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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOSEPH KISHORE; et al.,

Plaintiffs,

v.

GAVIN NEWSOM, Governor of California; and **ALEX PADILLA**, Secretary of State of California, in their official capacities,

Defendants.

Case No. 2:20-cv-05859-DMG (Ex)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: July 20, 2020
Hearing Time: 2:00 p.m.

Judge: Hon. Dolly M. Gee

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INTRODUCTION

Plaintiffs Joseph Kishore and Norissa Santa Cruz seek to appear on the November 2020 general election ballot as independent candidates for the offices of the president and vice president. They challenge the constitutionality of California's independent-nomination laws—recently upheld by the Ninth Circuit—that require prospective independent candidates for the office of the President to submit nomination papers with at least 196,964 signatures, alleging that it is "literally impossible" to gather signatures during the COVID-19 pandemic. Plaintiffs' motion to preliminarily enjoin the signature requirement as applied to their candidacies is without merit and should be denied.

While it is undisputed that the COVID-19 pandemic has caused disruptions to the daily lives of Californians, Plaintiffs have failed to articulate—let alone substantiate—a cognizable violation of their constitutional rights or any other basis for preliminary relief. The challenged independent-nomination process and signature requirement are generally applicable, evenhanded, politically neutral laws that protect the reliability and integrity of the election process and do not impose a severe burden on Plaintiffs' asserted rights. The COVID-19 pandemic does not change this.

Moreover, Plaintiffs have not shown the diligence required to prevail on their claims. By all indications, Plaintiffs have made no effort to gather any signatures and have submitted no evidence that they ever had any concrete plans either before or during the pandemic to collect the requisite number to signatures to qualify for the ballot. The State's public health orders at most restricted Plaintiffs' ability to gather in-person signatures by one week, out of a total nomination period of 15 weeks. And Plaintiffs could also have worked to gather signatures in other ways: Plaintiffs could have gathered signatures by mail, if notarized or executed in the presence of an elections official, and solicited support by traditional and social media, but they have provided no evidence that they have done so. In light of their

failure to show diligence, any alleged burden caused by California's independent-nomination requirements (even in light of the pandemic and the State's response) is not severe, and is amply justified by the State's compelling interest in ensuring that independent candidates are able to demonstrate sufficient voter support before they are permitted to appear on the general election ballot as candidates for the office of the President and Vice President.

In seeking emergency equitable relief, plaintiffs always bear a heavy burden. Plaintiffs' requested preliminary injunctive relief would enable Plaintiffs to circumvent the State's election-law system of independent nominations. In essence, Plaintiffs are asking this Court—by temporary relief—to permit them to appear on the ballot for the November election as candidates for the offices of the President and Vice President without demonstrating even a bare modicum of voter support or any effort to solicit such support. As such, Plaintiffs seek a disfavored mandatory injunction that is subject to a heightened burden that they cannot satisfy.

Plaintiffs have also failed to show that the remaining equitable factors favor a preliminary injunction. Significantly, granting preliminary relief would irreparably harm the public interest—if Plaintiffs could access the presidential ballot without demonstrating any significant modicum of voter support or any attempt to gather such support, then *anyone* who meets the bare age, citizenship, and residency qualifications to be president can seek to be placed on the ballot during the pandemic, leading to significant voter confusion and frustration of the democratic process. Accordingly, Plaintiffs' motion should be denied.

BACKGROUND

I. CALIFORNIA'S INDEPENDENT-NOMINATION SYSTEM

Under California law, a prospective candidate for the office of the President who was not nominated by a qualified political party may appear on the general-election ballot if the candidate is able to gather nomination papers signed by least one percent of the number of voters registered for the preceding general election.

