UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAWARIMEDIA LLC, DEBORAHL PARKER, JUDY KELLOGG and PAUL ELY,
Plaintiffs,
v
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,

Defendants.

No. 20-11246

HON. MATTHEW F. LEITMAN

MAGISTRATE MICHAEL J. HLUCHANIUK

DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING EMERGENCY APPEAL

RESPONSE REQUESTED AS SOON AS POSSIBLE BUT NO LATER THAN 5:00 P.M. ON JUNE 24, 2020 GIVEN THE NEED TO EXPEDITE DEFENDANTS' APPEAL

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DEFENDANTS' EMERGENCY MOTION FOR A STAY PENDING EMERGENCY APPEAL

Defendants Michigan Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and Director of Elections Jonathan Brater (the State Defendants), in their official capacities, by and through their attorneys, move for a stay pending appeal under Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)(1)(C) of the orders granting a preliminary injunction and rejecting Defendants' Second Proposed Remedy. In support of their motion, the State Defendants state as follows:

1. Plaintiffs asked this Court to enjoin the signature requirement and filing deadline for initiative petitions under Mich. Const. 1963, Art. 2, §9 and Mich. Comp. Laws §168.471. They argued the COVID-19 pandemic and the Governor's Stay-at-Home Orders made it impossible for them to meet the signature requirement by the May 27, 2020 filing deadline, and as a remedy the Court should enjoin the State Defendants from enforcing these constitutional and statutory requirements.

2. On June 11, 2020, the Court granted Plaintiffs' motion for a preliminary injunction, and directed the State Defendants to propose a remedy for

the purported violations of Plaintiffs' rights under the First and Fourteenth Amendments.

3. The State Defendants request this Court stay its order enjoining the State Defendants from enforcing the signature and filing requirements pending an emergency appeal by Defendants to the Sixth Circuit of this Court's injunction and rejection of the State Defendants' Second Proposed Remedy. The State Defendants are likely to succeed on their appeal of whether their proposed remedy adequately relieved any burden on the Plaintiffs, and the other stay factors weigh in favor of granting Defendants a stay.

4. Time is of the essence because if Defendants' proposed remedy is sufficient, the Plaintiffs' petition will need to be filed by July 6, 2020 and the petitions must be canvassed—and any challenges to signatures resolved—no later than July 24, 2020. Defendants thus ask this Court to grant their motion on an expedited basis.

5. Pursuant to L.R. 7.1, on June 23, 2020, defense counsel sought concurrence in the relief requested in this motion but defense counsel either did not hear back from opposing counsel by the time the motion was filed, or concurrence was not granted, necessitating the filing of this motion.

WHEREFORE, for the reasons more fully set forth in the attached brief, Defendants Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and

Director of Elections Jonathan Brater respectfully request that this Honorable Court grant their motion and stay its order enjoining the Defendants from enforcing the constitutional and statutory requirements for statewide initiative petitions pending Defendants' appeal to the Sixth Circuit.

Respectfully submitted,

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Dated: June 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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Dated: June 23, 2020

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether the portion of the Court's preliminary injunction ordering that Defendants cannot enforce the constitutional and statutory requirements for statewide initiative petitions as to Plaintiffs should be stayed pending the State Defendants' emergency appeal?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Mich. Comp. Laws § 168.471
Mich. Const. 1963, art 2, §9

Burdick v. Takushi, 504 U.S. 428 (1992)
Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006)
Libertarian Party of Ky v. Grimes, 835 F.3d 570 (6th Cir. 2016)
Maryland v. King, 133 S. Ct. 1 (2012)
Mascio v. Pub. Emps. Ret. Sys. of Ohio, 160 F.3d 310 (6th Cir. 1998)
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HDC, LLC v. City of Ann Arbor, 675 F.3d 608 (6th Cir. 2012)
Republican Nat'l Comm. v. Democratic Nat'l Comm., 2020 WL 1672707 at *1 (U.S., April 6, 2020)
U.S. Student Ass'n Found. v. Land, 546 F.3d 373 (6th Cir. 2008
Thompson v. Dewine, 959 F.3d 804 (6th Cir. 2020).

