

No. 20-16335

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE COMMON SENSE PARTY, et al.

Plaintiffs-Appellants,

v.

ALEX PADILLA, in his official capacity as Secretary of State of
California,

Defendant-Appellee.

From a decision of the United States District Court
for the Eastern District of California
No. 2:20-CV-01091-MCE-CKD
Hon. Morrison C. England, Jr.

APPELLANTS' OPENING BRIEF

JAMES R. SUTTON, State Bar No. 135930
BRADLEY W. HERTZ, State Bar No. 138564
THE SUTTON LAW FIRM, PC
150 Post Street, Suite 405
San Francisco, CA 94108
Tel: 415/732-7700
Fax: 415/732-7701
jsutton@campaignlawyers.com
bhertz@campaignlawyers.com

QUENTIN L. KOPP
State Bar No. 25070
380 West Portal Ave.
San Francisco, CA 94127
Tel: 415/681-5555
Fax: 415/242-8838
quentinlkopp@gmail.com

Attorneys for Appellants.

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INTRODUCTION

The COVID-19 pandemic has sickened over 500,000 people in California and has killed nearly 10,000. Nevertheless, on the very day in June 2020 that Governor Newsom announced a significant and alarming increase in COVID-19 cases in the State, emphasized the need to continue enforcing strict social distancing and mask rules, and delayed the re-opening of public spaces and retail establishments, the district court in this case issued a decision which shockingly stated that the COVID-19 pandemic placed minimal, if any, restrictions on in-person voter registration efforts as of May 1, 2020. (See Emergency Petition for Writ of Mandamus, Case No. 20-71888, ECF No. 1, Iredell Dec., Exh. D.)

The district court refused to acknowledge that, since mid-March, in-person voter registration efforts have been at worst illegal and unsafe, and at best completely impractical. The district court refused to provide any relief from California's ballot access laws in light of the extraordinary and devastating circumstances caused by the COVID-19 pandemic, despite the fact that at least 14 other states and the District of Columbia, as well as some California state courts, have done so. This Court should immediately vacate the district court's order denying Appellants' motion for a temporary restraining order ("TRO") and/or preliminary injunction, and issue an order granting Appellants' motion, in

acknowledgment of the reality that, between early March and early July 2020, the public health crisis made in-person voter registration efforts virtually, if not completely, impossible and was an absolute barrier to official political party qualification for the Common Sense Party (“CSP” or “the Party”), in violation of Appellants’ First and Fourteenth Amendment rights.

RELIEF SOUGHT

Appellants THE COMMON SENSE PARTY, TOM CAMPBELL, DEBBIE BENREY and MICHAEL TURNIPSEED (“Appellants”) respectfully request that this Court vacate the district court’s order denying Appellants’ motion for a TRO and/or preliminary injunction and enter a new order granting Appellants’ motion, thereby enjoining enforcement of California Elections Code (“EC”) section 5151(c), as applied to Appellants, and thereby permitting CSP to enjoy all of the rights afforded to officially-recognized political parties. (See EC section 5150.)

Even though the July 3, 2020 voter registration submission date has passed, a ruling in this case is still relevant and essential in order to protect Appellants’ First and Fourteenth Amendment rights. If a decision is rendered before August 26, 2020, then Appellants could be able to have its candidates for President and Vice President appear on the November ballot. If a decision is rendered after August 26 but before the November 3, 2020 election, Appellants could enjoy all of

the rights afforded to political parties in connection with the upcoming election, including but not limited to the right to contribute to candidates of its choosing without limit. (See Cal. Govt. Code sections 85301 - 85303.)

STATEMENT OF JURISDICTION

This case is an appeal from the June 26, 2020 order of the District Court for the Eastern District of California denying Appellants' motion for a TRO and/or preliminary injunction. (EOR 1.) The district court exercised jurisdiction pursuant to, inter alia, 28 U.S.C. sections 1331 and 1343. This Court has the authority to consider this appeal pursuant to 28 U.S.C. section 1292(a)(1), as this is an appeal of an order denying a preliminary injunction. Appellants timely filed this notice of appeal on July 10, 2020, according to Rule 3(a)(1) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED

- Whether this Court should exercise its authority to reverse the district court's order denying Appellants' motion for a TRO and/or preliminary injunction and to enter an order granting Appellants' motion.
- Whether the voter registration requirement for California political parties under EC section 5151(c) has placed an undue burden on Appellants' First and Fourteenth Amendment rights given the inability to conduct an effective voter

registration drive between early March and early July 2020 due to the COVID-19 crisis and state and local shelter-in-place orders.

STATEMENT OF FACTS

1. CSP's plans to qualify as an official California political party for the November 2020 ballot.

CSP is a political organization which has been seeking to qualify as a political party for the upcoming November 2020 California election. In the district court, Appellants sought protection from EC section 5151(c), which requires a political organization seeking to become a state-recognized political party to obtain voter registrations of equal to .33 percent of the total number of registered voters in the State by the 123rd day before the Presidential general election. Based on the number of registered voters in California, EC section 5151(c) requires new political parties to secure 68,180 voter registrations in order to qualify for the November 2020 election ballot. The deadline for submitting these registrations to the Secretary of State in order to qualify as a new political party was July 3, 2020.