Cal. Elec. Code § 8400; *see* §§ 8303, 8304.[1] For the November 2020 general election, at least 196,964 signatures from eligible voters would be required to meet the threshold. Decl. of Rachelle Delucchi in Supp. of Opp'n to Pls. Mot. ("Delucchi Decl."), Ex. 1. Those signatures must be gathered and submitted within a 105-day period, within 193 days (here, April 24, 2020) and 88 days (here, August 7, 2020) before the election. *Id.*, Ex. 1; § 8403 (together with § 8400, "Ballot Access Laws"). Signatures for nomination papers may be gathered in person or other means. For example, because circulators may sign the nomination papers themselves, a prospective candidate, or his or her campaign, may send the nomination papers for signature by circulators/signers by mail or email, or any other electronic means. The circulators/signers may have the nomination papers notarized safely through the use of mobile notaries.[2] § 8407. The nomination papers must be submitted to the county elections officials by August 7, 2020, for verification of signatures, and then forwarded for filing with the Secretary of State. § 8403(a)(2).

II. CALIFORNIA'S SWIFT RESPONSE TO THE COVID-19 PANDEMIC AND ITS EFFECT ON ELECTION ACTIVITIES

California recognized early that COVID-19, had the potential to spread rapidly throughout the state. In December 2019, California began working closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments to monitor and plan for the potential spread of COVID-19 to the United States. *See* Decl. of Peter H. Chang in Supp. of Opp'n to Pls. Mot. ("Chang Decl."), Ex. 1. On March 4, 2020, the Governor proclaimed a State of Emergency in California to prepare for and respond

[1] All statutory references herein are to the California Elections Code unless otherwise noted.

[2] The Secretary of State has issued guidance for notaries to safely notarize documents during the pandemic and in compliance with the shelter-in-place orders. *See* Delucchi Decl., Ex. 2.

to suspected or confirmed cases of COVID-19 in California and to implement measures to mitigate the spread of COVID-19. *See id.* at 2.

On March 19, 2020, the Governor issued Executive Order N-33-20, which directed all California residents to heed the directives of the State's Public Health Officer relating to COVID-19. Chang Decl., Ex. 2.[3] Then-current state public health directives required "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of [16 specified] federal critical infrastructure sectors, as outlined at https:/www.cisa.gov/identifying-critical-infrastructure-during-covid-19." Chang Decl., Ex. 3 (State Public Health Order) (collectively with Executive Order N-33-20, the "State Orders"); *see* Chang Decl., Ex. 2 at 1. The State Orders provided that "Californians working in these 16 critical infrastructure sectors may continue their work because of the importance of these sectors to Californian's health and well-being." Chang Decl., Ex. 2 at 1. The 16 critical infrastructure sectors referenced in the State Order are identified by the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency (CISA). One of the critical infrastructure sectors identified by CISA is "Other Community- or Government-Based Operations and Essential Functions." Chang Decl., Ex. 4 at 12. At least as of March 28, 2020, that section included "[e]lections personnel" which "include both public and private sector elections support." *Id.*

In addition, the State Public Health Officer designated a list of "Essential Critical Infrastructure Workers" to "help state, local, tribal, and industry partners as they work to protect communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security." Chang Decl., Ex. 5 at 1. Included under the heading of "Government Operations and other

[3] These directives (which are updated on an ongoing basis as circumstances change) are available at https://covid19.ca.gov/stay-home-except-for-essential-needs/.

community-based essential functions," the State Public Health Officer identified "Elections personnel" as "Essential Workforce." *Id.* at 10.

Since the State Orders issued, the Governor has continued to emphasize that elections are essential to our democracy and continued to clarify that election-related activities are permissible under the State Orders. On May 1, 2020, the "Stay home Q&A" page of California's COVID information website was updated. Under the section titled "Protected activities," and in response to the question "What about Voting?", the website provided that "Elections are an essential activity" and advised that whenever persons "engage in any permissible activity—including the collection and dropoff of ballots, or other election-related activities—be mindful of physical distancing and other measures to protect yourself and those around you." Declaration of Angelica Quirarte in Supp. of Opp'n to Pls. Mot. (Quirarte Decl.) at ¶ 5. That answer was later updated on June 5, 2020, to specifically identify as examples of permissible election-related activities "the collection of signatures to qualify candidates or measures for the ballot". *Id.* at ¶ 9.

