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

REPLY BRIEF OF APPELLANTS

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At the District Court's request, the parties agreed to submit a set of stipulated facts upon which the District Court could rely in ruling upon Plaintiffs-Appellants' motion for preliminary injunctive relief. The District Court specifically advised the parties that such stipulated facts should include each executive order issued by Governor Wolf referenced therein. Defendants-Appellees volunteered to prepare the exhibits to the parties' joint submission, but failed to submit them for several days after the date on which they advised Plaintiffs-Appellants that they would do so.

Defendants-Appellees submitted the exhibits approximately one hour before the District Court held its hearing on Plaintiffs-Appellants' motion. As a result, Plaintiffs-Appellants did not discover until they prepared the deferred appendix in this appeal that Defendants-Appellees omitted the two most important exhibits that the parties agreed to submit to the District Court: (1) the initial "Stay-at-Home" order that Governor Wolf issued on March 23, 2020; and (2) the statewide "Stay-at-

Home" order that Governor Wolf issued on April 1, 2020. Both orders are attached hereto as Exhibit A.

Defendants-Appellees' failure to include the Governor's Stay-at-Home orders in the parties' joint submission of stipulated facts to the District Court demands corrective action. A primary issue that Plaintiffs-Appellants raise on appeal is that the District Court erred by declining to find that the burden on their First Amendment right to petition was severe, and the Governor's Stay-at-Home orders prove that in-person petitioning was prohibited for 74 days of the statutory petitioning period. A legal prohibition on in-person petitioning is unquestionably more severe than burdens the Supreme Court has held unconstitutional. *See Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (striking down requirements that initiative petition circulators be registered voters, wear identification badges and disclose how much ther are paid); *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down prohibition on payment of initiative petition circulators).

The District Court likely overlooked the significance of the 74-day prohibition on Plaintiffs-Appellants' right to petition in-person because Defendants-Appellees, despite the parties' agreement, failed to place the

Governor's Stay-at-Home orders into the record. Such an oversight is the only explanation for the District Court's failure to find that Plaintiffs-Appellants' right to petition was severely burdened during those 74 days.

Defendants-Appellees' omission of the Governor's Stay-at-Home orders from the parties' joint submission of stipulated facts, whether designed or not, deprived the District Court of the most critical evidence in this case – the evidence demonstrating that Plaintiffs-Appellants were prohibited from petitioning in-person for 74 days of the statutory petitioning period. The District Court's order should be vacated and an injunction pending appeal should issue on that basis alone.

II. Plaintiffs Possess Standing and Assert Proper Claims Under § 1983.

Defendants-Appellees assert in a footnote that Plaintiffs-Appellants lack standing. *See* Appellees' Brief, Doc. No. 25, at page 33 n.7. They contend that 42 U.S.C. § 1983 is not available, because Pennsylvania's signature collection requirements were "imposed by federal court order, not a state law." *Id.* Defendants-Appellees are incorrect.

As this Court has recently observed, "it is inconsistent to the point of whiplash to suggest that … [Plaintiffs-Appellants] are properly subject

to the challenged provisions because there is a legitimate governmental interest in limiting their access to the ballot, but then to contend in the standing context that those same provisions are not, in fact, aimed at the very same parties." *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 362 (3rd Cir. 2014). This case is no different. Plaintiffs-Appellants' rights are directly and presently infringed by the same statutory provisions at issue in *Aichele*, as applied in combination with the Governor's ensuing executive orders. Plaintiffs are thus presently injured in fact, this injury is caused by Defendants-Appellees' enforcement of the challenged provisions, and emergency relief will redress that injury. *See id.* at 361-68; *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *Dearth v. Holder*, 641 F.3d 499, 502 (D.C. Cir. 2011).

Consistent with this Court's decision in *Aichele*, Courts during the COVID-19 crisis have uniformly recognized that minor political parties possess standing to challenge signature requirements for ballot access. *See*, e.g., *Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), *stay denied sub nom.*, *Libertarian Party of Illinois v. Cadigan*, __ Fed. Appx. __, 2020 WL 3421662 (7th Cir., June 21, 2020);

Esshaki v. Whitmer, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *stay denied in part*, __ Fed. Appx. __, 2020 WL 2185553 (6th Cir., May 5, 2020); *Acosta v. Restrepo*, 2020 WL 3495777 (D.R.I., June 25, 2020); *Constitution Party of Virginia v. Virginia State Board of Elections*, 2020 WL 4001087 (E.D. Va., July 15, 2020).

