UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC ESSHAKI,

Plaintiff,

MATT SAVICH and DEANA BEARD,

Plaintiff-Intervenors,

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.

Case No. 2:20-CV-10831-TGB-EAS
Hon. Terrence G. Berg
Mag. J. Elizabeth A. Stafford

INTERVENING PLAINTIFF HAWKINS'S REPLY BRIEF IN SUPPPORT OF HER *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

In their Response, Defendants do little more than raise arguments the Court previously rejected. (*See* ECF No. 23.) Due to how this case developed as a practical matter, the significance of some issues is overstated, but it should be clear enough why Hawkins merits an early injunction, if only due to her circumstances in comparison to the other parties. Moreover, by clarifying a few facts and a few points about the structure of the analysis, her entitlement to relief is crystal clear.

FACTS

1. **If the Court grants the relief sought, the State apparently will only need to include two additional candidates.**

Whatever the deadline might be to identify "worthy" candidates for the primary election, it probably has passed by now. The Board of Elections needs candidate information early enough to complete its June 2, 2020 deadline for verifying petitions, and it plans to meet on May 29. (*See* ECF No. 55, PageID.779.) As of May 8, 2020 (and apparently as of this May 18, 2020 hearing), only 2 – *two* – candidates actually filed nominating petitions and yet are disqualified from access to the ballot due to the current, unconstitutional accommodations. Hawkins is one. The other is described in Defendants' brief. (*Id.*, PageID.779-780.)

2. **Imposing a May 8, 2020 deadline will not alter the State's ordinary schedule for canvassing and certifying petitions.**

According to the State's schedule, the relief sought in this lawsuit has *zero* impact on its ordinary progress toward the elections. It impacts the time for filing

petitions and challenges, both of which elapsed no later than May 8 and May 15, respectively. (*Id.*, PageID.777-778.) Those filing and challenge deadlines only impact 18 candidates; the State already must verify 16 of them; and only two might be added if Hawkins succeeds. The State has already verified 3847 of her signatures. (*Id.* PageID.780.) At most, it might verify the additional 232 or 323. (*Id.*) The relief here does not present any meaningful delay.

3. **Hawkins has *not* violated § 224 as to her Statement of Organization.**

The State continues to conflate the technical candidate-committee deadline with the separate requirement for filing a statement of organization. They are different. Hawkins did not violate the latter. Section 224 of the Michigan Campaign Finance Act provides: "A committee shall file a statement of organization within 10 days *after the committee is formed*." Mich. Comp. Laws § 169.224(1) (emphasis added). Nothing in the statute links the deadline for filing a Statement of Organization – or its criminal penalties – to when a person becomes a candidate.[1] Instead, actual committee formation triggers it. The statute is not ambiguous, but "[e]ven if § [224] lacked clarity on this point, we would be constrained to interpret any

[1] The first date of one's "candidacy" only applies to the committee-formation deadline, and the penalties appear in § 221.This distinction makes sense. Section 224 applies generally to other PACs, Party Committees and Ballot Question Committees that do not involve candidates. By the time any of those interest-holders actually forms a committee, they usually are in a better position to have recognized the Finance Act's formation requirements, to have more personnel to sort through the Byzantine statute, and to discern the corporate formalities of committee-formation.

ambiguity in the statute in [Hawkins]'s favor," under the rule of lenity. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8, 125 S. Ct. 377, 384 (2004); *see People v. Sawyer*, 410 Mich. 531, 536, 302 N.W.2d 534, 536 (1981) (adopting the rule). Here, Hawkins did not form a committee until May 1. Thereafter, she timely complied with § 224 by filing a Statement of Organization on May 6, 2020.