III. PLAINTIFFS AND THEIR CAMPAIGN ACTIVITIES

Plaintiffs Joseph Kishore and Norissa Santa Cruz seek to be placed on the November 2020 general election ballot as independent candidates for the offices of the President and Vice President, respectively. Compl. ¶ 1. Plaintiff Kishore resides in Michigan. *Id.* ¶ 17. Plaintiff Santa Cruz resides in California. *Id.* ¶ 18. Plaintiffs allege they are candidates of the Socialist Equality Party and had organized in-person campaign events in Michigan and California. *Id.* at 28. Specifically, they organized two events in Michigan and three events in California: at the University of California, Berkeley on March 3; at the University of California Los Angeles on March 4; and at a public library in San Diego on March 5. *Id.* ¶¶ 28-29. Plaintiff Kishore also visited the University of California, Santa Cruz on an unspecified date. *Id.* At some point in March, Plaintiffs allegedly canceled all campaign activities to protect against the spread of the coronavirus. *Id.* at 30.

Plaintiff Kishore had planned to return to California to campaign "later in the spring and summer" but allegedly has not returned because of the pandemic. *Id.*

Plaintiffs alleged that one of their volunteers can gather 30 to 40 signatures in one day. Pls. Mot. for Prelim. Inj. (Pls. Mot.), ECF No. 11, at 5. However, they do not allege to have gathered any signatures for their nomination, or to have ever lined up any volunteers or professional signature gatherers to gather signatures.

LEGAL STANDARD

To obtain a preliminary injunction, Plaintiffs must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm without preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, injunctive relief "is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Even under this alternative sliding scale test, plaintiffs must make a showing of all four *Winter* factors. *Id*. at 1132, 1135. Injunctive relief "is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

Significantly, preliminary injunctions that would alter the status quo are "particularly disfavored." *Stanley v. Univ. of So. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quotation omitted). "It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963).

ARGUMENT

Plaintiffs' motion for preliminary injunctive relief should be denied because they fail to satisfy the four equitable factors that courts weigh in determining

whether to grant such extraordinary relief. Notably, Plaintiffs' application is subject to a heightened standard because they seek a mandatory injunction by requesting an injunction against the status quo of the statutory standard set by the Legislature for independent-candidate nomination. In contrast to prohibitory injunctions designed to preserve the status quo during litigation, "mandatory" injunctions go "well beyond simply maintaining the status quo *pendent lite*."[4] *Stanley*, 13 F.3d at 1320 (quotation omitted). In addition to satisfying the requisite equitable factors, Plaintiffs must meet the "doubly demanding" burden of "establish[ing] that the law and facts *clearly favor* [their] position.'" *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (emphasis in original). Plaintiffs cannot make this showing.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). In examining challenges to state election laws based on First and Fourteenth Amendment rights, the Supreme Court has developed a flexible balancing and means-end fit standard: when state election laws impose only "'reasonable, non-discriminatory restrictions . . . the State's important regulatory interests are generally sufficient to justify' the restrictions," but when those rights are subject to "severe restrictions," strict scrutiny is appropriate. *Id.* at 434 (quotations omitted); *see Public Integrity Alliance v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc). The balancing framework is a "sliding scale—the

[4] Plaintiffs may claim that, in seeking to "prohibit" the application of the Ballot Access Laws, they are requesting a "prohibitory" injunction, but the *effects* of such an order would prove otherwise. *See Saddiq v. Trinity Servs. Grp.*, No. 13-01671-PHX-ROS (MHB), 2015 WL 13684701, at *2 (D. Ariz. Nov. 3, 2015) (noting that a request for a preliminary "injunction 'prohibiting [defendants'] revoking of [plaintiff's] Halal diet' . . . . appears to seek a prohibitory injunction, or one that seeks only to maintain the status quo," but the "wording is misleading" as it would be "a mandatory injunction that would overrule an administrative decision already in effect").

more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny." *De la Fuente v. Padilla*, 930 F.3d 1101, 1105 (9th Cir. 2019) (quotations omitted).