INTRODUCTION

Plaintiffs are proponents of an initiative petition to amend Michigan's truth-in-sentencing law, 1893 P.A. 118, Mich. Comp. Laws § 800.33.[1] Under the Michigan Constitution, they are required to file at least 340,047 valid signatures by the statutory deadline of May 27, 2020 to potentially gain access to the November 3, 2020 general election ballot. Plaintiffs asked this Court to enjoin the signature requirement and filing deadline for legislative initiative petitions. Plaintiffs argued the COVID-19 pandemic and the Governor's executive orders limiting social interactions made it impossible for them to meet these requirements. But Plaintiffs failed to demonstrate a strong likelihood of success on the merits of their First and Fourteenth Amendment constitutional claims, and their similar failure to sufficiently demonstrate irreparable harm should have barred their request for injunctive relief. Nevertheless, on June 18, 2020, the State Defendants proposed extending the filing deadline from May 27, 2020 to July 6, 2020—an extension of 40 days that includes a major holiday. While the State Defendants do not believe that there was any burden imposed upon the Plaintiffs, let alone a severe burden, that supported a preliminary injunction, the proposed extension was sufficient to remediate any claimed harm.

[1] See website for Michigan Prisoner Rehabilitation Credit Act, available at https://www.mprca.info/.

The State Defendants request this Court stay its preliminary injunction and rejection of the State Defendants' proposed remedy pending an emergency appeal by Defendants to the Sixth Circuit. The State Defendants are likely to succeed on their appeal of this Court's rejection of their remedy, and the other stay factors weigh in favor of granting Defendants a stay.

Time is of the essence because Defendants' requests for relief, if successful, would result in Plaintiffs' petition being due to be filed on July 6, after which the State Defendants would need to canvass the petition signatures—and resolve any challenges to those signatures—by July 24, 2020 in order for the proposal to be presented to the Legislature in time for them to consider it for the constitutionally required 40 session days before the ballots must be certified and printed. Defendants thus ask this Court to grant their motion on an expedited basis.

STATEMENT OF FACTS

A. The Governor's declaration of emergency and other executive orders.

On March 10, 2020, Defendant Governor Gretchen Whitmer declared a state of emergency and invoked emergency powers in Executive Order No. 2020-4, in response to the spreading pandemic related to COVID-19 and to two confirmed cases in Michigan.[2] While this order noted the serious nature of the virus, it did

[2] EO No. 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html.

not restrict the movement or gathering of people in Michigan. On March 13, 2020, Governor Whitmer issued Executive Order 2020-5 prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[3] But the order stated that its "prohibition [did] not abridge protections guaranteed by the state or federal constitution under these emergency circumstances."[4]

Three days later, on March 16, 2020, Governor Whitmer ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[5] And on March 17, 2020, the Governor issued an order rescinding 2020-5, changing the cap on assemblages to 50 persons in a single shared indoor space, and expanding the scope of exceptions from that cap.[6] That order included the same language that its "prohibition [did] not abridge protections guaranteed by the state or federal constitution under these emergency circumstances."[7]

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[3] EO No. 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html.
[4] (*Id.*)
[5] EO No. 2020-9, available at, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. Replaced by EO 2020-20.
[6] EO No. 2020-11, available at, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521890--,00.html.
[7] (*Id.*)

Subsequently, on March 23, 2020, again in response to the spreading COVID-19 pandemic in Michigan, Governor Whitmer issued Executive Order No. 2020-21 (the "Stay-Home Order"), which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions.[8] The order also prohibited, with limited exceptions, all public and private gatherings of any number of people that are not part of a single household.[9] That order was to continue through April 13, 2020, however, on April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay-Home Order through April 30, 2020.[10] She then extended it through May 15, 2020, pursuant to Executive Order 2020-59.[11] These orders did not contain the "does not abridge" language. But the orders were interpreted to permit outdoor "expressive activities protected by the First Amendment," so long as "social distancing measures . . . including remaining