Once officially recognized under EC section 5151(c), a new political party has the right to designate its candidates for President and Vice President, even without having participated in the primary election. (EC section 5005(b).) An officially-recognized party may also raise campaign funds in larger increments

than other political organizations, and may spend money to support candidates for state office in unlimited amounts. (Cal. Govt. Code sections 85301 - 85303; EOR 2: Sutton Dec., Exh. 6.) Unless relief is granted in this case, CSP and its members will be deprived of these constitutional rights enjoyed by the other recognized parties in California.

CSP developed a plan in September 2019, far in advance of the July 3, 2020 deadline, to collect the required number of registrations. (EOR 3: Campbell Dec., ¶3, EORs 4 & 5: Peace and Glaser Decs. generally: EOR 12 Peace Supp. Dec.) CSP's comprehensive registration-gathering plan had several components, including running a pilot program in December 2019 to test various means of registering voters, soliciting bids from social media companies to drive traffic to the Party's website, having its volunteers solicit new registrants, and, most notably, engaging a professional circulation firm to obtain registrations. (EOR 3: Campbell Dec., ¶3.) Importantly, this plan had CSP focusing its efforts primarily in April, May and June 2020 because, by that point in time, statewide initiative petitions would have to be submitted to County Registrars of Voters and the Secretary of State, thereby freeing up the individuals who had been circulating the statewide petitions to now solicit voter registrations on behalf of the CSP. CSP's entire plan to qualify for the November 2020 ballot was based on the ability to

retain professional circulators in April, May and June 2020. CSP expected to obtain the majority of its new registrants in these months utilizing these newly available circulators, and had every reason to believe that it would reach its goal within this period. (EOR 6: Glaser Supp. Dec., ¶¶9-11.) It had no reason to believe, and could not have been expected to predict, that this well-conceived plan would be abruptly halted by a worldwide pandemic in early March 2020.

The in-person registration process was suspended on or about March 8, 2020 because of the COVID-19 pandemic and concerns related to public health and safety. (EOR 3: Campbell Dec., ¶6.) As of that date, CSP had obtained between 15,000 and 20,000 registrants, over 20 percent of the required number. (EOR 3: Campbell Dec., ¶7.) Had CSP been able to execute its plan to secure the majority of its voter registrations in April, May and June 2020, it would have been able to obtain more than 68,180 voter registrations by July 3, 2020. (EOR 3: Campbell Dec., ¶9; EOR 5: Glaser Dec., ¶13.)

2. State and local shelter-in-place orders.

The devastating nature of the COVID-19 pandemic prompted Governor Newsom to issue a series of executive orders, beginning with a Declaration of Emergency on March 4, 2020. (EOR 2: Sutton Dec., Exh. 1.) Cities and counties throughout the state then issued their own public health orders, some of which

were more restrictive than what the state orders required. (EOR 7: Iredell Dec., Exhs. 1-5.) These state and local public health orders mandated the closures of most businesses and public places and required people to shelter-in-place in their homes and severely restrict their interactions with others, effectively shutting down the state and ushering in a “new normal.” These state and local shelter-in-place orders remained in place through July 3, 2020 (and to this date).

These “social distancing” rules made – and continue to make – in-person solicitation of voter registrations unlawful and impossible, because in-person solicitation necessarily requires a circulator to be in close proximity to a potential registrant and requires significant numbers of people to congregate in public spaces. (EOR 5: Glaser Dec., ¶8.) Moreover, these orders prevented circulators, whether paid professionals or volunteers, from doing their jobs. Because circulators are not deemed “essential,” they are prohibited from setting up a table in a shopping mall, approaching people with a clipboard in a park, or going door-to-door, and signature gathering firms could not recruit or retain circulators during this time period. (EOR 8: Paparella Dec., ¶7.)

Citizens have been explicitly and sternly warned for the last five months that they will be risking their health and safety, and the health and safety of others, if they venture out of their houses for any unnecessary trips, spend any more time

in public spaces than is absolutely necessary, or interact directly with people outside of their immediate families and households. (EOR 7: Iredell Dec., ¶¶ 2-6.) Given such explicit instructions to not visit public spaces or interact with others, and given the absence of volunteer or paid circulators, there is simply no way that CSP could have been expected to conduct a viable voter registration drive between March and July 2020. Thus, in the context of the pandemic, EC section 5151(c) effectively served as an absolute barrier to Appellants' ability to gather the requisite number of voter registrations to qualify CSP for the November 2020 Presidential election ballot by the July 3 deadline.¹

3. Judicial, legislative and executive relief from ballot access requirements due to the COVID-19 crisis.

Across the country, various ballot access requirements have been eliminated or reduced in light of the overwhelming obstacles new political parties and candidates currently face during the public health crisis. Ballot access

¹Importantly, Appellants do not maintain that State or local governments acted unconstitutionally in making in-person registrations virtually impossible; the shelter-in-place orders are certainly prudent and necessary from a public health perspective. Rather, Appellants believe that the shelter-in-place orders contributed to making EC section 5151(c) unconstitutional, as applied to Appellants, given the highly unusual circumstances of the COVID-19 pandemic between early March 2020 and July 3, 2020. Enforcing an otherwise acceptable requirement that new political parties obtain a certain number of voter registrations must give way when real-world circumstances render the requirement unworkable and unattainable.

requirements have sometimes been eliminated or modified by court order; sometimes by an act of a state legislature; and sometimes by a gubernatorial executive order. (EOR 9: Iredell Dec., Exh. 6.) In any case, these jurisdictions have all concluded that ballot access requirements must be modified during these extraordinary times in order to protect the constitutional rights of political parties and candidates.