To apply this *Burdick* standard, courts weigh "the character and magnitude" of the asserted injury against the "interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration the extent to which the State interests make the burden necessary. *Burdick*, 504 U.S. at 434. When the asserted rights are subject to "severe restrictions," the law must be "narrowly drawn to advance a state interest of compelling importance." *Id.* For a ballot-access restriction, the burden placed on the candidate by the law is "measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (citation omitted); *see Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012).

Applying these precepts, the Ninth Circuit has "repeatedly upheld as 'not severe' restrictions that are generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the election process," *Public Integrity Alliance*, 836 F.3d at 1024 (quotation omitted), and has "noted that 'voting regulations are rarely subject to strict scrutiny'" *Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013) (citing *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)).

Plaintiffs' motion should be denied under this balancing standard because they have failed to show that they are likely to succeed on their merits of their claims, or that they raise a serious question going to the merits, particularly in light of the "doubly demanding" hurdle they must overcome in seeking a mandatory injunction.

A. The Independent-Nomination Signature Requirement Does Not Impose a Severe Burden on Plaintiffs' Asserted Rights

The Supreme Court has established with "unmistakable clarity" that "States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (citation and internal quotation marks omitted). And the Ninth Circuit has recently upheld the constitutionality of California's independent-nomination system challenged here. *De La Fuente v. Padilla*, 930 F.3d 1101, 1105-06 (9th Cir. 2019) (holding that §§ 8400 and 8403 and California's overall scheme did not significantly impair ballot access and did not violate the First or Fourteenth Amendment), *cert. denied*, 140 S. Ct. 676 (2019). Indeed, Plaintiffs do not dispute that the independent-nomination signature requirement of § 8400 or the time for gathering signatures set by § 8403 are reasonable and nondiscriminatory on its face, or that the requirement is applied evenhandedly, is politically neutral, and protects the integrity of California's election process. And there is no merit to Plaintiffs' allegation that the independent-nomination signature requirement is "impossible" to meet due to the COVID-19 pandemic. *See* Pls. Mot. at 4. Plaintiffs fail to show that the challenged signature requirement for independent nomination imposes a severe burden on their ability to appear on the ballot for the November election even under current circumstances.

1. Plaintiffs Have Not Demonstrated "Reasonable Diligence" and Failed to Show the Signature Requirement Imposes a Severe Burden

Plaintiffs cannot show a severe burden here, because they have not demonstrated reasonable diligence in gathering signatures. Under Ninth Circuit precedent, the severity of an alleged burden imposed by elections law must be measured by Plaintiffs' diligence in seeking access to the ballot. *See Nader*, 531 F.3d at 1035 ("[T]he burden on plaintiffs' rights should be measured by whether, in

light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain a place on the ballot or they will rarely succeed in doing so.") (citation omitted); *Angle*, 673 F.3d at 1133.[5] Prospective candidates who are simply unwilling to comply with the applicable requirements because of their perception of the law and circumstances cannot show that they were blocked from the ballot because of the challenged ballot-access law, as opposed to their own action or inaction. *See Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983), *cert denied* 469 U.S. 831 (1984) ("Some of the plaintiffs in this case testified they had not even attempted to undertake a petition drive because in their view the 3% requirement simply was impossible to meet. Plaintiffs failed to present factual evidence that they were precluded from obtaining ballot status by the challenged regulations.").