Defendants-Appellees' claim that a federal court is responsible for Plaintiffs-Appellants' injuries and thus no § 1983 claim exists is specious. The District Court declared Pennsylvania's signature requirements unconstitutional as applied and entered injunctive relief, but it said nothing about how those signatures must be collected, nor did it issue emergency orders making in-person petitioning unlawful. Those causal events are Defendants-Appellees' alone. Further, the District Court's order does not preclude Defendants-Appellees from making reasonable accommodations to protect Plaintiffs-Appellants' First and Fourteenth Amendment rights in response to the COVID-19 pandemic, and Defendants-Appellees' failure to do so is subject to constitutional challenge.

Only "[w]here the challenged action by state employees is nothing more than application of federal rules" will the "the federal involvement

[be deemed] so pervasive that the actions are taken under color of federal and not state law." *Rosas v. Brock*, 826 F.2d 1004, 1007 (11th Cir. 1987) (citation omitted). "When the violation is the joint product of the exercise of a State power and of a non-State power then the test under the Fourteenth Amendment and § 1983 is whether the state or its officials played a 'significant' role in the result." *Kletschka v. Driver*, 411 F.2d 436, 448 (2d Cir. 1969).

Here, Defendants-Appellees continue to enforce the challenged statutory provisions, which require that Plaintiffs-Appellees obtain original signatures on legal-size petition papers during a pandemic and file them by the August 3, 2020 deadline. Further, the Governor has issued emergency orders prohibiting in-person petitioning for 74 days of the statutory petitioning period, banning public gatherings and otherwise making it substantially more difficult to gather signatures. These prohibitions and restrictions go far beyond playing a significant role; they are the reason that Plaintiffs-Appellants cannot qualify for the ballot. And Defendants-Appellees have declined Plaintiffs-Appellants' requests for relief from Defendants-Appellees' strict enforcement of the

challenged provisions. Plaintiffs-Appellants have standing to challenge such enforcement. *See Aichele*, 757 F.3d at 362.

III. There Are No Viable Alternatives to In-Person Petitioning, Which Was Prohibited for 74 Days of the Statutory Petitioning Period.

Intervenor asserts that Plaintiffs "by employing a mixture of collection efforts, including active social media outreach, targeted mailings to receptive voters, and small personal signature gatherings" could have gathered thousands of signatures in a reduced period of time in order to qualify for the ballot. Intervenor's Brief, Doc.No.24, at Page 10. It adds that Plaintiffs "did not even attempt to use many of the tools at their disposal." *Id.* Defendants-Appellees concur. Appellees' Brief, Doc. No. 25, at Page 30. But these assertions are incorrect, and this Court should not credit the testimony on which they are based. Moreover, even if they were true – and they are not – it would not change the fact that Plaintiffs-Appellants' right to petition was severely burdened during the 74 days when it was unlawful for them to engage in in-person petitioning during the statutory petitioning period.

A. Plaintiffs-Appellants Attempted or Considered All Options.

As the record confirms, Plaintiffs-Appellants considered and/or attempted each and every alternative technique that Intervenor suggests. In regard to gatherings and physically approaching people, for example, Jennifer Moore testified that "members of the party have reported that people are very hesitant to sign papers and approach them." Moore Testimony at 28 (JA 196). Kevin Gaughen stated in his testimony that the LPPA is "out there collecting every single day. We are going to work double time to collect the signatures." Gaughen Testimony at 53-54 (JA 221-22). Steve Scheetz testified that he collected approximately one hundred signatures on Primary Election Day. Scheetz Testimony at 79, 85 (JA 247, 253). Moore testified that the slate of Libertarian Party candidates has only been able to collectively gather "a few hundred" signatures from "within our families because there were not large gatherings for us to go to." Moore Testimony at 16 (JA 184). Timothy Runkle testified that he was able to circulate petitions before the COVID-19 shutdown and personally collected "about ten signatures … in one large event March 9th." Runkle Testimony at 120 (JA 288). Runkle further testified that he believed the Green Party had collected

in the aggregate for all its candidates between 200 and 500 signatures at the time of the Hearing. *Id.* at 119-20 (JA 287-88).

In terms of using social media to gather people at events, Gaughen noted in his testimony that LPPA candidates are trying to hold events to obtain signatures and using social media to advertise them, but that very few people have expressed interest during the pandemic. Pointing to a Facebook event hosted by an LPPA candidate, Liz Terwilliger, Gaughen testified that only one person responded that they were going and zero expressed interest in the post. Gaughen Testimony at 67 (JA 235).

Plaintiffs-Appellants also attempted remote collection through e-mail and U.S. mail. Gaughen testified that the LPPA determined that e-mailing nomination petitions would not be effective. "People just simply don't look at your e-mails. So when you e-mail people, it does not matter how supportive they were in the past, they don't necessarily respond to it. You might get five or six people out of 10,000 e-mails." Gaughen Testimony at 83 (JA 251). Scheetz testified that the State's voter registration list does not always include e-mail addresses and because of this the LPPA does not have the e-mail addresses needed for contacting voters. Scheetz Testimony at 98-99 (JA 266-67). Gaughen testified as an

example that LPPA "sent out 30,000 pieces of mail last year to registered Libertarians and other interested parties, and the response rate was less than 2 percent." Gaughen Testimony at 68 (JA 236).