Recent court cases have addressed the same issue presented in this case; namely, the ability of new or minor political parties to access the ballot given how COVID-19 has impacted the ability to gather signatures and/or voter registrations. For instance, the United States District Court for the Northern District of Illinois held that a state's interest in requiring some minimum showing of support before granting ballot access to a political party can be met with a lowered number of signatures, taking into account the extreme nature of the present public health crisis. (Libertarian Party of Illinois v. Pritzker (N.D. Ill. 4/23/20) No. 20-CV-2112, 2020 WL 1951687.) The federal district court dramatically reduced the number of signatures needed to qualify a new political party for the Illinois ballot to only 10 percent of the original statutory requirement. (Id.)

Similarly, a federal district court granted relief to a minor political party from New Hampshire's 3,000 signature requirement threshold for ballot access.

(Libertarian Party of New Hampshire v. Sununu (D. N.H. 7/28/20) No. 20-cv-688-JL, 2020 WL4340308.) The district court ordered a 35 percent reduction in the number of signatures required for a political party to qualify for the ballot, in recognition of the detrimental impact of present public health circumstances on the ability to gather signatures. (Id.)

Another federal district court recognized that the ballot access signature threshold under Virginia law unreasonably hindered the ability of minor parties to qualify for that state's ballot given COVID-19. (Constitution Party of Va. v. Va. State Bd. of Elections (E.D. Va. 7/15/20) No. 3:20-cv-349.) The court ordered a 65 percent reduction in signature requirements for statewide candidates and a 50 percent reduction for Presidential candidates. The court also extended the signature submission deadline by almost two months. (Id.) Finally, a court in Maryland cut the signature requirement for minor political parties by 50 percent, from 10,000 to 5,000. (Maryland Green Party et al v. Hogan (D. Md. 5/19/20) No. 1:20-cv-01253-ELH.)

In sum, courts in other jurisdictions have acknowledged the pressing need for ballot access accommodations given COVID-19's effect on the ability to qualify for the ballot – and this Court should do the same.

4. California's deteriorating COVID-19 situation.

During the month of June, California unfortunately experienced a huge spike in COVID-19 cases and deaths. (See “Our Luck May Have Run Out’: California’s Case Count Explodes,” The New York Times (6/29/20).) In response, the State and several municipalities issued more stringent health orders in June, which included shutting down various businesses and public spaces. (See “‘We Have to Enforce and We Will’: Newsom To Enact Stricter COVID-19 Enforcement, Roll Back Reopenings,” CBS News (6/30/20).) Governor Newsom also issued a statewide mandatory mask requirement on June 18, 2020. (See “Californians Must Wear Face Masks in Public under Coronavirus Order Issued by Newsom,” San Francisco Examiner (6/18/20).) Though some cities and counties had hoped to re-open in June, they enacted new rules further limiting access to public spaces, and instituted their own mask requirements. (See “California Officials Rolling Back Reopenings as Coronavirus Surges Creates New Crisis,” Los Angeles Times (7/13/20).)

Given this increase in cases and the corresponding health orders, citizens were understandably unwilling to come into close proximity with and engage in conversation with registration solicitors. The district court was therefore wrong in implying that the COVID-19 situation in California was improving, wrong in stating that much of California was in the process of re-opening, and wrong in

deciding that CSP could have solicited voter registrations in-person as of May 1, 2020.

PROCEDURAL HISTORY

Appellants filed a Verified Complaint on May 29, 2020, and then filed a Motion for TRO and/or Preliminary Injunction with an accompanying Memorandum of Points and Authorities on June 4, 2020. Appellants' Memorandum of Points and Authorities established that: (1) Appellants are likely to succeed on the merits of the case; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in their favor; and (4) the preliminary relief sought is in the public interest. (See Winter v. Nat. Res. Def. Council (2008) 555 U.S. 7, 20.) Appellee, ALEX PADILLA, in his official capacity as the Secretary of State of California, ("Appellee") filed an Opposition Brief on June 12, 2020, and Appellants then filed a Reply Brief on June 19, 2020. Appellee subsequently made objections to the Reply Brief and Appellants filed a Response to these objections.

On June 22, 2020, the district court informed Appellants that it would not permit any oral argument. On June 26, 2020, the court entered an order denying Appellants' motion, demonstrating an alarming disregard for current circumstances caused by the COVID-19 pandemic. (EOR 1.) The district court's

refusal to allow oral argument deprived Appellants of the opportunity to ask the court to take judicial notice of the practical worsening of the COVID-19 pandemic since they had filed their Memorandum of Points & Authorities and Reply and as of the day of oral argument. This refusal to allow oral argument thereby constituted an abuse of discretion, given that the court did take judicial notice of what turned out to be false facts about the State's re-opening.

Immediately thereafter, Appellants filed an Emergency Writ of Mandamus with this Court, asking for relief by July 3, 2020, the statutory deadline for qualifying a political party for the November 2020 California ballot. The Court denied this emergency request. Appellants then filed a Motion to Expedite the briefing and hearing schedule in their appeal with this Court, asking for relief by August 26, 2020, the date when the Secretary of State is supposed to send the certified list of candidates for the November ballot to the County Registrars of Voters. The Court denied this Motion to Expedite.