Here, Plaintiffs have failed to demonstrate any diligence in attempting to gather the requisite number of signatures to secure an independent nomination to the general election ballot. While Plaintiffs allege that they were prohibited from gathering signatures by the State's stay-at-home orders, those orders at most restricted Plaintiffs' ability to gather signatures in person—but not other ways—for a brief amount of time. Under § 8403(a)(2), Plaintiffs have a 15-week period between April 24 and August 7 to collect signatures for their nomination papers. The stay-at-home directive in the State Orders issued on March 19, five days before

[5] In the context of facial challenges (which do not turn on facts specific to a particular plaintiff), it is appropriate to look to evidence of impacts on parties other than a particular plaintiff—i.e., by independent nomination more generally. See, e.g., *Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747, at *2 (D. Ariz. Apr. 17, 2020). Because Plaintiffs here bring an as-applied challenge, rather than a facial challenge, the Court should confine its inquiry to whether Plaintiffs, specifically, have been reasonably diligent. *See Fair Maps Nevada v. Cegavske*, No. 3:20-cv-00271-MMD-WGC, 2020 WL 2798018, at *1 (D. Nev. May 29, 2020). But even if the Court were to look at evidence of impacts on parties other than Plaintiffs, Plaintiffs would still fall short, because they have submitted no evidence related to any other candidates seeking access to the ballot by independent nomination.

the nomination period started. However, one week after the nomination period started, the State clarified that "election-related activities" are "permissible activities" under the State Orders. Quirarte Decl. at ¶ 5. Thus, Plaintiffs could have begun signature gathering no later than May 1, 2020. Having one fewer week to gather signatures in person (between April 24, when the signature-gathering period started, and May 1, when the State clarified that election-related activities are permissible) cannot be said to impose a severe burden on Plaintiffs' ability to be placed on the ballot for the November election.[6]

Further lessening any alleged burden on Plaintiffs is the fact that they could have also gathered signatures by mail, email, or other electronic means, and campaigned by traditional or social media. *See*, *supra*, Background Section I. A prospective candidate, or his or her campaign, may send the nomination papers for signature to circulators or potential circulators by mail or email, or any other electronic means (for example, by download from a website), who may sign the papers themselves. The circulators/signers may sign the nomination papers, have them notarized and safely through the use of mobile notaries, and then forward them to the county election officials. *See* Delucchi Decl., Ex. 2; § 8407.[7] These alternative means of gathering signatures greatly lessens any alleged burden on Plaintiffs. *See Thompson*, 959 F.3d at 810 (no First Amendment violation where plaintiff could have "advertise[d] their initiatives within the bounds of our current situation [of the COVID-19 pandemic], such as through social or traditional media inviting interested electors to contact them"). In total, Plaintiffs could have gathered signatures in person during 14 out of the original 15 weeks, or over 93%

[6] Plaintiffs also argue that they were restricted by shelter-at-home orders in San Diego and Los Angeles from gathering signatures in person. Pls. Mot. at 7-8. But simply identifying orders affecting two cities statewide is insufficient to show that they were precluded from the ballot. In any event, Plaintiffs do not identify any order that restricts their ability to gather signatures by mail.

[7] There are over 150,000 notaries in California. *See* Secretary of State, *Notary Public Listing*, https://www.sos.ca.gov/notary/notary-public-listing/ (as of July 8, 2020).

of the available time, and could have gathered signatures by remote means during the entire 15-week period.

Despite their burden to show diligence, Plaintiffs do not allege that they ever started signature-gathering efforts or engaged in any communications with any potential signatories after the pandemic began. Plaintiffs have submitted no evidence of how many (if any) signatures have been gathered; provided no explanation for what (if any) efforts they expended to gather signatures; provided no evidence as to any concrete plans they had prepared prior to the pandemic for gathering signatures in California; and provided no evidence as to how they would have obtained the requisite number of signatures. In short, Plaintiffs have provided no evidence that they have attempted anything to further their presidential campaign since the nomination window opened, except by filing this lawsuit.