Finally, although not in Reply to the State's Brief, an additional factual clarification might warrant mention.[2]

ARGUMENT

Nature of the Challenge. Hawkins contends that the State's actions in jointly imposing the Stay-At-Home Orders and the ordinary signature filing quotas and deadlines of Mich. Comp Laws §§ 168.544f and 168.413 burden her rights as a candidate and a voter. (E.g., ECF No. 47, PageID.702-704.) That unconstitutional burden continues despite the State's partial non-enforcement policy as reflected in its May 8 accommodations, which do not apply to her. Her challenge does not attack

[2] The State appears to have updated its website defining a "candidate." Subsequent remedial measures do not prove liability although they can show the preventability of a harm. Fed. R. Evid. 407. As of May 6 and at least until May 11 – that is, whenever it still mattered to serious candidates – the Secretary of State's online definition of a "candidate" reflected what Hawkins included in her opening Brief at PageID.749, and it did not discuss personal expenditures. (*See, e.g.*, ECF No. 42-2, PageID.623 (Witucki Decl.)) By sometime on the evening of May 12, that text apparently changed to include a reference to when a person "receives a contribution or makes an expenditure in an attempt to be nominated or elected to office." Although – at the time of this filing – the site still includes a "last updated" date in January 2019, the date does not appear to be correct in light of the record.

any state action in isolation (including the March 10 deadline). Instead, the State's actions are unconstitutional as a whole.

Defendants' Burden of Proof. This case involves shifting burdens of proof. It makes sense to clearly define the State's burden in context. While Hawkins has the procedural burden under Rule 65 to support her motion, the State has the substantive burden to prove constitutional compliance, and it has not done so. Much like summary judgment, since the State bears the substantive burden of proof, Hawkins meets her burden where she simply identifies the State's lack of evidence. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106, S. Ct. 2548, 2554 (1986). The record evidence (below) supports that she is entitled to the relief she seeks.

Litigants like the State sometimes conflate parts of the "rational basis test," "intermediate scrutiny," and "strict scrutiny," and obscure the structure that governs their application. (*E.g.,* ECF No. 55, PageID.786 (importing rational basis considerations)). Where, as here, laws impede fundamental rights or involve suspect classifications, they are presumptively irrational. In such cases, the burden shifts[3] to the

[3] The burden initially starts on the Plaintiff. Through due process and equal protection, the Fourteenth Amendment "protects individuals from arbitrary and capricious state action." *Spielberg v. Bd. of Regents*, 601 F. Supp. 994, 999 (E.D. Mich. 1985) (due process); *see Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 44, 81 S. Ct. 997, 1003 (1961) (Harlan, J.) (discussing the Fourteenth Amendment's protection against arbitrary state action); *Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005) (citing *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S. Ct. 1074 (1981)) (equal protection). An ordinary law is "presumed to be valid and will be sustained if [it] is rationally related to a legitimate state interest." *Harbin-Bey v. Rutter*, 420 F.3d 571, 576

State to prove the validity of its action. Depending on how severe the impediment or how suspect the criteria, the State must overcome intermediate or strict scrutiny. *See, e.g., Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2015) (*en banc*) (Second Amend.). For either kind of scrutiny, the burden of proof is on the State. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992).[4] All state election laws, though necessary, burden fundamental voting and associational rights. So, similar to *Tyler*, the *Anderson-Burdick* analysis calls upon the Court to weigh the severity of the impediment and determine how much proof to require of the State.

Defendants failed to meet their burden. The familiar standards for strict scrutiny have been clearly applied in this case so far. Standards for intermediate scrutiny, however, can be somewhat harder to pin down. One thing is clear: the "reasonableness" they require (including under the *Anderson-Burdick* test) and the "reasonable fit" between state action and its purpose are not minimal or lenient, but rather are still demanding. *See Stimmel v. Sessions*, 879 F.3d 198, 207 (6th Cir. 2018). After the State identifies a significant, substantial or important government interest that its

(6th Cir. 2005) (citing *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S. Ct. 1074 (1981)). Absent a suspect class or fundamental right, Plaintiff must prove the violation.