SUMMARY OF THE ARGUMENT

The district court reached numerous erroneous and prejudicial factual and legal conclusions which require reversal by this Court. Most notably, the district court failed to acknowledge the fact that, from March 19, 2020 (when Executive Order No. N-33-20 was issued) to July 3, 2020 (the voter registration submission

deadline), collecting voter registration in-person was illegal, unsafe, and impractical. The district court instead claimed that in-person voter registration drives were safe and legal as early as May 1, 2020. In addition, the district court erred in completely “DISREGARDING” the various local government shelter-in-place orders, somehow concluding that orders issued by cities and counties to close public spaces and businesses did not impact public behavior in these jurisdictions. Finally, the district court ignored facts in the record regarding the timing of CSP’s voter registration gathering plans – namely, that CSP could not complete its plan to gather the remaining registrations in April, May or June 2020 – as well as the fact that other methods of obtaining voter registrations, apart from in-person methods, were unavailing. Without reversal by this Court, Appellants will be unable to participate in the November 2020 general election as an officially-recognized political party, will be unable to support candidates of their choosing, will be deprived of their First and Fourteenth Amendment rights, and will suffer irreparable harm.

STANDARD OF REVIEW

Whether the shelter-in-place orders, both State and local, prohibited, or effectively prohibited, voter registration drives between early March and July 3, 2020 is a legal question that this Court considers *de novo*. (Carson Harbor Vill.,

Ltd. v. Unocal Corp. (9th Cir. 2001) 270 F.3d 863, 870 [holding that, “[t]he district court’s interpretation of a statute is a question of law which we review de novo”].) Appellants contend that the shelter-in-place orders certainly prohibited the type of in-person voter registration effort needed to meet the requirements of EC section 5151(c).

The district court’s factual findings – whether public apprehension about contracting or spreading the virus made voter registration drives impossible regardless of what the shelter-in-place orders said; whether CSP could have gathered voter registrations via mail or email; that CSP’s plans to meet the July 3 deadline relied on circulators in April, May and June; whether public spaces and businesses have ever “re-opened” to a sufficient degree to allow for meaningful voter registration drives; etc. – are reviewed under the clearly erroneous standard. (United States v. Cazares (9th Cir. 1998) 121 F.3d 1241, 1245.) This Court has explained that the “clearly erroneous” standard is “elusive at best.” (In re Cement Antitrust Litig. (9th Cir. 1982) 688 F.2d 1297, 1305-06.) But, “a finding [of fact] is ‘clearly erroneous’ when although there is evidence to support [the district court’s finding], the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed.” (Anderson v. Bessemer (1985) 470 U.S. 564, 574.) Appellants contend that the district court definitely made

mistakes with regards to all of these factual issues.

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT RECOGNIZING THAT COLLECTING IN-PERSON VOTER REGISTRATIONS WAS ILLEGAL FROM EARLY MARCH TO JULY 3, 2020.

A. The district court erred in finding that the State’s shelter-in-place order permitted in-person voter registration drives as of May 1st.

The gravamen of the district court’s ruling, and the most notable basis for this Court to vacate the decision, are the claims that: (1) “The stay-at-home orders only prohibited Petitioners from conducting in-person solicitation, if at all, for a very short period of time” (EOR 1: p.15; emphasis added); and (2) that there was only “a short window where in-person solicitation may not have been permitted” (EOR 1: p.12; emphasis added). The conclusion that in-person voter registration drives were only prohibited for just six weeks, between March 19 and April 30, 2020 is belied by the record before the district court. California’s State and local shelter-in-place directives did not allow for in-person voter registration gathering efforts – either on May 1st (as claimed by the district court), on June 26, 2020 (the date of the district court’s ruling), or at present. The Governor’s original order on March 19th mandated the closures of all but the most “essential” businesses and required people to stay at home. (EOR 10: Chang Dec., Exh. 5.) Nothing in the

Governor's order stated or implied that in-person voter registration falls under the "essential" exception, which instead is limited to hospitals, pharmacies, grocery stores, fire departments, etc.

The district court agreed with Defendant's assertion that the State officially permitted in-person voter registration solicitation on May 1st, when it updated the "Stay at Home Q&A" information on the State's COVID-19 information website to include "election-related activities" as permissible activities. This assertion is not true. The "election-related activities" allowed by this webpage update clearly related solely to the actual act of voting itself, and the state most likely added these activities at that time because two elections were scheduled to take place in the State soon thereafter, on May 12, 2020. Proving that this website update was about voting, not voter registration drives, was that it appeared under the heading "What About Voting?" and added "the collection and drop-off of ballots" as permissible activities. (EOR 11: Quirarte Dec., ¶5.) Thus, the only activities related to an election which became permissible on May 1st were dropping off a ballot at a voting center or working at a polling place (or similar activities relating to the act of voting), not voter registration or initiative petition drives. Furthermore, the "election-related activities" was not added to the official order issued by the Governor, but rather was buried in the text of a Q&A on a state

website. Not only did the district court err in equating a website Q&A with the law, but it also had no evidence in the record that potential CSP registrants and circulators were even aware of the update or the website Q&A.