Plaintiffs submitted one declaration in which a volunteer-retiree stated that, in her experience, she can collect 30 to 40 signatures in a "whole day in front of a supermarket or train station." Affidavit of Kuzay in Supp. of Pls. Mot., ECF No. 11-4, ¶ 4.[8] However, there is no evidence that, other than Ms. Kuzay, Plaintiffs had solicited any other volunteers or paid signature-gatherers to collect signatures on their behalves, or that they ever had a plan to do so.[9] Notably, Plaintiffs' other declarants state only that they would vote for Plaintiffs if Plaintiffs were on the ballot, but did not indicate they would volunteer to gather signatures for Plaintiffs for any amount of time. *See* Decls. of Ayala (ECF No. 11-5), Castillo (ECF No. 11-6), and Ellevold (ECF No. 11-7) in Supp. of Pls. Mot. Plaintiffs have also provided no evidence that they considered gathering signatures by mail or other

[8] Ms. Kuzay states that she could collect 30 to 40 "valid" signatures. Id. However, she would have no means to validate whether the signatures she gathered were from eligible voters. By statute, the county election officials would verify the signatures after the nomination papers are submitted. *See* §§ 8401, 8403; *see also* Cal. Code Regs. tit. 2, § 20085, *et seq*.

[9] Assuming each signature-gatherer could collect 40 signatures day, Plaintiffs would have needed 66 signature-gatherers, working five days a week for 15 weeks, to obtain the requisite number of signatures during the signature-collection period.

means. Therefore, Plaintiffs have failed to show that they were reasonably diligent in timely gathering the requisite number of signatures to comply with § 8400.

Even assuming Plaintiffs had limited ability to gather voter signatures in person during the one-week window of time between April 24 and May 1, and face more difficulty in procuring signatures in person than before the pandemic, it cannot be said that Plaintiffs are excluded from the ballot by the independent-nomination signature requirement. *See Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020) ("[J]ust because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot.") (emphasis in original). Indeed, it cannot be suggested that successful signature-gathering campaigns are "impossible" under the current circumstances with reasonable diligence. Even in light of the ongoing pandemic and the state and local orders, other electioneering efforts have carried on. For example, as of July 2, 2020, the proponent of a ballot initiative submitted petitions containing over 900,000 signatures at the end of May and is awaiting signature verification. Delucchi Decl., ¶ 15, Ex. 4. And the proponents of at least three other ballot initiatives had submitted petitions in April and May that each contained over 900,000 raw signatures and have qualified for the ballot. *Id*., ¶¶ 16-19, Exs. 5-7.

Furthermore, while it may now be more difficult to gather signatures in person due to the pandemic, that alleged result cannot be attributed to the signature requirement of § 8400. *See Thompson*, 959 F.3d at 810. ("[W]e cannot hold private citizens' decisions to stay home for their own safety against the State."); *see also Common Sense Party v. Padilla*, No. 2:20-cv-01091-MCE-EFB, 2020 WL 3491041, at *7 (E.D. Cal. June 26, 2020) (same). There is no dispute that § 8400 is generally applicable, evenhanded, politically neutral, and protects the reliability and integrity of the election process. Therefore, § 8400 and its independent-nomination signature requirement do not impose a severe burden on Plaintiffs' asserted rights even in light of the pandemic and the State Orders. *See Thompson*, 959 F.3d at 810

("Because the state has not excluded plaintiffs from the ballot, the burden imposed on them by the state's initiative requirement cannot be severe.").

Further lessening any alleged burden on Plaintiffs, the independent-nomination process was also not Plaintiffs' only option for accessing the November ballot for the offices of the President and Vice President. Plaintiffs could have sought to qualify the Socialist Equality Party for that election, which would have required approximately 68,000 voter registrations and could have been gathered without any in-person contact. *See Common Sense Party*, 2020 WL 3491041, *1-2; *see also De La Fuente*, 930 F.3d at 1105-06.

