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' REPLY BRIEF

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INTRODUCTION

The standard for "reasonable diligence" applied by the district court is fundamentally wrong. The district court determined that Appellants Kishore and Santa Cruz and their supporters did not exercise "reasonable diligence" because they did not attempt to gather thousands of physical signatures during the raging coronavirus pandemic.

This Court should reject the district court's Kafkaesque and dangerous conception of "diligence," which would contribute to the spread of the deadly infection and encourage noncompliance with Appellee Whitmer's stay-at-home orders and the advice of public health officials. And if Appellants' forbearance from signature gathering was reasonable, then the burden is severe, strict scrutiny applies, and Appellants should prevail.

The exercise of "reasonable diligence" required Appellants to do precisely the opposite of what the district court suggested. The exercise of "reasonable diligence" meant encouraging their supporters to stay at home to the extent possible, to comply with state and local emergency directives, and to protect the health and lives of their families and the public. Appellants' forbearance from signature gathering only bolsters and does not detract from a finding that they were diligent.

Indeed, in the district court's decision, in Appellees' brief and in Appellee Whitmer's public statements, the state and district court effectively concede that Appellants acted reasonably, calling their conduct "good," "conscientious," "understandable" and "certainly respectable."

But Appellees now claim that demonstrations by armed, right-wing militias in Lansing should have prompted Appellants and their supporters to begin collecting signatures. As will be shown below, Governor Whitmer herself warned at the time that those demonstrations were illegal and would spread death.

Appellees further claim the signature requirement is the only way to measure whether Appellants have a significant modicum of support, although nowhere in their answering brief do they deny that efforts to physically gather signatures would have resulted in death. Appellees state they "cannot simply deviate from the statutory process to which it is bound," that they are simply following *Graveline*, and that there has been no state action here. R. 15, Response Brf at Page ID #45, 53. But that only underscores why this lawsuit became necessary, as the state of Michigan is simply not providing Appellants with any safe route to access the ballot. Meanwhile, Appellees do not contest the fact that the state provided incorrect information to Appellants' campaign in May, concealing the fact that the *Graveline* decision had struck down the existing signature requirement as unconstitutional.

There is a striking contrast between Appellee Whitmer's public statements and her arguments in this litigation. The extreme and unnecessary zeal with which Appellees have opposed this action, arguing against common sense and against positions that the Governor has taken publicly, points to an improper motive, namely preventing candidates from accessing the ballot that are perceived as likely to garner votes that would otherwise be cast for the Appellees' political party.

ARGUMENT

1. Appellees and the district court effectively concede that Appellants' decision to forbear from signature gathering was reasonable, calling it "conscientious," "understandable," "certainly respectable," "a good choice" and undertaken in order to save lives.

Appellees and the district court have essentially conceded that Appellants' decision to forbear from signature gathering was reasonable. The district court acknowledged: "Plaintiffs have made a conscientious choice" by forbearing. R. 17, Order, Page ID #227-28. (Emphasis added). Appellees write: "Like the district court, Defendants understand Plaintiffs decision not to collect signatures." R. 15, Response Brf, Page ID #47. "The State Defendants certainly respect, and understand, Plaintiffs' personal decisions." Id. at 13. Appellees concede that Appellee Whitmer's stay at home orders "curtailed traditional, in-person petition circulation." Id. at Page ID #46. Appellees accept Appellants argument that the

latter "decided to suspend all subsequent public events, including ballot gathering initiatives, in order to protect volunteers, staff and the public at large from spreading coronavirus." Id. at Page ID #24 (Quoting R. 3, TRO Brf, Page ID #38). They do not deny that gathering signatures would have required Appellants to interact with hundreds of thousands of people, risking death. At the hearing before Judge Cox on July 2, 2020, Appellants' counsel conceded that Appellee's forbearance was "a good choice for you." R. 18, Transcript, Page ID #250.

The Appellees' belief that Appellants' decision was made to protect lives, was "conscientious," "a good choice," "understandable," and "certainly respectable" is certainly incongruous with its argument that Appellants were not "diligent."