The district court's assertion that the State's shelter-in-place order allowed in-person registration drives as early as May 1 is also contradicted by actions taken by the Governor and State Legislature during this same time period to reduce voting at physical polling places and to minimize interactions with poll workers for this November's election. Specifically, on May 8, 2020, only a week after the district court claimed it was safe to go outside and interact with circulators, Governor Newsom ordered all County Registrars of Voters to send a vote-by-mail ballot to all registered California voters. (Executive Order N-64-20.) The State Legislature codified this Executive Order on June 28, 2020, two days after the district issued its ruling. (Cal. Assembly Bill 860.) Potential CSP registrants and circulators who read media accounts of these vote-by-mail mandates clearly received the message that they should not be interacting with others, touching someone else's pen or clipboard, or even venturing into public spaces.

B. The district court erred in “DISREGARDING” local governments’ shelter-in-place orders – which made clear that

in-person voter registration drives were not allowed, regardless of what the state’s shelter-in-place order said or did not say.

The district court explicitly stated that it completely “DISREGARDED” the shelter-in-place orders issued by local governments which were discussed and attached to Appellants’ Reply Brief. (EOR 1: p. 10, fn. 4; capitalization done by district court.) Despite the district court’s assertion that these local orders constituted “new arguments” not raised in Appellants’ Complaint or Memorandum of Points & Authorities, they were actually provided to the district court specifically in direct response to the Appellee’s argument in his Opposition that the State’s shelter-in-place orders allowed in-person voter registration as of May 1st. The district court therefore abused its discretion in excluding this evidence and ignoring these local orders because Appellants were “merely responding” to arguments offered by the Appellee. (Grange Insurance Assn. v. Sran (E.D. Cal. 2016) 184 F.Supp.3d 799, 819 [arguments in reply were neither “new” or improper because “Plaintiff was merely responding to . . . arguments advanced by [Defendant]”].)

Had Appellee not made the surprising claim that Appellants were actually allowed to conduct in-person voter registration under the state’s shelter-in-place orders as early as May 1st (i.e., if Appellee had acknowledged that people were not

supposed to venture outside of their homes or interact with other non-household members unless absolutely “essential”), Appellants would not have needed to point out that local orders, as well as the orders issued by Governor Newsom, critically hindered Appellants’ effort to qualify for the November 2020 ballot. The inclusion of the local orders in Appellant’s Reply Brief responded to Appellee’s absurd argument that circulators and voters were allowed to directly interact in close proximity with potential registrants as early as May 1st and clearly demonstrated that California’s ballot access laws placed an undue burden on Appellants during the public health crisis.

The shelter-in-place orders issued by cities and counties directly impacted the ability of CSP to solicit new registrants between March and July 2020 and therefore infringed its First Amendment right to qualify for the ballot. The prohibition on interacting with other people in public places – which is of course what circulators must do when attempting to convince citizens to register to vote – is spelled out explicitly in the local orders. (EOR 7: Iredell Dec., Exhs. 1-5.) These local orders also warned citizens that they would be risking their health and safety, and the health and safety of others, if they ventured outside of their houses for unnecessary trips or spent more time out that was absolutely necessary. (Id.) Given such explicit instructions to not interact with others, there is simply no way

that CSP could have been expected to have conducted a viable voter registration drive between March 2020 and July 2020.

The district court not only “DISREGARDED” these local government orders, it effectively disregarded the truth. Ignoring the local governments’ orders, and more importantly ignoring the truth of how COVID-19 prevented interactions between voters and circulators, are grounds for this Court to vacate the district court’s order.²

II. THE DISTRICT COURT ERRED IN FAILING TO RECOGNIZE THAT COLLECTING IN-PERSON VOTER REGISTRATIONS WAS UNSAFE FROM EARLY MARCH TO JULY 3.

A. The district court downplayed the severity of the pandemic and ignored the reality of COVID-19.

In suggesting that CSP should have been gathering voter registrations in-person as of May 1st, the district court failed to acknowledge the severity of the

²The district court also indicated that it “DISREGARDED” the additional examples of judicial, legislative and executive orders in other states granting ballot access relief which were cited in the Reply Brief, evidently also believing that these additional examples were “new arguments.” (EOR 1: p. 10, fn. 4.) Again, the district court erred in characterizing these additional examples of judicial, legislative and executive ballot access relief as “new arguments.” First, Appellants’ Complaint in fact contained several examples of judicial, legislative and executive ballot access relief; the Reply Brief simply referenced additional examples discovered while researching responses to Real Party’s opposition. Second, Appellants wanted to make certain that the district court had information about all precedent which may be relevant to its decision.

pandemic and failed to recognize how much of a public health threat COVID-19 is. Media accounts, mandatory mask orders, re-closing of retail establishments and the recent surge in the number of COVID-19 cases and deaths in California signal that COVID-19 is still a huge risk and that Californians do not believe that it is safe to interact with or be in close proximity to others.