2. Federal Courts in California and Other Jurisdictions Have Denied Preliminary Relief to Enjoin Ballot-Access Measures During the Pandemic

Indeed, consistent with the analysis above, multiple federal courts have denied preliminary injunctive relief to enjoin similar ballot access measures during the COVID-19 pandemic. The instant case is akin to the Sixth Circuit's recent decision in *Thompson* denying a preliminary-injunction motion filed by initiative proponents against Ohio's in-person signature-gathering requirement. *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020). There, the court determined that Ohio had exempted conduct protected by the First Amendment from its stay-at-home order, but the court found it significant that even if Ohio's stay-at-home orders had applied to the plaintiffs, Ohio had begun to lift its stay-at-home restrictions. *Id.* at 810. The court concluded that even if the state orders had applied to plaintiffs, the orders imposed only a five-week period from the lifting of the state restrictions until the deadline to submit an initiative petition, which "undermine[d] Plaintiffs' argument that the State ha[d] excluded them from the ballot." *Id.* Similarly here, assuming the State Orders limited Plaintiffs' ability to gather signatures in person, that limitation lasted only one week (from April 24 to May 1). Plaintiffs were able to begin their in-person signature-gathering efforts at least as of May 1, had they opted to do so,

giving them 14 of the original 15 weeks to gather signatures in person (in addition to gathering signatures by other means).

A recent decision by the District Court for the Eastern District of California is also instructive. There, the district court denied preliminary relief in a challenge to California's ballot-access requirement that prospective political parties obtain approximately 68,000 voter registrations to participate in the November 2020 election and to place on the ballot candidates for the offices of the President and Vice President. *Common Sense Party*, No. 2:2-cv-01091-MCE-EFB, 2020 WL 3491041, at *8.[10] The plaintiffs alleged that they were unable to conduct in-person solicitation of voter registrations to qualify a new political party because of the State Orders and the pandemic, and therefore California's requirement for approximately 68,000 registrations is unconstitutional. *Id.* at *1. The district court determined that even in light of the pandemic and the state's stay-at-home orders, plaintiffs "failed to show they are likely to succeed in proving that the burden imposed by [the challenged law] under these pandemic-related circumstances is close to severe" because the plaintiffs had means other than in-person solicitation to collect voter registrations, such as by mail or email and by traditional and social media. *Id.* at *6. Furthermore, the stay-at-home orders only prohibited the plaintiffs from conducting in-person solicitation, "if at all, for a very short amount of time." *Id.* The court thus concluded that the plaintiffs failed to meet their "heavy burden to show they are likely to succeed on the merits," and denied the motion for preliminary relief. *Id.* at *8.[11]

Similarly here, Plaintiffs had, and still have, the ability to gather signatures in person and by other means. To the extent Plaintiffs' ability to gather signatures in person were restricted by the State Orders, it was for at most one week. Plaintiffs

[10] After the district court denied preliminary relief, the plaintiffs filed an emergency writ petition with the Ninth Circuit to overturn the district court's decision, which petition the Ninth Circuit denied. *In re Common Sense Party*, No. 20-71888, ECF No. 6 (9th Cir. July 2, 2020).

[11] The district court also noted skepticism that the plaintiffs would have collected sufficient registration to participate in the November 2020 election. *Id.* at *6, n.6.

have thus failed to show that the alleged burden imposed by California's independent nomination system is close to severe, even under these pandemic-related circumstances. Plaintiffs' claims must therefore be analyzed under the flexible balancing test under *Burdick*, and any alleged burden is justified by the State's compelling interests. *See infra* Section I.A.2.

Other courts around the country have similarly denied preliminary relief based on challenges to ballot-access measures even in the midst of the continuing pandemic. *See*, *e.g.*, *Murray v. Cuomo*, No. 1:20-CV-03571-MKV, 2020 WL 2521449 (S.D.N.Y. May 18, 2020) (denying TRO application challenging New York's signature requirement for ballot access because challenged COVID-19-related restrictions are reasonable and non-discriminatory and furthers both the state's interest in protecting public health and interest in ensuring the orderly conduct of election); *Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747, *2 (D. Ariz. Apr. 17, 2020) (denying plaintiffs' TRO application because plaintiffs failed to show a severe burden even though the pandemic has created havoc on initiative committees' ability to gather signatures, some committees were able to gather enough signatures to qualify initiatives before the pandemic took hold).