Runkle testified that he and the Green Party were and are familiar with collecting signatures by mail and e-mail, but have not pursued such "alternatives" because "the Party believes that it is cost prohibitive for us to do something like that." Runkle Testimony at 114 (JA 282). Runkle added that the Green Party has attempted to use e-mail to contact supporters, *id.* at 118 (JA 286), but that it has not proven productive "because of the liability that you could have with people filling them out incorrectly and being uninformed how to properly circulate a petition." *Id.*

All of the witnesses agreed that in contrast to these non-viable alternatives, the best way to collect signatures is in-person at public gatherings that are common throughout the spring and summer, but which were prohibited under the Governor's Stay-at-Home orders. LPPA Executive Gaughen testified that the "the most effective method [of obtaining signatures] is to stand outside the polls on Primary Day, …." Gaughen Testimony at 37 (JA 205). Runkle from the Green Party

testified that the most productive seasons for collecting signatures are spring and summer. Runkle Testimony at 112-13 (JA 280-81). Within these seasons, April, May and June are the most productive months. *Id.* at 113 (JA 281). Runkle emphasized that large gatherings are the preferred venue for collecting signatures: "The large events are much more effective as far as the time required to gather the greater number of signatures." *Id.* at 109 (JA 277). Last year, for example, at "[s]ome of the events we tabled at in Lancaster County[,] [w]e could collect towards 600, 800 signatures in the matter of six hours. In comparison, if I did that on the ground just canvassing a street, in six hours I may get 20 to 30 signatures at best." *Id.*

Scheetz testified that "door knocking is extremely ineffective" and that at large gatherings, such as festivals, petitioners "would get six people at a time to sign your petition. They would pass it around to each other, used the same pen." Scheetz Testimony at 80 (JA 248) He went on to note, "now they are not touching that petition form. Now they are not touching your pens." *Id.* at 80-81 (JA 248-49).

In terms of past recurring events that were canceled this year because of the Governor's orders, Runkle pointed to "Lancaster Pride

Fest. We would canvass at the Latino Festival. We would also do Lancaster Peace Fest." Runkle Testimony at 110 (JA 278). Runkle made clear that "all of those events either have been canceled or postponed…." *Id.* Runkle added that even in the green phase counties where gatherings of up to 250 people are now allowed, he does "not believe that there are any events being planned in many of those counties." *Id.* at 122 (JA 290). The Green Party, moreover, "did have a lot of events planned during April, specifically April, which were all canceled due to shutdown and the concerns over COVID." *Id.* at 113 (JA 281).

Scheetz likewise testified that large public events were the best possible venue for petitioning and that the large public events that were held in the past were not occurring this year, including, "Memorial Day picnics … July 4th picnics … Puerto Rican Day … an arts and crafts event up in northern Bucks County." Scheetz Testimony at 97-98 (JA 265-66). Moore testified that because of the continuing restrictions on gatherings in Pennsylvania, signature collection efforts are still being thwarted: "There is still a restriction on large gatherings in the yellow phase, and that is the best place for us to collect signatures, our parades and festivals

and places like that, so it is still very difficult for us to get the signatures we need." Moore Testimony at 20 (JA 188).

Meanwhile, the Governor's emergency orders precluded circulators from gathering signatures in-person either at public events or door-to-door from March 23, 2020 until June 5, 2020 across Pennsylvania, thus denying to Plaintiffs-Appellants several weeks of the most productive time to collect signatures. *See* Stipulated Facts at ¶¶ 44-59 (JA 91-94). The Governor's ban on large gatherings in Pennsylvania beginning on March 23, 2020 has resulted in continuing cancelations of large events that have in the past been used by Plaintiffs-Appellants to successfully gather signatures and that were planned to be used to collect signatures in the current election cycle.

Suffice it to say that there was a tremendous amount of evidence and testimony establishing that Plaintiffs-Appellants attempted many alternative signature collection techniques. They found that the single most productive path is to collect signatures at large gatherings that take place in the spring or summer – *i.e.*, by exercising their right to petition in person, and not by social media, U.S. Mail or some other purported alternative. Because of COVID-19 and the Governor's orders, however,

these gatherings are not taking place. Consequently, the single most productive means of collecting signatures is lost, and as demonstrated below the so-called alternatives that Defendants and Intervenor propose have been proven to be non-viable.