In this regard, the district court erred in relying on Thompson v. Dewine. (Thompson v. Dewine (6th Cir. 2020) 959 F.3d 804.³) This case out of Ohio is distinguishable from the case at hand, and – like the district court in this case – erroneously made light of COVID-19 and ignored the realities of present circumstances. First, unlike the State and local shelter-in-place orders in California, Ohio’s order had an explicit exception for “all activity protected under the First Amendment” and the state had explicitly confirmed that “its stay-at-home restrictions did not apply to ‘initiative or referendum circulators.’” (Id. at p. 6.) Furthermore, the Ohio case involved signatures on initiative petitions, not voter registrations for new political parties, and the relevant Ohio statute did not require signature drives conducted via mail or email to include a directive to disregard

³We note that the district court in this Ohio case had ruled that the state’s ballot access laws had to be mitigated because of the COVID-19 crisis, and that the Sixth Circuit’s reversal of the district court’s decision is currently on appeal to the United States Supreme Court. (Emergency Application to Vacate Stay filed 6/16/20, U.S. Supreme Court Case No. 19A-1054.)

them (see discussion of EC section 2158(b)(4) below). Because Ohio allows initiative campaigns to gather signatures via mail and email, while California does not allow voter registrations to be gathered this way, Thompson v. Dewine is not instructive.

More notably, the Sixth Circuit’s decision is difficult to reconcile with the health risks posed by the COVID-19 pandemic, including the rather absurd suggestions that the initiative’s proponents might “bring the petitions to electors’ homes to sign” and “sterilize writing instruments between signatures,” and that relief from the state’s ballot access laws was not warranted because the “disease [was] beyond the control of the state.” (*Id.* at pp. 7-8.) The Sixth Circuit panel, like the district court here, based its decision to deny relief from ballot access laws on an inaccurate picture of what’s going on in the real world. Further, the Sixth Circuit panel, like the district court here, appeared to construe the complaint at issue as one against the State’s response to COVID-19. Of course the State did not cause COVID-19 – what is relevant to this appeal is what the state did: to enforce an unreasonable barrier to ballot access which the COVID-19 circumstances has rendered unconstitutional as applied to CSP.

B. The district court relied on facts not in the record about the state of affairs in June vis-à-vis COVID-19 and the “re-opening” of California.

The district court also erred in relying on unsubstantiated facts not in the record that the State had begun to “re-open” as of early June 2020. (EOR 1: pp. 12-13. [“ . . . even now when much of California is re-opened . . . ”].) Not only was the State certainly not re-opened in June – nor it is re-opened now – under any circumstances,⁴ neither Appellants nor Appellee ever submitted evidence about whether the State was re-opening in June.⁵

Instead, Appellee only provided documents and declarations about the status of the shelter-in-place orders in March, April and May, and Appellants similarly provided documents and declarations about the efficacy of in-person voter registration during that time period. The district court’s decision to deny Appellants relief from the ballot access laws was nevertheless based on its view of the state of affairs in late June, even though no facts about the state of affairs in

⁴COVID-19 infections and deaths throughout California unfortunately increased in June 2020. (See Emergency Petition for Writ of Mandamus, Case No. 20-71888, ECF No. 1, Iredell Dec., Exh. C)

⁵As mentioned above, Appellants believe that the worsening of the COVID-19 pandemic in June, since the parties had filed their pleadings, could have been discussed and debated at oral argument – but the district court refused to hold a hearing in the case. Appellants therefore believe that the district court’s refusal to hold oral argument in this case constituted an abuse of discretion – especially given that the court based its ruling on what turned out to be false facts about the State’s re-opening and the spreading of the virus.

late June were in the district court's record. This Court must intervene immediately both to correct the district court's error in drawing on facts not in the record, and to set the record straight about what was – and still is – going on in the real world vis-à-vis COVID-19 and how it has impacted public behavior.

III. THE DISTRICT COURT ERRED IN FAILING TO RECOGNIZE THAT COLLECTING IN-PERSON VOTER REGISTRATIONS WAS IMPRACTICAL FROM EARLY MARCH TO JULY 3.

Even if, as the district court contends, in-person registration drives were technically permissible as of May 1st (which they were not), these efforts would have been futile. During a time when the public was being continually instructed to “stop the spread,” “stay safe” and wear masks, it is unreasonable to think that people would be willing to take the risk of interacting with circulators about a new political party. People are hesitant to come in to close contact with their own friends and neighbors, let alone with strangers – and can also become fearful or even hostile if approached by a circulator. (EOR 6: Glaser Supp. Dec., ¶14; EOR 8: Paparella Dec., ¶8.) Furthermore, in-person registration gathering involves more than just a circulator coming in to close proximity to a potential registrant, it also involves the exchange of physical objects – pens, clipboards and registration forms – which is likely to exacerbate a potential registrant's apprehension. (EOR 8: Paparella Dec., ¶8.) Moreover, the public spaces typically used for voter

registration drives because of heavy foot traffic – shopping centers, libraries, government buildings, etc. – have basically been empty throughout the shelter-in-place orders.

Other courts have seen what the district court could not. The federal district court which granted a political party’s request for relief from Illinois’ ballot access laws in light of the COVID-19 pandemic recognized that voter registration drives are likely to be ineffective and impractical for the foreseeable future: “[T]he court notes that even after some restrictions are lifted, until a vaccine is available, voters are likely to continue practicing social distancing and avoiding any physical hand contact with other persons or objects.” (Libertarian Party of Ill. v. Pritzker, supra, p. 7.) The district court in this case did not see this obvious point, which is ground for reversal by this Court.

