UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC ESSHAKI, as candidate for United States Congress and in his individual capacity,	Case No. 2:20-cv-10831
Plaintiff, vs.	Hon. Terrence G. Berg
GRETCHEN WHITMER, Governor of Michigan, JOCELYN BENSON, Secretary of State of Michigan, and JONATHAN BRATER, Director of the Michigan Bureau of Elections, in their official capacities,	Mag. Elizabeth A. Stafford
Defendants.	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I. INTRODUCTION

Defendants would have this Court believe that Esshaki and other similarly situated candidate are not severely burdened and do not face irreparable harm by Defendants' enforcement of M.C.L. §§ 168.133 and 168.544(f) in combination with Governor Whitmer's Executive Order 2020-21 (the "Stay-home Order"). Nothing could be further from the truth.

Defendants insist on enforcing the signature requirement and filing deadline, notwithstanding that the Stay-home Order has stripped candidates of the means to satisfy those requirements by making it a crime for them to leave their homes to collect signatures. In combination, these ballot access requirements impose severe burdens on candidates like Esshaki, making it nearly impossible for them to get their names printed on the ballot and leaving them with no meaningful way to run for public office.

While Esshaki has demonstrated a strong likelihood of success on the merits of his constitutional claim, Defendants have utterly failed to show that the State has a compelling or substantial interest in refusing to modify the ballot access requirements. Moreover, Defendants deny that Esshaki will suffer irreparable harm in the absence of injunctive relief, ignoring altogether that without relief Esshaki will be robbed of the ability to run for office in a meaningful way or, alternatively,

will be forced to spend an exorbitant amount of money on a mail campaign that is entirely unproven in these unprecedented times.

Because Esshaki has demonstrated a strong likelihood of success on the merits of his claim, and because he will suffer irreparable harm without immediate injunction relief, Esshaki is entitled to relief from this Court.

II. Esshaki has demonstrated a strong likelihood of success on the merits because he has shown that he is severely burdened by the combination of the signature and deadline requirements, and the Stay-home order.

Defendants argue that Esshaki has failed to demonstrate a strong likelihood of success on the merits because the ballot-access statutes in combination with the Stay-home Order do not impose a severe burden on Esshaki. They are wrong.

First, Defendants argue that Governor Whitmer's declaration of an emergency six weeks prior to the filing deadline should have "acted as a wake-up call" to cause Esshaki to "double-down" on signature collection efforts before the Stay-home Order was announced thirteen days later on March 23, 2020. (ECF No. 6 at PageID).

As an initial matter, this is a tacit admission that Defendants have effectively imposed an early filing deadline and a further acknowledgement of the severe burdens Esshaki and other candidates face in trying to collect signatures while the Stay-home Order is in place. Further, these assertions are wholly irrelevant to the issue here. To suggest that Esshaki could have obtained signatures prior to the

Stay-home Order without severe burden says nothing whatsoever about the burdens Esshaki faces in his attempts to collect signatures and meet the filing deadline while the Stay-home Order is in effect.

Second, Defendants argue that Esshaki is not severely burdened because he can obtain signatures by mail. Defendants ignore, however, the incredible expense and uncertainty associated with this option. Indeed, the Esshaki campaign sent nearly 1,000 petitions by mail on or around April 2, 2020, at a cost of roughly $1.75 per piece. To date, the campaign has received approximately fifteen signatures by mail. That is roughly $115 dollars per signature.[1] Thus, Esshaki would be required to spend around $45,000 to obtain the additional 400 signatures needed. These would not be mere "incidental costs."

Additionally, advocating for the use of a mail campaign to obtain signatures assumes that the postal service will continue to operate at normal capacity, notwithstanding that several post offices, including Esshaki's home post office, are temporarily closed or have decreased the frequency of mail delivery in half.[2] This means that it is taking the post office twice as long to deliver both outgoing and incoming mail.

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[1] For purposes of comparison, the first 700 signatures Esshaki collected cost nothing except the printing fees for the petition forms.

[2] *See* Fox2 News article located at: https://www.fox2detroit.com/news/some-se-michigan-zip-codes-to-receive-mail-every-other-day-due-to-covid-19.