[4] *See also Johnson v. California*, 543 U.S. 499, 505, 125 S. Ct. 1141 (2005), *cited in Cole v. City of Memphis*, 97 F. Supp. 3d 947, 961 (W.D. Tenn. 2015) (burden in strict scrutiny cases); *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 2275 (1996) (intermediate scrutiny); *Cole v. City of Memphis*, 839 F.3d 530, 538-39 (6th Cir. 2016) (same); *Morrison v. Colley*, 467 F.3d 503, 508 (6th Cir. 2006) (same).

action furthers or advances, *see Cole v. City of Memphis*, 839 F.3d 530, 538-39 (6th Cir. 2016), the State must prove that its law "bears a reasonably close relationship" that is proportionate to the interest, *id.*; *see Tyler*, 837 F.3d at 698, and does not "burden substantially more" of the plaintiff's protected interest "than is necessary," *Mich. State v. Miller*, 103 F.3d 1240, 1252 (6th Cir. 1997).

Hawkins Should Succeed on the Merits. As noted at PageID.750, since the balance of harms substantially favors Hawkins, she only needs to show serious questions going to the merits, rather than a "strong likelihood." But her likelihood of success is exceedingly strong. Absent relief from this Court, the signature reduction accommodation will not apply to Hawkins, and she will be excluded from the ballot. (ECF No. 55, PageID.780.) If the jointly applied laws – the Stay-At-Home Order and §§ 544f and 413 – alone imposed a severe burden, *adding* an early deadline making it harder to comply will not withstand scrutiny.[5] The burden is severe, and Defendants fail to satisfy the demands of strict scrutiny.[6]

[5] The state contradicts itself, arguing that the pandemic is an emergency justifying unprecedented restrictions but that the pandemic should have sent Hawkins to the streets to collect signatures. This is striking amid the threat of a deadlier second wave of COVID-19. https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/ (Director of the CDC has predicted a second wave of COVID-19 later this year which is likely to be more devasting). A State message like this would be troubling as applied to possible in-person voting in the fall.

[6] The hallmark of a severe burden requiring strict scrutiny is "exclusion or virtual exclusion from the ballot." *Schmitt v. LaRose*, 933 F.3d 628, 639 (2019). The burden on Hawkins is severe, requiring Defendants to prove its actions are narrowly tailored to a compelling interest. *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005).

The depth of Defendants' shortfall is evident in their failure to satisfy even intermediate scrutiny. Defendants cite interests in limiting accommodations to bona fide candidates, limiting the number of candidates, managing the election schedule, and requiring candidates to show sufficient support before being placed on the ballot. (ECF No. 55, PageID. 783-784,787.) Hawkins challenges the joint application of the laws, but the State's March 10 condition to granting relief from the otherwise unconstitutional laws cannot even be justified in isolation. Eliminating it will only add *two* candidates, who will not delay the Board of Elections' schedule. As the Court previously noted, the April 21 signature deadline could be moved back to May 8, 2020 without significantly harming the State's interests. (ECF No. 23, PageID.344.) Hawkins has since fully complied with the law, and the State's interest in compliance is fully vindicated. Moreover, the State confirms Hawkins has demonstrated more support than any other party. The State cannot demonstrate that her exclusion advances its interest in ensuring a "modicum." The State Defendants failed to show any "proportionate" and "reasonably close" relationship between their actions and interests, or that they refrained from "burdening substantially more" of Hawkins's rights than necessary. As to the other elements of the Rule 65 analysis, Hawkins relies upon her prior arguments. Hawkins is entitled to relief.

May 18, 2020

Respectfully Submitted,
/s/Saura J. Sahu
Saura J. Sahu (P69627)
Attorney for Plaintiff Hawkins

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2020, I electronically filed the foregoing paper and attached exhibits with the Clerk of the Court using the ECF system, which will send notification and copies of these filings to all counsel of record.

Respectfully Submitted,

May 18, 2020

CLANCY ADVISORS PLC
By: /s/Saura J. Sahu
Saura J. Sahu (P69627)
Attorneys for Shakira L. Hawkins
230 Nickels Arcade
Ann Arbor, MI 48104
(734) 780-7595
sahu@clancyadvisors.com