Under normal circumstances, Appellants would agree that if they had gathered zero signatures, that this would point away from a finding of reasonable diligence. But in the time of the COVID-19 pandemic, as Judge Leitman explained in the *SawariMedia* case, Appellants could not gather any signatures for fear of spreading death: "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." *SawariMedia LLC v. Whitmer*, 2020 WL 3097266 at *24 (E.D. Mich. June 11, 2020) (Stay denied on appeal, *SawariMedia LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020)).

Gathering a few hundred signatures, sickening a few dozen people, and causing a few deaths would not have made Appellants "diligent." Since the district court's decision is premised on a false and upside-down conception of "diligence," it should be reversed.

2. **Appellees now cite right-wing anti-shutdown demonstrations as proof that First Amendment activity was not impacted by the stay-at-home orders, even though Appellee Whitmer explicitly said at the time that those demonstrations were not protected free speech activity because they would spread the virus.**

Appellees now argue that Appellants should have followed the example of right-wing militias, some armed with assault rifles and some with Nazi flags, who violated the stay-at-home order in Lansing in April, brought weapons into the statehouse gallery, and threatened to assassinate Democratic lawmakers and Appellee Whitmer herself. Appellees now call this activity "free speech." But that is not what Appellee Whitmer said in April and May.

Appellees claim the far-right militia protests "effectively demonstrated that First Amendment activities were not precluded by the Governor's orders." R. 15, Response Brf, Page ID #36, n. 26. Appellees argue that because these demonstrations took place "before Plaintiffs [Appellants] filed this action," that

Appellants were required to follow the example of the far-right militias and violate the stay-at-home orders in order to establish "diligence."

At the time, Appellee Whitmer said the demonstrations would spread death: "This is not appropriate in a global pandemic, but it's certainly not an exercise of democratic principles where we have free speech," she said. "I ask that everyone who has a platform uses it to call on people to observe the best practices promulgated by the CDC and to stop encouraging this behavior."[1] (Emphasis added).

"I respect peoples' right to dissent, but that does not extend to endangering other people's lives," she added, warning that the protests were spreading the virus: "We have seen from initial protests here is that we've got COVID-19 spreading in rural parts of our state from which people traveled…If discouraging protests is something you consider doing, I'd really be grateful."[2] (Emphasis added).

The *World Socialist Web Site*, the online political newspaper of the Appellants' political party, denounced the far-right protestors, noting that the militias "defied the state's social distancing and face covering regulations."[3] The

[1] https://www.nbcnews.com/politics/politics-news/calls-violence-michigan-gov-whitmer-says-armed-protests-could-lengthen-n1206296
[2] Ibid.
[3] https://www.wsws.org/en/articles/2020/05/02/lans-m02.html

WSWS deplored the fact that the far-right militia was comprised of neo-Nazis who had threatened to assassinate Governor Whitmer.[4]

On the one hand, Governor Whitmer denounces the far-right groups and says their activities were not protected by the First Amendment because they were spreading death. But in this case, Governor Whitmer states the exact opposite—suggesting that these neo-Nazis were in fact model citizens practicing free speech, and that Appellants were obligated to emulate them in order to establish "reasonable diligence."

3. State officials dishonestly provided incorrect information to Appellants' campaign in May and concealed the fact that the statute had been struck down.

Appellees do not contest the fact that that Appellee Brater's office provided incorrect information to Appellants' campaign volunteer in May, informing Appellants' campaign that the signature requirement remained 30,000 when in fact *Graveline* had struck down that requirement as unconstitutional. This exchange is significant, both as state action constituting the basis for a constitutional violation and also as a fact pointing to Appellants' diligence.

Appellees claim they are now obligated to follow the statutory framework and cannot establish any less deadly way to test for a modicum of support. They

[4] https://www.wsws.org/en/articles/2020/05/13/whit-m13.html

say *Hall v. Austin*, 495 F. Supp. 782 (E.D. Mich. 1980) does not apply because it is old, without pointing to any authority overturning that decision, and because a statutory framework now exists. But that statutory framework was found unconstitutional in *Graveline v. Benson*, Case No. 18-12354 (E.D. Mich. Dec. 22, 2019). Appellees only conceded that the new requirement was 12,000 after Appellants brought this suit. They now attempt to use this lower figure, which they dishonestly concealed from Appellants' campaign, to distinguish *SawariMedia*. R. 15, Response Brf, Page ID #42-43.