[8] EO No. 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.
[9] (*Id.*)
[10] EO No. 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf. See also EO No. 2020-43, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525927--,00.html.
[11] EO No. 2020-59, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html.

at least six feet from people from outside the person's household" were followed.[12] Since then the Governor has additionally extended the Stay-Home Order, but has lessened the restrictions each time.[13] On June 1, 2020, Governor Whitmer issued EO 2020-110, which reduced restrictions and permitted indoor gatherings of up to 10 people, and outdoor events of up to 100 people.[14] Similarly, the FAQ for this EO also provides that activities protected by the First Amendment are *not* prohibited.[15] On June 5, 2020, EO 2020-115 further reduced restrictions and permitted indoor gatherings of up to 50 people and outdoor gatherings of up to 250 people.[16] Further, there were multiple, nationally-publicized protests in Michigan

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[12] *See* EO No. 2020-21, FAQ's, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-522631--,00.html; EO No. 2020-42, FAQ's https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html; EO No. 2020-59, FAQs, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-527027--,00.html.

[13] *See* EO Nos. 2020-70, 2020-77, 2020-92, 2020-96, and 2020-100 available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html. These orders were likewise interpreted to permit outdoor, expressive First Amendment activities. See FAQ's for EOs 70, 77, 92 and 96, available at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-521682--,00.html.

[14] *See* EO No. 2020-110 available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-530620--,00.html.

[15] See FAQ's for EO No. 2020-110, available at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-530654--,00.html.

[16] *See* EO No. 2020-115 available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-531127--,00.html.

that occurred before Plaintiffs filed this action and which effectively demonstrated that First Amendment activities were not precluded by the EO's.[17] Plaintiffs have not alleged or demonstrated with affirmative evidence that any of the Defendants or their agents ever told them that they were required to cease their petition circulation.

B. General requirements for initiative petitions in Michigan

Article 2, § 9 of the Michigan Constitution empowers the people to propose laws or to enact or reject laws, called the initiative. Mich. Const. 1963, art. 2, § 9. With respect to initiatives, § 9 provides in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent for initiative . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required. [Mich. Const. 1963, art. 2, § 9.]

The Michigan Legislature implemented article 2, § 9 with respect to initiatives in various sections of the Michigan Election Law, Mich. Comp. Laws § 168.1 *et seq*. Under the Constitution and the Election Law, in order for the people to place an initiative on the general election ballot, the people must: (1) prepare a petition that meets the form requirements of Mich. Comp. Laws § 168.482; (2) gather the required number of valid signatures under article 2, § 9; and (3) timely

[17] See e.g. https://abcnews.go.com/US/convoy-protesting-stay-home-orders-targets-michigans-capital/story?id=70138816

file the petitions with the Secretary of State under Mich. Comp. Laws § 168.472. After filing, Michigan's Board of State Canvassers must canvass the petition to determine whether there are sufficient valid signatures under Mich. Comp. Laws § 168.476. Once the review is complete, the Board of State Canvassers must make an official declaration of the sufficiency or insufficiency of the initiative petition at least 100 days before the election at which the proposal is to be submitted. Mich. Comp. Laws § 168.477(1).

If the initiative petition is certified as sufficient, the Secretary of State must present it to the Legislature for enactment or rejection within 40 sessions days under article 2, § 9. If the Legislature rejects the initiative, it must be submitted to the people for a vote at the next general election. Mich. Const. 1963, art. 2, § 9.

C. Requirements and timeline for initiatives for the November 2020 general election

For this election cycle, proponents of a legislative initiative, like Plaintiffs, must file a petition containing at least 340,047 valid signatures of registered voters with the Secretary of State by May 27, 2020. Mich. Const. 1963, art. 2, § 9; Mich. Comp. Laws § 168.477.[18] As explained by Defendant Director of Elections Jonathan Brater in his declaration, after a petition is filed it undergoes a rigorous

[18] *See also* Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition, p 5, available at www.michigan.gov/documents/sos/Initiative_and_Referendum_Petition_Instructions_2019-20_061119_658168_7.