B. Remote Collection Is Not a Viable Option Under Pennsylvania's Requirements.

Intervenor's assertion that collecting signatures remotely is a viable option does not comport with reality. Signatures collected to support a candidate's ballot access petition in Pennsylvania must be (1) personally witnessed by the person circulating the candidate's petition, and always must be (2) "wet" and original when delivered to State officials. The latter requirement precludes the use of analog copies like those produced on Xerox machines, and also precludes digitally produced copies, like PDF files, common to e-mails and the Internet. Marks Testimony at 148-49 (JA 316-17), 171-72 (JA 338-39); Verified Complaint at ¶ 68 (JA 69). As a result, in-person signature collection is almost exclusively required.

The lone exception to the first requirement is that Pennsylvania allows voters to self-witness their own signatures. *Id.* A voter with access to a candidate's ballot access petition can sign it, witness it himself or

herself, and then return the single wet and original signature on the petition form to the candidate. There are two important catches to this "exception," however. The first lies in the delivery of the petition to the voter, and the second in the return of the wet, original self-witnessed petition to the candidate.

First, delivery to the voter. Simply put, getting the petition to the voter in a form that can be used for an acceptable signature is no easy venture. Pennsylvania requires that candidates' petitions be printed on non-standard, legal-size (8 1/2 inch by 14 inch) paper; letter-size petitions will not be accepted by the Secretary of the Commonwealth. Deposition of Jason Henry at 56 (JA 481); Moore Testimony at 17 (JA 185).

Consequently, e-mail and other forms of electronic delivery of the petition to voters are useless. They can only work if the recipient has a ready supply of legal-size paper, Moore Testimony at 17 (JA 185), something most law offices no longer even keep in stock. Even assuming that a candidate has access to a functioning voter list with e-mails, which is not necessarily the case in Pennsylvania (since available voter lists do not always have e-mail addresses, Scheetz Testimony at 93, 98-99 (JA 261, 266-67), and lists are frequently incorrect, Moore Testimony at 13

(JA 181), use of an-email list to collect signatures simply cannot work. The same debilitating obstacle prevents social media platforms from working.

The result is that to make meaningful use of the self-witnessing exception, a candidate must either use the postal service to mail her petition, pre-printed on legal size paper, to voters, or physically deliver it. Physical delivery, however, was foreclosed for 74 days in Pennsylvania by the Governor's emergency orders. That leaves U.S. mail, which costs $0.55 for postage for each petition mailed; and this does not include the price of envelopes, legal-size paper and handling. Sending out 1000 of these to voters would cost $550.00 in postage alone, and by most accounts with the price of paper and handling would well exceed this amount. *See Esshaki v. Whitmer*, 2020 WL 1910154, *5 (E.D. Mich., Apr. 20, 2020), *aff'd in part*, 2020 WL 2185553. __ Fed. Appx. __ (6th Cir., May 5, 2020), (stating that with postage, handling and paper the cost was $1.75 per mailing).

Assuming that these legal-size petitions are delivered to voters, the next challenge is having the voters sign and return the original, wet signatures. Copies are not allowed, so voters cannot simply scan their

signed petitions and e-mail them or somehow deposit them on an Internet platform. They must be either physically delivered, which was precluded for 74 days by the Governors' orders, or U.S. mailed back, costing another $0.55 for postage alone. Because voters cannot be expected to foot this expense, candidates must supply self-addressed, stamped envelopes for the return, thus doubling the price. Sending out 1000 now is at least $1.10 per mailing, totaling $1,100.00 in postage alone. Adding in paper, envelopes and handling and the price according to one Court is $1.75 per mailing, driving the total for just 1000 outbound to $1750.00.

Assuming that a candidate has this much money on hand to support a mail-driven effort, empirical evidence reports an extremely small response rate. Among other things, effort is required on behalf of the voter. Inertia and the volume of unsolicited mail people receive conspire to prevent the mailing from even being opened. Voters who attempt to respond by mail, moreover, often (due to the absence of a circulator) fill out the petitions incorrectly. Runkle Testimony at 115 (JA 283).

For all of these reasons, response rates are vanishingly small. In *Esshaki v. Whitmer*, 2020 WL 1910154, *5, the Court explored the prospects of mail campaigns for signature collections and rejected them

as a viable alternative. It made much of costs and low response rate to dismiss mail as an adequate signature gathering device. It pointed to a candidate there who had "sent one thousand petitions by mail at a cost of $1.75 each, [and] by April 14, 2020, the mail campaign had garnered a total of fifteen additional signatures—which, given the cost of the mailing, meant the equivalent of paying approximately $115 per signature." *Id.* The Court concluded that "[w]hile Plaintiff is not entitled to free access to the ballot, the financial burden imposed by an unforeseen but suddenly required mail-only signature campaign is far more than an incidental campaign expense or reasonable regulatory requirement." *Id.* "For any candidate other than those with unusually robust financial means, such a last-minute requirement could be prohibitive." *Id.* It then added:

> the efficacy of a mail-based campaign is unproven and questionable at best. Conducting an effective mail campaign in the current environment presents a significant hurdle. Such a mail-only signature gathering campaign assumes both a fully operational postal service and a public willing to walk to the mailbox, open physical envelopes, sign a petition, and deposit the envelope back into a mailbox or make a trip to the Post Office. Today, sadly, ample reasons exist to question the plausibility of each of those assumptions.