The 12,000 signature requirement in *Graveline* was only "an interim measure" that has now expired. The legislature was required to enact a new, constitutional requirement for the 2020 election and failed to do so. Establishing a new framework for the 2020 election was required to "protect…the rights of prospective independent candidates and those who wish to vote for them." *Graveline,* at *45. Since the legislature enacted no new requirement, it follows that there is no existing statutory method for ballot access and the *Hall* case is apposite. Alternatively, the signature requirement is now zero.

In *Graveline*, the district court focused on the "real impact" the laws have on the election process. *Id*. at *27. It found that "a reasonably diligent independent candidate" could not satisfy the 30,000 signature requirement. *Id*. If a reasonably diligent candidate could only be expected to obtain 12,000 valid signatures under

normal conditions, then 12,000 signatures is certainly all the more impossible during the ongoing public health disaster unleashed by the COVID-19 pandemic.

4. **Appellees fail to respond to Appellants' argument that forcing them to gather signatures would unconstitutionally require that they violate their own political principles.**

Appellees fail to respond to Appellants' argument that forcing them to gather signatures would unconstitutionally require they violate their own political principles. Appellants discussed this issue in detail in the district court and in their opening brief, explaining that "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." R. 12, Opening Brf, Page ID #11, 32-34. By failing to address this issue, Appellees concede it in favor of Appellants.

5. **The night-and-day contrast between Appellee Whitmer's public statements regarding the pandemic and Appellees' arguments in this litigation undermines Appellees' claim to be defending legitimate or compelling state interests.**

Throughout this litigation, Appellees have put forward arguments that directly contradict public statements made by Governor Whitmer herself.

Appellants have not pointed to these contradictions merely to "castigate" Whitmer, as Appellees claim. R. 15, Response Brf, Page ID #13.

Rather, the night-and-day contrast between Appellee Whitmer's public statements and Appellees' positions in litigation, including regarding the far-right demonstrations in Lansing, points to the practical political reality underlying this litigation, which that Appellees have a motive to try to keep Appellants off the ballot: Michigan is a key battleground of the 2020 presidential elections.

In public, Appellee Whitmer has constantly urged Michiganders not to act unreasonably, not to downplay the pandemic, not to violate social distancing norms, and not to interact unnecessarily with others. In fact, such statements have boosted her national profile and she is now on the shortlist for nomination as the Democratic Party's vice presidential candidate. But in this litigation, Appellee Whitmer argues the opposite: that in order to establish reasonable diligence Appellants were obligated to violate her executive orders and her public appeals—i.e., they were obligated to act in a manner she herself has said would be dangerous and unreasonable.

Appellee Whitmer is a national campaign co-chairperson for presumptive Democratic nominee Joe Biden's campaign. In 2016, the Democratic Party lost the state of Michigan by 10,700 votes, a margin such that that an independent, left-wing candidate could impact the outcome. This supports an the inference that

legitimate or compelling state interests are not driving Appellees' opposition to this action, but partisan political aims. This also explains why Appellees are making arguments that are contrary to their own public positions.

6. Appellees' brief is incorrect as to several additional points of fact and law.

Appellants wish to briefly clarify several additional points raised by Appellees in their response brief.

First, Appellees err in claiming "the SEP submitted a petition to qualify as a new political party" in June. R. 15, Response Brf, Page ID #25. Appellees link to a board of canvassers meeting at which the Socialist Party—not the Socialist Equality Party—sought new party status. The SEP has made no such filing.