IV. THE DISTRICT COURT ERRED IN IGNORING FACTS IN THE RECORD REGARDING DETAILS OF CSP’S VOTER REGISTRATION PLANS.

Appellants made very clear in both their Memorandum of Points & Authorities and Reply Brief that they always planned on focusing their voter registration efforts to qualify for the November 2020 ballot in earnest starting in April or May 2020, when the individuals who had been circulating statewide initiative petitions up until that point in time would be available to solicit voter

registrations on behalf of the CSP. This plan was reasonable, and was based on a pilot program conducted by the CSP in late 2019 and the advice of experts who indicated that soliciting voter registrations between December 2019 and March 2020 would not be particularly effective. (EOR 3: Campbell Dec., ¶3; EOR 6: Glaser Supp. Dec., ¶¶9-10.) More specifically, CSP planned to – and had no reason to believe that it would not be able to – ramp up its efforts in April, May and June 2020 when statewide initiative petitions had to be turned in and it could therefore more easily retain the number of circulators needed to gather the additional voter registrations by July 3, 2020. (EOR 6: Glaser Supp. Dec., ¶¶9-11.) Neither the district court nor Appellee ever disputed or even questioned that CSP planned to ramp up its voter registration drive in April or May – they just chose to ignore this important fact and how it supports the assertion that relief from EC section 5151(c) is warranted.

Additionally, the district court completely mis-characterizes Appellants’ plan to reach the 68,180 goal. The district court asserts that Appellants “essentially abandoned” their voter registration efforts when the COVID-19 pandemic hit in early March (EOR 1: p.12) – though the real facts are that CSP was unable to execute on the plan to focus on April, May and June once the COVID-19 pandemic shut down public spaces and completely changed most

human interactions. The district court also refers to Appellants’ “registration-gathering plan up until early March when the COVID-19 crisis hit” (EOR 1: p. 5) – but completely ignores that CSP’s strategy (which, again, was completely reasonable) was to gather the vast majority of the required 68,180 registrations in April, May and June. As described in various declarations in the district court’s record, COVID-19 was the sole reason why CSP could not reach the registration goal by July 3, 2020.

The district court also attempts to characterize the facts that CP “only” had gathered 5,519 voter registrations by October 2019, 9,819 registrations by January 2020, 10,859 by February 2020, and 15,010 by June 2020 as evidence that it would not reach its goal within the given time frame (EOR 1: pp. 4-5) – but the opposite is true. The data relied on by the district court all occurred before the time when CSP planned to ramp up its efforts and at the time when the Party was utilizing significantly fewer paid circulators than it intended to use in April, May, and June. The more accurate way to characterize this data is that the Party was able to obtain thousands of voter registrations between September 2019 and March 2020 period even though it had not yet committed significant resources or efforts to its voter registration drive; in other words, the record before the district court shows that the CSP was able to reach over 20 percent of its goal relying solely on

the efforts of volunteers and a minimal number of paid circulators. Appellants believed, and its experts concurred, that the three months after statewide initiative petitions were submitted would be more than enough time for the CSP to gather the remaining voter registrations to reach its goal. (EOR 3: Campbell Dec., ¶9; EOR 5: Glaser Dec., ¶13.)

The COVID-19 crisis shelved CSP's voter registration gathering plan and irreparably harmed Appellants' First and Fourteenth Amendment rights. The Court must vacate the district court's decision because the COVID-19 pandemic, the ensuing State and local shelter-in-place orders, and the reticence of the public to interact with others unless absolutely necessary rendered CSP's voter registration plan moot. Had the pandemic not taken over the state, CSP would have been able to send circulators into shopping centers, farmers markets, parks and other public spaces in April, May, and June and would have been able to reach 68,180 new registrations by July 3, 2020. (EOR 6: Glaser Supp. Dec., ¶17.)

Appellants should not be faulted for not front-loading their efforts and anticipating a global pandemic. The First Amendment does not impose such impossible foresight on political organizations seeking access to the ballot. Instead, courts have consistently invalidated ballot access laws when – as has

happened in California since early March – the laws make it “virtually impossible” to qualify for the ballot. (See, e.g., Williams v. Rhodes (1968) 393 U.S. 23, 25.)

V. THE DISTRICT COURT ERRED IN CONCLUDING THAT CSP COULD HAVE RELIED ON METHODS OF VOTER REGISTRATION OTHER THAN IN-PERSON EFFORTS.

The district court apparently believes that being able to post information about CSP on social media and send emails with links to voter registration forms are perfectly acceptable and effective ways to convince individuals to register with a new political party. Though the district court lists various ways in which political organizations can encourage voters to register with a new political party, including mailings, the internet, paper registration cards, and on-line applications (EOR 1: p. 3), the facts in the record reveal that in-person solicitation is the only effective method to register voters with a new political party. As clearly demonstrated by the declarations of petition circulation experts, as well as CSP’s experience soliciting voter registrations since last fall, in-person solicitation is the only way to gather new registrants because the circulator can actually engage with the potential registrant and discuss CSP’s message and mission face-to-face. (EOR 5: Glaser Dec., ¶¶8-9.) The district court completely ignores that letters and emails of course do not allow for this kind of personal engagement, and does not even discuss these expert declarations.