Id.

In this case, Plaintiffs-Appellants offered their own evidence corroborating the *Esshaki* Court's conclusion. Moore testified that in 2018 she attempted to collect 100 signatures by U.S. Mail by sending to voters the required forms on legal-size paper, pre-stamped self-addressed envelopes. Moore Testimony at 10 (JA 178). The cost of this mailing of 100 petitions by U.S. Mail was $125.00. *Id.* Moore testified that she "received seven signatures back, only five of them were valid because two of them were filled out incorrectly," *id.* resulting in a cost of $25.00 per valid signature. *Id.*

Intervenor argued to the District Court that a 5.8% response rate could be reasonably expected, though it cited no evidence to support this claim. Intervenor's Response, R.25, at 6. Even assuming that this best-case 5.8% figure is correct, that would translate into only 58 responses to a 1000-voter mailing effort. Dividing the cost of the mailing, $1750.00, by 58 successfully harvested signatures comes to a price of $30.17 per signature. For a candidate needing 5000 signatures, this totals to $150,850.00. Building in an extra thousand signatures just in case some are invalid drives the price over $180,000.00. *See also* Runkle Testimony

at 115 (JA 283) (stating "It would be over a hundred thousand dollars for us to launch an all-mail petitioning effort.").

In contrast to these $25.00 to $115.00 per signature prices, meanwhile, the cost of professional in-person signature gathering in Pennsylvania is between $2 and $6 per signature, with an "average going rate [of] about $3 a signature." Moore Testimony at 17 (JA 185). It is for these reasons that Plaintiffs-Appellants' witnesses testified that they could not successfully use U.S. mail, e-mail, and social networking platforms to gather signatures. Those alternatives, at best, can supply only a fraction of the needed signatures, and even then at great cost. Runkle Testimony at 114 (JA 282) ("We have looked into it, and the Party believes that it is cost prohibitive for us to do something like that.")

Unlike the major parties, the Plaintiffs do not have the finances to maintain a sophisticated voter registration database. As Scheetz noted in his testimony, "we don't have all [of the supporters'] phone numbers. We don't have all their addresses. The database that we have of the registered Libertarians is not one of those databases that is kept up-to-date extremely well … so we get a lot of returned mail." *Id.* at 93 (JA 261). Scheetz also testified that the State's voter registration list does not

always include e-mail addresses and phone numbers of the voters and accordingly the LPPA does not have the e-mail addresses or phone numbers of voters. *Id.* at 98-99 (JA 266-67).

Combined, these two catches make use of the self-witnessing exception in Pennsylvania almost trivial. It is impossible to use this approach to collect hundreds, let alone thousands, of signatures in a limited amount of time.

IV. Ongoing Infringement of First Amendment Rights Is Irreparable Injury.

Defendants-Appellees assert that Plaintiffs-Appellants cannot demonstrate irreparable harm because their First Amendment injuries are simply "unsubstantiated assertions of potential future harm." Appellees' Brief, Doc. No. 25, at Page 34. In support, they quote *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997), for the proposition that *Elrod v. Burns*, 427 U.S. 347 (1976), and its presumption of irreparable harm to First Amendment rights do not apply in this case. They are wrong.

In *Davila*, 125 F.3d at 164, the Government had "terminated its surveillance of Anderson and Lee Rohn [the plaintiffs]." "If this is true," the Court observed, "an injunction is unnecessary and unsupportable." *Id. Elrod* was different, the Court noted; "injunctive relief was warranted

because the plaintiffs' First Amendment injuries were 'both threatened and occurring at the time of respondents' motion.'" *Davila*, 125 F.3d at 164 (citation omitted). Hence, this Circuit like all others has recognized that where there is either an "occurring" First Amendment violation, or one that is threatened, irreparable harm exists.

Here, there is an "occurring" First Amendment violation because of COVID-19, its past, present and future effects, and the Governor's past, present and continuing emergency orders. This is necessarily irreparable harm under *Elrod*.

V. Pennsylvania Does Not Risk Harm.

Defendants-Appellees argue that should relief be granted Pennsylvania would be irreparably harmed. Appellees' Brief, Doc. No. 25, at Page 35. Claiming that more than 500 political bodies would automatically need to be placed on the ballot if relief is entered, Defendants-Appellees claim a threat to the orderly administration of Pennsylvania's election.