and time-sensitive canvassing process that includes a face review of every petition sheet, a random signature sampling process, and a signature challenge period. (R. 7-2, Def's Resp. to TRO, Ex A, Brater Decl, PgID# 147-155, ¶¶ 7-8). The canvassing process ends with the State Board of Canvassers, which must meet to declare the sufficiency or insufficiency of an initiative petition by July 24, 2020 for this cycle. (*Id.*, ¶ 6). If a petition is declared sufficient, the Secretary of State will transmit the proposal to the Legislature for its 40-session day review. (*Id.*, ¶¶10-11). By September 4, 2020, the Board must assign a proposal number to any initiative that is not passed by the Legislature and approve ballot wording. (*Id.*, ¶ 11). The Secretary of State will immediately thereafter certify the ballot to the county clerks, which clerks must then prepare to print ballots. (*Id.*, ¶ 11). As explained in Director Brater's declaration, ballot printing is, or at least can be, a complex process involving significant levels of preparation and review. (*Id.*, ¶ 13-17). But ultimately, ballots must be printed and available for delivery to military and overseas voters beginning September 21, 2020. (*Id.*, ¶19). The following table shows the timeline of pertinent dates leading up to the November 2020 general election:

Date and Time	Action	Statute
By 5:00 pm on May 27, 2020	Petitions for legislative initiative filed with Secretary of State (340,047 valid signatures required)	Mich. Comp. Laws § 168.471 Art 2, § 9
May 27, 2020 to July 23, 2020	Canvass of initiative petitions begins, including random sampling process;	Mich. Comp. Laws § 168.476

	signature challenges permitted during this time period. (Canvassing may take up to 60 days)	
July 24, 2020	Board of State Canvassers to declare sufficiency or insufficiency of initiative petitions	Mich. Comp. Laws § 168.477
September 4, 2020	Board of State Canvassers must assign numerical designation and approve ballot wording for all statewide proposals, and Secretary of State must certify the ballot to county clerks	Mich. Comp. Laws §§ 168.474a, 168.480, 168.648
September 5, 2020	County clerks begin ballot proofing and printing	Mich. Comp. Laws § 168.689
September 19, 2020	Deadline for county boards of election commissioners to deliver AV ballots to county clerks for November Election	Mich. Comp. Laws § 168.713
September 21, 2020	Deadline for county clerks to deliver AV ballots to local clerks; deadline for AV ballots to be available for delivery to military and overseas voters	Mich. Comp. Laws §§ 168.759a, 168.714 Art. 2, § 4 52 U.S.C. § 20302
November 3, 2020	General Election	

D. Procedural History

Plaintiffs filed the complaint for declaratory and injunctive relief, along with a motion for a temporary restraining order, on May 4, 2020. Defendants were not served with the complaint or motion. The undersigned counsel received an e-mail from the Court on May 21, 2020, alerting them to the existence of the motion and requesting they join a scheduling conference by telephone that afternoon. During that telephone conference, the Court indicated that—due to some issue involving the mail—the complaint and motion had just arrived to the Court that day.

Defendants agreed to submit a response to the motion by Wednesday, May 27, 2020. On June 1, 2020 Plaintiff SawariMedia retained counsel and filed a reply, raising new claims and arguments for the first time. Defendants requested leave to file a surreply, which was granted. Defendants filed their sur-reply on June 4, 2020. The Court held a video-conference hearing on the motion for preliminary injunction on June 5, 2020. On June 11, 2020, the Court issued its opinion granting Plaintiffs' motion for preliminary injunction.

After initially proposing relief that mirrored relief provided in a similar case in Michigan's Court of Claims, (Doc. 18), the State Defendants proposed on June 18, 2020 a second remedy that would modify the filing deadline for initiative petitions to July 6, 2020. (Doc. 23). This was an extension of 40 days after the original deadline, and would give Plaintiffs the ability to gather signatures over the July 4th holiday weekend. In addition, the State Defendants offered the alternative of tolling the expiration of any signatures gathered if Plaintiffs chose to pursue the 2022 ballot. On June 22, 2020, the Court ruled that the proposed remedy was inadequate to remediate the burden on Plaintiffs' access to the 2020 general election ballot. (Doc. 25.)