Third, and equally unavailing, Defendants argue that even if Esshaki does not have his name printed on the ballot, he is not severely burdened because he can run as a write-in candidate. (ECF No. 6 at PageID 112). This ignores reality. Indeed, the Supreme Court has indicated that "[t]he realities of the electoral process ... strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Lubin v. Panish,* 415 U.S. 709, 719 n. 5, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *see also Anderson,* 460 U.S. at 799 n. 26, 103 S.Ct. 1564 ("We have previously noted that [a write-in] opportunity is not an adequate substitute for having the candidates name appear on the printed ballot"). And in 2018, in *Graveline v. Johnson*, this Court recognized that because Michigan's statutory scheme prevented the plaintiff from having his name on the ballot, the plaintiff and his voters had no alternative means to exercise their rights to cast their votes effectively, and that writing in the plaintiff's name was not an "adequate substitute." 336 F. Supp. 3d 801, 811 (E.D. Mich. 2018).

III. Defendants' articulation of the State's asserted interests in enforcing the ballot-access scheme and its chosen means of pursuing those interests while the Stay-home Order is in effect are overstated and disingenuous.

The ballot-access statutes **in combination with** the Stay-home Order impose severe burdens (as opposed to "more-than-minimal but less-than-severe") on Esshaki's constitutional rights. Because of the severity of those burdens, the State's interest in enforcing ballot-access statutes must be "narrowly drawn to advance a

state interest of compelling importance." *See Burdick v. Takushi,* 504 U.S. 428, 434 (1992).

Defendants argue that burdens imposed on Esshaki are somewhere between minimal and severe, thus asserting that the more "flexible" standard applies here, which weights the burden imposed on Esshaki against the State's asserted interest. (ECF No. 6 at PageID 110). Under this standard, Defendants argue that the State's interest in regulating the voting process and requiring candidates to obtain signatures to have their names printed on the ballot outweighs the burden imposed on Esshaki. Defendants are wrong.

No one is denying that the State has an interest in requiring candidates to obtain signatures to have their names on the ballot. Under normal circumstances, Esshaki could not complain that the burden of gathering signatures outweighs the State's interest. But these are not normal circumstances, and Defendants all but ignore the combined effect of the statutes and the Stay-home Order.

The issue here is whether the State's interest in enforcing the statutes **in combination with** the Stay-home order outweighs the burden (or impossibility) Esshaki faces in his attempts to comply with the statutory requirements to have his name printed on the ballot. *See Graveline,* 336 F. Supp. 3d at 810 (E.D. Mich. 2018) (noting that "the Court must consider the 'combined effect' of the challenged regulations, rather than each statute's requirement by itself.").

Under any standard of review, requiring Esshaki to obtain at least 1,000 signatures by April 21, 2020, during a state-wide quarantine, imposes a substantial burden on Esshaki because he has been and is prohibited from leaving his home until after the filing deadline.

i. Defendants' interest in refusing to modify the filing deadline does not outweigh the burdens imposed on Esshaki.

Defendants argue that the State has an important interest in enforcing the filing deadline because an extension would leave Secretary Benson without "sufficient time to canvass the petitions, provide a challenge period, and meet the ballot certification deadline." (ECF No. 6 at PageID 115). Defendants further argue that providing citizens "the opportunity" to participate in the political process is not "on par with protecting lives." (ECF No. 6 at PageID 115-16). This line of reasoning is disingenuous at best.

Indeed, these considerations did not prevent Defendants from (i) extending the canvassing deadline for the March 10, 2020 primary election; and (ii) ordering our local May elections to be conducted by mail. Interestingly, Defendants' Response Brief argues that these actions were necessary to "address the problems and dangers of in-person canvassing and in-person voting without unduly disrupting the electoral process." (ECF No. 6 at PageID 116). Yet when it comes to congressional and judicial candidates' involvement in that very same process, Defendants refuse to make any accommodations to avoid a disruption and are

willing to go a step further, effectively eliminating that process altogether, without any justification whatsoever.

ii. Defendants' interest in refusing to modify the signature requirement does not outweigh the burdens imposed on Esshaki.