Defendants-Appellees' claimed bogeyman is an illusion. Plaintiffs-Appellants do not ask that 500 political bodies be placed on Pennsylvania's ballots. Plaintiffs-Appellants ask only that the previously

recognized Constitution Party, Libertarian Party and Green Party have their candidates restored to the ballot. These parties' candidates should be placed on the ballot because these parties alone have previously qualified under Pennsylvania law as minor parties, and as such they have qualified for the ballot in every election cycle in recent decades when they were not subject to an unconstitutional statutory scheme. *See Constitution Party of Pennsylvania v. Cortes*, 877 F.3d 480 (3d Cir. 2017), *on remand sub nom. Constitution Party of Pennsylvania v. Aichele*, 2018 WL 684837 (E.D. Pa. 2018). They have demonstrated the necessary "modicum of support". *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Political bodies that have not are not entitled to this same relief.

VI. A Majority of Courts Have Concluded that COVID-19 Restrictions on Candidates Warrant Constitutional Relief.

Defendants-Appellees assert that "substantial authority" supports the District Court's conclusion that COVID-19 restrictions placed on candidates do not violate the First Amendment. They are wrong.

As Plaintiffs-Appellants argued in their principal Brief, most Courts and many States have concluded that COVID-19 when coupled with governmental restrictions on gatherings and candidates' abilities to freely collect in-person signatures violate the First Amendment. They

therefore require constitutional correction, with the precise remedy being dependent on the peculiar facts in the State. The Court in *Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), *stay denied sub nom.*, *Libertarian Party of Illinois v. Cadigan*, __ Fed. Appx. __, 2020 WL 3421662 (7th Cir., June 21, 2020), collects a number of these cases and States, but many more recent ones have been added to the list. *See*, *e.g.*, *Esshaki v. Whitmer*, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *stay denied in part*, __ Fed. Appx. __, 2020 WL 2185553 (6th Cir., May 5, 2020); *Acosta v. Restrepo*, 2020WL3495777 (D.R.I., June 25, 2020); *Constitution Party of Virginia v. Virginia State Board of Elections*, 2020 WL 4001087 (E.D. Va., July 15, 2020); *Goldstein v. Sec'y of Commonwealth*, 142 N.E.3d 560 (Mass., Apr. 17, 2020); *see also Thomas v. Andino*, 2020 WL 2617329, *21 (D.S.C., May 25, 2020) (enjoining South Carolina's witness requirement for absentee ballots).

Plaintiffs-Appellants are not so bold to argue that all Courts have agreed about COVID-19's effects on First Amendment rights. Justin Levitt on the Election Law Blog web page, after all, reports that as of July 21, 2020, there are "163 cases in 41 states and DC" brought "over election practices in light of COVID-19." *See* Justin Levitt, Election Law

Blog, https://electionlawblog.org/?p=111962. Unanimity among results given differing State laws and facts on the ground is impossible.

The fact remains, however, that most Courts have concluded that for candidates who have experienced COVID-19 disruption some sort of signature-collection relief is required under the First Amendment. In particular, where States require in-person signature collection as the principal method for ballot access and have implemented emergency bans on movement and gatherings for significant lengths of time because of COVID-19, Courts have uniformly ordered relief for candidates. The handful of contrary cases Defendants-Appellees cite are not only distinguishable, they prove this rule.

Several of the cases Defendants-Appellees cite do not involve candidates, but involve initiatives, where the constitutional nuances are different and unique. They are therefore inapposite. *See*, *e.g.*, *Sinner v. Jaeger*, 2020 WL 3244143 (D.N.D., June 15, 2020); *Arizonans for Fair Elections v. Hobbs*, 2020 WL 1905747 (D. Az., April 17, 2020), *appeal voluntarily dismissed*, 2020 WL 4073195 (9th Cir., May 19, 2020); *Miller v. Thurston*, 2020 WL 2617312 (D. Ark., May 25, 2020), *rev'd*, 2020 WL 4218245 (8th Cir., July 23, 2020); *Thompson v. DeWine*, 959 F.3d 804 (6th

Cir. 2020). These cases demonstrate that Courts employ a different constitutional calculus when reviewing the state-created right to propose an initiative than they do when reviewing candidates' right to access the ballot.

To be sure, initiative proponents have also won relief during the COVID-19 crisis. *See*, *e.g.*, *People Not Politicians v. Clarno*, 2020 WL 3960440 (D. Oregon, July 13, 2020) (granting relief for initiatives), *stay denied*, No. 20-35630 (9th Cir., July 23, 2020); *SawariMedia, LLC v. Whitmer*, 2020 WL 3097266 (W.D. Mich., June 11, 2020) (same), *stay denied*, __ F.3d __, 2020 WL 3603684 (6th Cir., July 2, 2020);[1] *Reclaim Idaho v. Little*, 2020WL3490216 (D. Idaho, June 26, 2020) (same), *appeal filed*, 2020 WL 3490216 (9th Cir., July 1, 2020). But the fact is that precedent involving initiatives cannot be extended by rote to the First Amendment rights of candidates and their voters.