ARGUMENT

I. The Court's preliminary injunction should be stayed pending the State Defendants' emergency appeal.

The standard for a stay pending appeal of the grant of a preliminary injunction is as follows:

> [W]e consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." All four factors are not prerequisites but are interconnected considerations that must be balanced together. [473 F.3d 237, 244 (6th Cir. 2006) (citations omitted).]

Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006) (citations omitted). It bears repeating that a preliminary injunction is an extraordinary remedy, *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009), which is to be granted only if the movant carries its burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002). Every factor of this balancing test supports an emergency stay.

A. The State Defendants are likely to prevail on the merits of their appeal regarding the injunction or, alternatively, their proposed remedy.

The Court concluded that Plaintiffs demonstrated a substantial likelihood of success on the merits of their claim that Mich. Const. 1963, art 2, §9, Mich. Comp. Laws §168.471, and the Governor's Stay-at-Home Orders, as applied in combination to Plaintiffs, unconstitutionally burdened Plaintiffs First and Fourteenth Amendment associational rights. (R. 17, Injunction Order, Page ID ##

220-256). Following the Sixth Circuit's directives in *Esshaki, et al. v. Whitmer, et al.*, 2020 U.S. App. LEXIS 14376 and *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020), the Court did not replace the enjoined requirements and instead directed the State Defendants to propose a remedy that relieved the burden on Plaintiffs.

The State Defendants are appealing the Court's decision to enjoin the enforcement of constitutional and statutory requirements for initiative petitions, for all of the reasons already stated in their opposition to the preliminary injunction motion. But, further, the State Defendants are appealing the Court's conclusion that there remained a severe burden on Plaintiffs after the State Defendants proposed extending the filing deadline to July 6, 2020.

In evaluating the State Defendants' likelihood of prevailing on appeal, the Court must consider the likelihood that Defendants can "show that the [ ] court abused its discretion in granting the preliminary injunction." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008). Under the abuse-of-discretion standard, an "injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

The State Defendants maintain that the Court abused its discretion in ordering the signature reduction because it went beyond what was necessary to

alleviate Plaintiffs' burden as alleged under the circumstances. In rejecting the State Defendants' proposed remedy, the Court stated that the extension it provided was insufficient, and an appropriate remedy would need to include a later deadline, a reduction of signatures, or some combination of both. Because the State Defendants have already offered the latest possible deadline that complies with their obligations to have ballots in voters hands no later than September 21, the Court's rejection essentially requires Defendants to agree to reduce the number of signatures required. While the Court concluded that Michigan's constitutional signature requirement and statutory filing deadline contributed to the severe burden imposed on Plaintiffs, that conclusion does not necessarily compel a reduction in the constitutionally-required number of signatures. In fact, the very signature requirement in question was hotly debated during the state's constitutional convention, and reductions were directly rejected by the delegates for reasons that deserve repetition here:

> It's tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That's what we have a senate and house of representatives for.

Woodland v. Mich. Citizens Lobby, 423 Mich. 188, 217 (1985)(quoting 2 Official Record, Constitutional Convention 1961, p 2394.) As the Michigan Supreme Court recognized in *Woodland,* the initiative process was a "gun behind the door" operating as a threat to the state legislature, and was intended as a last resort for the

people when the legislature failed to act on issues that "so inflame the citizenry on a grass-roots level" that reach disinterested or unknowing voters. *Woodland,* 423 Mich. at 217-218. If Plaintiffs cannot—even with a 40-day extension that includes a major holiday weekend—collect a sufficient number of signatures, then perhaps the issue is simply not important enough to the electorate to warrant the strong medicine of overriding the state legislature and presenting the question directly to the voters.

Regardless, a reduction in signatures for initiative petitions would be an unprecedented disruption to the established and traditional process for an initiative proposal to gain ballot access in Michigan. Further, it would directly contradict the expressed view of delegates who drafted the initiative provision of Michigan's Constitution, and the will of the people who adopted it.