Second, Appellees err in stating Appellants "waived" their equal protection clause argument. Appellees claim Appellants "only address this claim in a perfunctory manner" (R. 15, Response Brf, Page ID #57, n. 33), but in reality Appellants dedicated three pages to this argument in their opening brief in the section titled "The District Court Failed to Consider the Burden to Appellant Kishore as a Voter and Appellants' Equal Protection Clause Argument." *See* R. 12, Opening Brf, Page ID #56-58.[5] They raised it at length and in detail at the district

[5] Appellant also raised its equal protection clause argument earlier in its brief, explaining in a discussion on *Esshaki, SawariMedia LLC* and *Thompson* that "It would further violate the Equal Protection Clause for this Court to apply one set of

court level, in briefings and during the hearing. It is not Appellants' fault that Appellees "did not discern the equal protection argument either and did not separately address it in their response" below. R. 15, Response Brf, Page ID #57, n. 33.

Third, Appellees err in stating the court has no right to issue rulings on election law roughly three months before the election. But the cases they cite—*Republican Nat'l Comm. v. Democratic Nat'l Comm.*, ___ U.S. ___ (2020) and *Purcell v. Gonzalez*, 549 U.S. 1 (2006) were decided a matter of days before the elections in question. Here, this matter can be decided well before November.

Fourth, though Appellants do not need to recapitulate their arguments explaining why *Esshaki v. Whitmer*, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020) (partial stay granted, 2020 WL 2185553 (6th Cir. May 5, 2020)), *SawariMedia LLC*, and *Thompson v. DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) all mandate application of a severe burden standard here, it bears repeating that in all three cases this Court affirmed that in Michigan, as opposed to in Ohio, the combination of the pandemic, the governor's executive orders and the ballot access statutes imposed a severe burden on those in Appellants' position. Judge Leitman's decision in *SawariMedia* explains in detail why this distinction was "vitally

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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." *Id*. at Page ID #28-29.

important" to the court in *Thompson*. *SawariMedia LLC*, 2020 WL 3097266 at *16 (quoting *Thompson*, 2020 WL 2702483, at *3).

Appellees' assertion that the later deadline here *minimizes* the burden makes no sense. On the contrary, it *increases* the burden, because unlike in *Esshaki*, *SawariMedia* and *Thompson*, where only the last few weeks of signature gathering were impacted by the pandemic and stay at home orders, here the vast majority of the 180-day window fell within the period when the pandemic was in full swing, as Appellees themselves acknowledge. Because the signature-gathering period in those cases extended well into the prior year when there was no pandemic, it makes sense that the courts referenced the number of signatures gathered by mid-March—just a month before the April primary deadlines—to measure diligence. It would be prejudicial and violate equal protection to apply this test with equal force to Appellants here, because Sixth Circuit and Supreme Court case law clearly establishes that independent presidential candidates have the right to gather signatures in the warm summer months when the general election is on voters' minds.[6]

Furthermore, these cases made clear that in Michigan, (1) the governor's "FAQs" did not legalize signature gathering under the stay-at-home orders, and (2)

[6] The plaintiff in *Graveline* "waited to begin his campaign until June 4, 2018" and diligence was not an issue. *Graveline v. Benson*, at *7.

mail-in and other "creative" signature gathering methods are not valid replacements for in-person campaigning.

Esshaki, *SawariMedia* and *Thompson* are good law. This Court will effectively overturn them as applied to Michigan if it rules for Appellees in this case.

CONCLUSION

The state of Michigan cannot force its residents to risk serious illness and death in order to satisfy procedural requirements that the state has interposed between them and the exercise of their fundamental constitutional rights.

Compliance with the state of Michigan's ballot access requirements would necessarily involve a risk of serious illness and death for Appellants and their supporters. Accordingly, the burden that these requirements impose on the Appellants' basic constitutional rights should be deemed "severe" and should be subjected to strict scrutiny.

This Court should affirm Appellants' basic democratic and constitutional rights in connection with the upcoming elections by reversing the decision of the district court. Appellants contend that they are entitled either to an order placing them directly on the ballot, as in *Hall*, or an order that Michigan state officials provide them with a means of accessing the ballot that they can exercise safely and with reasonable diligence before the printing of ballots begins.

Respectfully submitted,

August 3, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(1)-(6) and (7)(B)(ii) because this brief contains 3,069 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.

August 3, 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 August 3, 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