Even if Defendants are correct (they are not), and the State's interest in enforcing the deadline is of particular importance, Defendants utterly fail to address what important State interest exists to justify their refusal to decrease the number of signatures candidates are required to gather during these unprecedented circumstances. Defendants' only argument is that a candidate's ability to gather signatures demonstrates that he has a "modicum of support" before his name is printed on the ballot. But it is at least equally true that a candidate who has collected seventy percent of the required number of signatures six weeks before the actual filing deadline also has a "modicum of support." *See generally Jenness v. Forton,* 403 U.S. 431 (1971).

The Defendants' arguments fail to show that the State has a substantial interest in refusing to modify the filing deadline, the signature requirements, or some combination of both. On balance, the burden the statutes and Stay-home Order place on Esshaki and similarly situated candidates are substantially greater than the State's asserted interests in refusing to modify the deadline and signature requirement. Thus, even under the more "flexible" analysis advocated for by

Defendants, Esshaki has demonstrated a strong likelihood of success on the merits and injunctive relief is both warranted and appropriate.

IV. Absent injunctive relief, Esshaki will suffer irreparable harm because he will not have his name printed on the ballot and will be forced to spend tens of thousands of dollars in an attempt to collect signatures by mail.

Once again, Defendants' argument misses the mark. Defendants claim that Esshaki will not suffer irreparable harm because he "had a late start and questionable diligence," which "places much of the injury on [his] shoulders." (ECF No. 6 at PageID 117). In reality, Esshaki was on track to collect 2,000 signatures before the filing deadline. Thus, not only are the Defendants' allegations speculative and false, they are wholly irrelevant to determining whether Esshaki will suffer irreparable harm. Indeed, by Defendants' own admission, the standard to determine the existence of irreparable harm requires Esshaki to show that he "will suffer actual and imminent harm." (ECF No. 6 at PageID 116). Esshaki has done this.

Defendants next argue that Esshaki will not suffer irreparable harm because he can seek signatures through the mail. As explained above, however, this is not a viable or proven option under the circumstances. It is expensive, unproven, and wrought with difficulties in light of the current crisis this country is facing. The Defendants' assertion that other candidates are conducting mail campaigns to gather signatures proves nothing except that Defendants' refusal to modify the

ballot-access statutes are likely causing those candidates to also suffer irreparable harm. Moreover, Defendants have failed to point out one example where a candidate has successfully obtained the required number of signatures through the mail.

While the thrust of Defendants' argument focuses on the efficacy of a mail campaign, they ignore entirely the primary harm Esshaki complains of—namely, not having his name on the ballot. This would seriously harm Esshaki and his supporters in the exercise of their First and Fourteenth Amendment rights. *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (stating, "[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"). Given the gravity associated with the violations of these rights, the harm Esshaki will suffer is readily apparent. Tellingly, Defendants make no attempt to address or refute this.

V. Relief Requested

While it is certainly within the purview of this Court to grant a range of equitable remedies, reducing the signature requirement by forty percent for all candidates is preferred because it would impose the least disruption to State election processes (as opposed to changing the filing deadline). Moreover, a reduction in signatures is not only consistent with, but required by, the "flexible" analysis that Defendants urge this Court to apply here. That analysis requires

courts to weigh "the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (internal citations omitted). That analysis also provides a guiding principle that can be used to "draw the line" at a certain number of signatures because as the burden is lightened for candidates, the weight of the State interests will increase.

Here, a reduction in signatures would reduce the burden on Esshaki and other similarly situated candidates. It would simultaneously continue to protect the State's interest in ensuring that a candidate has a "modicum of support" prior to having his or her name printed on the ballot because candidates who have obtained sixty percent of the required signatures at the time the Stay-home Order was implemented have undoubtedly demonstrated their support. Moreover, fewer signatures would ease the burdens of the State during the canvassing of signatures, allowing the State to spend more time on each petition, thereby strengthening the integrity of our election process.

VI. CONCLUSION

WHEREFORE, Plaintiff Esshaki respectfully requests that this Court enter a temporary restraining order and/or a preliminary injunction against Defendants restraining them from enforcing the Ballot Access Statutes, reducing the signature

requirements to sixty percent of the statutory requirement for all candidates, and such other equitable relief as this Court deems appropriate.

Respectfully submitted,

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Dated: April 14, 2020

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that on the 14th day of April, 2020, the foregoing paper was electronically filed with the Clerk of the Court using the ECF system.

/s/ Amanda Perkins
Amanda Perkins
Legal Assistant