[1] The Application for Stay filed in the Supreme Court by Michigan in *SawariMedia*, No. 20A1 (U.S.), was withdrawn on July 23, 2020. *See* Supreme Court of the United States, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a1.html. That same day the Plaintiffs sought to dismiss their Complaint in the District Court. *SawariMedia*, No.4:20-cv-11246, Doc. No. 43 (E.D. Pa., July 23, 2020). The District Court has set a Status Conference for August 5, 2020 in that matter. *Id.*, Doc. No. 44.

The eight cases that Defendants-Appellees cite involving candidates, meanwhile, are all distinguishable. None involved circumstances where, as here, COVID-19 emergency orders, through their limitations on movement and gatherings, significantly interfered with the principal in-person signature collection method employed by candidates to gain ballot access. Specifically, the cases fall into four groups where: (1) the State had already provided meaningful COVID-19 relief; (2) the candidates were not serious or were not making any serious qualifying efforts; (3) COVID-19 and emergency restrictions had nothing or little to do with the candidate's exclusion; or (4) the State's law either did not restrict in-person collection or alternatively provided a meaningful remote collection alternative.

Into this first group fall *Libertarian Party of Connecticut v. Merrill*, 2020 WL 3526922 * 3 (D. Conn., June 27, 2020), *appeal filed sub nom. Libertarian Party of Connecticut v. Lamont*, 2020 WL 3526922 (2d Cir., July 10, 2020), and *Gottlieb v. Lamont*, 2020 WL 3046205, *2 (D. Conn., June 8, 2020), where the Court (Hall, J., in both cases) denied relief to parties (*Merrill*) and candidates (*Gottlieb*) because the State had already provided it. The Court concluded that "plaintiffs have failed to make a

clear showing that Connecticut's petitioning requirements, as modified by Executive Order 7LL, severely burden plaintiffs' rights." *Merrill*, 2020 WL 3526922, at *9. *See also Gottlieb*, 2020 WL 3046205, *2 (D. Conn., June 8, 2020) (same). Here, by contrast, Pennsylvania has offered no remediation of any sort.

In the second group are *Kishore v. Whitmer*, 2020 WL 3819125 (E.D. Mich., July 8, 2020), *appeal filed*, 2020 WL 3819125 (6th Cir., July 13, 2020), and *Acosta v. Wolf*, 2020 WL 3077098 (E.D. Pa., June 10, 2020). In *Kishore*, the Court denied relief because "in sharp contrast to the plaintiffs in both *Esshaki* and *SawariMedia*, Plaintiffs have not been diligent in the exercise of their rights." 2020 WL 3819125 at *10. It explained that "while the filing deadline is now less than two weeks away, Plaintiffs have not even undertaken the most basic first step towards getting on the ballot in Michigan – preparing a qualifying petition to circulate in order to collect signatures in support of Kishore's candidacy." *Id.*

In *Acosta v. Wolf*, 2020 WL 3077098 (E.D. Penn., June 10, 2020), meanwhile, the Court dismissed a pro se in forma pauperis (IFP) action filed by a "frivolous" candidate under the Americans With Disabilities

Act (ADA) and the Equal Protection Clause that alleged no First Amendment violation. The District Court's opinion cannot be given much (if any) weight here, however, because not only did it involve a frivolous pro se plaintiff, there was no First Amendment challenge made. Further, the Court incorrectly reported what happened in *Garbett v. Herbert*, 2020 WL 2064101 (D. Utah, April 29, 2020), and *Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), the cases on which it purported to rely. The Court stated those cases found no First Amendment violations and refused relief when they did just the opposite. The District Court's misunderstanding led it to "agree with [its] colleagues in Utah, Illinois, and New York,[2]" *Acosta*, 2020 WL 3077098, at *3, while dismissing the challenge.

In contrast to the situations in both those cases, Plaintiffs here are established Parties that have prepared the needed petitions and collected signatures. They have been diligent, but Pennsylvania's response to the COVID-19 pandemic has severely burdened their right to petition.

[2] In *Murray v. Cuomo*, 2020 WL 2521449, *3 (S.D.N.Y., May 16, 2020), the Court did refuse relief, but did so not only because New York had already reduced its signature collection requirement from "1,250 to 375" signatures, *id.* at *13, but also because COVID-19 had nothing to do with the plaintiff's failing to obtain ballot access. *Id.*

The third group includes *Fagin v. Hughs*, 2020 WL 4043753, *4 (W.D. Tex., July 17, 2020), where Texas candidates were only prohibited from collecting signatures "between March 24 and April 2 when San Antonio's stay-at-home order was in effect." Thus, the Court found no real burden on his collection time and no First Amendment violation. Further, the candidate needed only "500 signatures in support of his petition and [needed to] file the same by August 13." *Id.* at *5.

