REMAINING PRELIMINARY INJUNCTION FACTORS TEND IN APPELLEES' FAVOR

The district court abused its discretion in ruling that Appellants would not suffer irreparable injury, and that the public interest would not be served by issuing the injunction. If this Court concludes via *de novo* review that the lower court erred in ruling against Appellants on the first prong of the preliminary injunction standard, then it necessarily must rule that the district court abused its discretion as regards the other three factors.

The district court ruled that "unless a statute is unconstitutional, enjoining a state from conducting its elections pursuant to a statute enacted by the legislature…would seriously and irreparably harm the state." Order, R. 17, Page ID #230. (Quoting *Abbot v. Perez*, 585 U.S. ___ (2018). But the district court forgot that the statutes in question were already found to be unconstitutional as written in *Graveline*. It defies all logic to claim that the state will be irreparably harmed by

enforcing an unconstitutional statute that they have failed to remedy. In contrast, "There are few greater burdens that can be placed on a political [candidate] than being denied access to the ballot." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2006) (internal citations omitted).

Regarding the public interest prong, as Appellants argued below, according to a 2019 Gallup poll, 49 percent of US voters aged 18-39 have a positive view of socialism.[29] Thirty-nine percent of those aged 40-54 had similarly positive views, while roughly one-third of those aged 55 and over had positive views of socialism. At present, there is no socialist candidate on the ballot in Michigan. Absent this court's intervention, Kishore and Santa Cruz will be excluded and this growing number of socialist-minded voters will be effectively disenfranchised.

Enforcement of the ballot access statutes in combination with the Stay-at-Home Order and the health risks associated with canvassing for signatures severely limits the choices available to voters. The Supreme Court has noted that "by limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Ensuring that Kishore and Santa Cruz's names appear on the ballot is in the public interest, providing all socialist-minded

[29]https://news.gallup.com/poll/268766/socialism-popular-capitalism-among-young-adults.aspx

voters in Michigan with the option of selecting a candidate that matches their political values and beliefs.

CONCLUSION

The signature requirement was already struck down as unconstitutional as written in *Graveline*. If a 30,000 signature requirement is unreasonable when candidates can interact with whomever they please, 12,000 cannot be reasonable when candidates are forced to stay inside and avoid close contact with voters. Appellees are telling Appellants that the only way they can exercise their fundamental rights is to violate the law, violate their principles and risk their lives and the lives of their potential supporters in the public. There is nothing "reasonable" about Appellants' definition of "reasonable diligence," especially when the Democratic and Republican Parties are allowed to hold their nominating conventions virtually in August, without any health risk to their candidates or supporters.

The U.S. Constitution protects Appellant-citizens and socialist-minded voters against such state action. Appellants respectfully request this Court uphold *Esshaki*, *SawariMedia LLC* and *Thompson* in ruling that Michigan's restrictions are severe and that strict scrutiny applies. In a democracy, the state does not have the right to effectively ban socialists from the ballot.

Respectfully submitted,

July 23, 2020

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ADDENDUM PURSUANT TO SIXTH CIRCUIT RULES 28(b)(1)(A)(i) AND 30(g)(1)

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Appellants designate the following docket entries from E.D. Michigan Docket No. 2:20-cv-11605-SFC:

RE	**Description**	**Page ID# Range**
1	Complaint	1-17
3	Motion for Temporary Restraining Order Or Preliminary Injunction and Attachments	26-111
10	Response to Motion and Attachments	126-173
15	Reply to Response and Attachments	181-195
17	Order Denying Motion	206-231
18	Transcript of July 8, 2020 Hearing	232-253
19	Notice of Appeal	254

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 12,390 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

July 23, 2020

/s/ Eric Lee
Eric Lee

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on July 23, 2020. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Eric Lee
Eric Lee