The State has a compelling interest in requiring proponents of initiatives to demonstrate the required modicum of support as established by the Legislature or its state constitution. *See, e.g., Jenness v. Forton*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a [ ] candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *American Party of Texas v. White*, 415 U.S. 767, 783

(1974); *Munro v. Socialist Workers Party,* 479 U.S. 189, 194 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). The State also has an interest in upholding the terms of its own Constitution.

The State Defendants proposed to the Court the less disruptive option of extending the filing deadline by a significant length—40 days. The extension of the filing deadline to July 6, along with the alternative of tolling the expiration of signatures under Mich. Comp. Laws §168.472a, would have been sufficient to alleviate the alleged burden to Plaintiffs.

While Plaintiffs say that the extended deadline was less than the 61 days they "lost," that argument misses the mark. First, Defendants do not agree that Plaintiffs were prevented from circulating their petition *at all* during even the most restrictive Executive Orders. Plaintiffs could—and should have—been continuing to gather signatures throughout the months of March, April, and May. Second, the time period is in line with the Plaintiffs' allegations about their campaign. Plaintiffs argued in their motion for preliminary injunction that they gathered signatures between January 16, 2020 and March 15, 2020 (when they began to halt their gathering effort following President Trump's initiative to slow the spread of COVID-19). In those 59 days, they claim to have gathered 215,000 signatures. That is a rate of 3644 signatures per day. So, it is not unreasonable to expect that they could gather more than the remaining 125,047 signatures in another 40 days—

especially where the weather is warmer, there a fewer restrictions on gatherings, and more people are likely to be outside than they would have been in January, February, March, April, or even May.

It was thus an abuse of discretion for the Court to reject the Defendants' Second Proposed Remedy.

B. The State Defendants will be irreparably harmed absent a stay and the public interest weighs in favor of a stay.

The remaining factors, "harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009). While there will be no irreparable harm to the Plaintiffs without an injunction, the issuance of an injunction will irreparably harm the State and its citizens. The Supreme Court has recognized that "anytime a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, *3 (2012) (C.J. Roberts in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977). The election law enjoined by the Court, Mich. Comp. Laws § 168.471, was duly enacted by the Michigan Legislature, and Mich. Const. 1963, art 2, §9 was adopted as part of the Michigan Constitution. Moreover, the people have an interest in the fair and orderly holding of elections and ensuring that initiative petitions meet the threshold for public support that the people expressly required in their Constitution. These factors thus weigh in favor

of staying the injunction. *See Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000) (noting that "[a] state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent.").

Conversely, the Plaintiffs will not be harmed by a stay of the injunction. The statutory deadline has already passed. So, there are two outcomes of the appeal. Either the Sixth Circuit agrees that the injunction was unwarranted or the State Defendants' remedy was sufficient, or the Sixth Circuit upholds the injunction. If the Sixth Circuit finds that injunctive relief was not warranted, then Plaintiffs will be not harmed by staying an injunction to which they are not entitled. Or, if Sixth Circuit decides that the Defendants' proposed relief was sufficient, then the relief offered by the Defendants will be available to Plaintiffs without interference by the stay. On the other hand, if the Sixth Circuit decides that an injunction was appropriate and the proposed relief was insufficient, then the Defendants will likely be required to propose a different remedy that allows Plaintiffs another opportunity to access the November 2020 ballot. In any of these outcomes, Plaintiffs will not be inconvenienced by a temporary stay pending the determination of the appeal.

Finally, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." *Michigan Coal of*

Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). Given that Plaintiffs are unlikely to succeed on the merits on appeal, *see* the arguments presented in II. A., Defendants have a lower burden concerning their irreparable harm.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendants Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and Director of Elections Jonathan Brater respectfully request that this Honorable Court grant their motion and stay its order enjoining the Defendants from enforcing the constitutional and statutory requirements for statewide initiative petitions as to Plaintiffs pending Defendants' appeal to the Sixth Circuit.

Respectfully submitted,

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Dated: June 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record, as well as via electronic mail to the following parties appearing *in pro per*:

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