Also in this group is *Garcia v. Griswold*, 2020 WL 2505888 (D. Colo., May 7, 2020), *opinion issued*, 2020 WL 4003648, *3 (July 15, 2020), where the Court denied relief because of laches as opposed to the merits of the candidate's First Amendment claim. The candidate had submitted his signatures on March 17, 2020, before the COVID-19 crisis, only to learn that his submitted signatures were not enough. *Id.* at *4. He then waited over a month to challenge the denial, claiming that COVID-19 required a "substantial compliance" exception. The District Court responded, "This is frankly incredible." *Id.* It therefore distinguished *Esshaki*, *Pritzker* and other cases as involving facts where COVID-19 actually interfered with access. *Id.* at *4-*5. By way of contrast here, Plaintiffs-Appellants were precluded from collecting signatures for 74 days,

Pennsylvania continues to restrict gatherings, signatures are due August 3, and the numbers of signatures required range up to 5000.

Perhaps the best example of cases falling into the last group is *Common Sense Party v. Padilla*, 2020 WL 3491041 (E.D. Cal., June 26, 2020), *appeal filed*, 2020 WL 3491041 (9th Cir., July 8, 2020), which involved a California system markedly different from the signature collection requirement used in Pennsylvania. In California, parties seek to register members as opposed to collect signatures. They "may use paper voter-registration cards or the California Online Voter Registration Application" to collect the needed number of member registrations for party status. *Id.* at *1. Unlike Pennsylvania, parties could "solicit voter registration through the internet in various ways. … political bodies may send links to the Secretary of State's voter-registration page in targeted emails to persons who request them, or in unsolicited mass emails." *Id.* at *2. Voters could then on this page electronically register their membership. "None of these options were impacted by the State's response to the COVID-19 pandemic." *Id.* at *6.

Whitfield v. Thurston, 2020 WL 3451692 (D. Ark., June 24, 2020), *appeal filed*, 2020 WL 3451692 (8th Cir., June 29, 2020), also fits into this

final category. The Court observed there that "Arkansas did not issue a stay-at-home order of the sort seen in other states," and that "other independent candidates for state representative complied with the signature requirements over this same period." *Id.* at *21. Consequently, although COVID-19 impacted collection, it was much easier under the laws and circumstances to gather signatures -- as proven by candidates' successes.

In the present case, of course, Pennsylvania issued a stay-at-home order that prevented in-person signature collection for 74 days. No minor party or independent candidates have complied with Pennsylvania's signature collection requirements. Had Pennsylvania not shut down, or better yet had it allowed Internet registration, things would be different. But Pennsylvania did shut down and unlike California still relies on the horse-and-buggy approach of in-person, wet signatures collection on legal-size paper.

VII. This Court Has the Power to Order Relief.

Appellees claim that federal courts do not have the authority to correct constitutional violations. They are plainly incorrect. Federal courts have the power to redress all sorts of constitutional violations,

including those that deny First Amendment ballot access rights. *See*, *e.g.*, *Constitution Party of Pennsylvania v. Cortes*, 877 F.3d 480 (3d Cir. 2017), *on remand sub nom. Constitution Party of Pennsylvania v. Aichele*, 2018 WL 684837 (E.D. Pa. 2018).

CONCLUSION

For the foregoing reasons, and those stated in Plaintffs-Appellants' opening brief, the District Court's opinion and order should be vacated, and enter an injunction granting Plaintiffs-Appellants relief from Pennsylvania's strict enforcement of its signature requirement, in-person petitioning requirement and filing deadline.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of this Court.

/s/Oliver B. Hall

CERTIFICATE OF COMPLIANCE AND VIRUS-SCAN CERTIFICATION

I certify that the foregoing brief complies with Fed. R. App. P. 32(a)(5) because it was prepared in proportionally spaced typeface using 14-point Century font.

I certify that the foregoing brief complies Fed. R. App. P. 32(a)(7)(B) because it contains 6,476 words, excluding the Caption, Signature Blocks and Certificates.

I certify that pursuant to the Court's March 17, 2020 Notice Regarding Operations to Address the COVID-19 Pandemic, "The filing of paper copies of briefs . . . is deferred pending further direction of the Court."

I certify that a virus scan was run on the electronic copy of this brief using AVG Antivirus software.

s/Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I certify that on July 26, 2020 this Brief was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding.

s/*Oliver B. Hall*
Oliver B. Hall