Though the district court references the state law requirement that voter registration cards sent through the mail or email must include a cover letter “instructing the recipients to disregard the cards if they are currently registered voters” (EC section 2158(b)(4); emphasis added), it ignores that this state-mandated cover letter effectively acts as a complete bar to gathering voter registrations of already registered voters via mail or email. Rather paradoxically, in order to pursue a mail or email registration gathering effort, CSP would have to spend resources on creating and distributing the materials, and then include a notice telling potential registrants to ignore those very same materials. There is no reason to think that recipients would not heed these instructions and toss the letter or delete the email. This state-mandated cover letter makes the alternative methods suggested by the district court insufficient to overcome the unconstitutional barrier of EC section 5151 during the current public health crisis. Notably, in the portion of its ruling in which it emphasizes alternative mail and email registration efforts, it does not address or analyze how the state-mandated cover letter impacts such efforts. (EOR 1: p. 12.)⁶

⁶In addition, the postal service has not been untouched by the current public health crisis and the public is not opening and reading their mail as they usually would. (Some citizens are evidently even placing their mail in “quarantine” for several days before touching it.) A federal district court recognized that direct mail campaigns are not viable at this time and do not justify denying relief from

Soliciting voter registrations via electronic means is also not effective. The record shows that voters simply do not respond to requests to register with a new political party through an email the same way they do through a conversation with a live human being. (EOR 5: Glaser Dec., ¶9; EOR 6: Glaser Supp. Dec. ¶16.) In addition, electronic voter registration drives do not reach lower-income communities which may not have access to the internet or older adults who may not be familiar with operating electronic devices. The shelter-in-place orders have also hampered public access to computers at community centers and libraries.

VI. APPELLANTS WILL BE IRREPARABLY HARMED WITHOUT REVERSAL OF THE DISTRICT COURT’S ORDER.

Without the requested relief from this Court, CSP will be deprived of its fundamental freedoms protected under the First and Fourteenth Amendments, and

ballot access requirements:

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.

(Esshaki v. Whitmer (ED Mich. 4/20/20) No. 2:20-CV-10831-TGB, 2020 WL 1910154, at *19.)

will be prevented from participating in the November 2020 election as an official political party – through no fault of its own. Injury to these fundamental rights can not be corrected on appeal after the November election has passed. (See Ebel v. Corona (9th Cir. 1983) 698 F.2d 390, 393 [injury to one’s fundamental right of freedom of expression constitutes irreparable harm and goes beyond monetary damages].) Courts have acknowledged that “[r]estrictions on access to the ballot impinge on the fundamental right to associate for the advancement of political beliefs and the fundamental right to vote” and that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” (Elrod v. Burns (1976) 427 U.S. 347, 373-74; Klein v. San Clemente (9th Cir. 2009) 584 F.3d 1196, 1207-08 [granting preliminary injunction against anti-littering ordinance which prohibited leafleting of parked, unoccupied vehicles because it violated First Amendment rights]; CTIA - The Wireless Assn. v. Berkeley (9th Cir. 2019) 928 F.3d 832, 851 [stating that “party seeking preliminary injunctive relief in the First Amendment context can establish irreparable injury . . . by demonstrating the existence of a colorable First Amendment claim”].)

Not allowing CSP to qualify as an official political party for the November 2020 election – one of the most significant Presidential elections in recent history – implicates Appellants’ First Amendment rights, specifically their freedom of

speech and freedom of association. (Elrod, supra, 427 U.S. at 373-74.) Without the reversal of the district court's order and the issuance of a new order granting Appellants' motion for a TRO and/or a preliminary injunction, Appellants will suffer irreparable injury because they will be deprived of their fundamental rights to vote for a Presidential and Vice Presidential candidate of their choice, and will be deprived of the ability enjoyed by other political parties to contribute to candidates of CSP's choosing without limit.

CONCLUSION

Sadly for California and the entire country, COVID-19 has not gone away. In fact, in California, infections and deaths recently spiked, compelling Governor Newsom and local public health officers to re-emphasize that citizens need to continue to stay at home as much as possible and to avoid interactions with people outside of their immediate family. For Appellants and other political organizations seeking to qualify for the November 2020 ballot, COVID-19 has meant that they can not engage voters about their mission or message, can not conduct meaningful voter registration drives, and that their First and Fourteenth Amendment rights have been severely impaired.

The district court issued a decision claiming that Appellants could have, and should have, sent circulators into shopping centers, public parks and other public

spaces as early as May 1st – despite clear evidence in the record that an in-person voter registration drive would have been unsafe from a public health perspective, that it would have violated State and local shelter-in-place orders, and that citizens were unwilling to interact with circulators during this time period. The district court’s decision also claims that Appellants could have focused on mail and email solicitation efforts – despite clear evidence in the record that in-person solicitation is the only viable option for new political parties to obtain voter registrations and – more notably -- that CSP’s plans to gather the majority of its new registrants in April, May, and June was dashed by the unanticipated public health crisis.

For these reasons, this Court should reverse the district court’s order and vacate its decision. This Court should enter a new order granting Appellants’ motion for a TRO and/or preliminary injunction, in order to preserve Appellants’ First and Fourteenth Amendment rights.

Dated: August 5, 2020

The Sutton Law Firm, PC

By: s/James R. Sutton

James R. Sutton

Bradley W. Hertz

The Sutton Law Firm, PC

Attorneys for Appellants

THE COMMON SENSE PARTY,

TOM CAMPBELL, DEBBIE BENREY

and MICHAEL TURNIPSEED