Plaintiffs' reliance on *Esshaki v. Whitmer*, ---Fed. Appx.---, 2020 WL 2185553 (6th Cir. May 5, 2020), an unpublished Sixth Circuit decision, to argue that this Court must apply strict scrutiny to analyze the independent-nomination signature requirement is misplaced. Pls. Mot. at 13-14. In *Esshaki*, the Michigan district court enjoined the enforcement Michigan's signature-gathering requirements for a Congressional candidate to appear on the ballot. *Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, 2020 WL 1910154, at *1 (E.D. Mich. Apr. 20, 2020), *aff'd in part*, ---Fed. Appx.---, 2020 WL 2185553 (6th Cir. May 5, 2020). *Esshaki*, however, is inapposite. As an initial matter, *Esshaki* is inapplicable here

because, as a decision by an out-of-circuit court, it did not apply the Ninth Circuit reasonable-diligence analysis set out in *Nadar* and *Angle*.

Furthermore, a significant part of the district court's consideration in *Esshaki* was that Michigan's prohibition on signature-gathering remained in place through the deadline for petition submission.[12] *Esshaki*, 2020 WL 1910154, at *1; *see Thompson*, 959 F.3d at 809 (noting that "Michigan abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures that they had gathered to that point.") (internal citations omitted). In contrast, here—even assuming that the State Orders had prohibited Plaintiffs from in-person signature gathering when the nomination circulation period began on April 24—the state clarified a week later on May 1 that "election-related activities" are permitted, thus any perceived restriction on in-person voter-registration gathering lasted one week (from April 24 to May 1). *See* Quirarte Decl. at ¶ 5. Therefore, Plaintiffs had 14 weeks out of the 15-week period to collect signatures in person for independent nomination, yet they do not allege that they attempted at any time to gather signatures. Plaintiffs also had, and still have, the ability to gather signatures by mail.

Plaintiffs have therefore failed to show that, even in light of the pandemic and the resulting shelter-at-home orders, the Ballot Access Laws impose a severe burden on them and is subject to strict scrutiny. The statute therefore must be justified only by the state's important regulatory interests. *See Burdick*, 504 U.S. at 434. As explained below, § 8400 clearly meets that standard.

[12] In *Esshaki*, the deadline to submit signatures was April 21, 2020, while the state's stay-at-home order restricted public gatherings beginning on March 23, 2020. *Id.*

B. The State's Compelling Interest in Establishing Minimum Voter Support for Presidential Candidates to Appear on the Ballot Is Undiminished by the Pandemic

Plaintiffs do not address the State's interests.[13] However, it is unquestionable that the State has a compelling interest in ensuring that prospective candidates have a modicum of voter support, determined by the Legislature to be one percent of registered voters. Thus, Plaintiffs' motion must be denied because any burden imposed by the independent-nomination requirements on Plaintiffs' asserted rights is outweighed by compelling state interests even in light of the pandemic and State Orders.

It is well settled that states have a compelling interest in regulating the method by which candidates appear on the ballot and "protecting the integrity, fairness, and efficiency of their ballots and election processes as a means of electing public officials." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). The Supreme Court has established with "unmistakable clarity" that "States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Munro*, 479 U.S. at 194 (citation and internal quotation marks omitted). In affirming the dismissal of a recent challenge to the Ballot Access Laws, the Ninth Circuit held that the State has important interests "in requiring some preliminary showing of a significant modicum of support" and "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *De La Fuente*, 930 F.3d at 1106 (quotation omitted). "California's ballot regulations [relating to independent nomination] seek to protect its 'important regulatory interests,' in streamlining the

[13] Plaintiffs argue only that there is a national interest to presidential elections and that the State's interests are "less important." Pls. Mot. at 13-14 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983). However, the State's important interests in managing its presidential general elections were recently affirmed by the Ninth Circuit. *See De La Fuente*, 930 F.3d at 1106. In any event, while there is no doubt some national interest in federal elections where the outcome may be largely determined by voters outside the state, that national interest is nonextant here when Plaintiffs do not allege to be on, or expect to be on, the ballot of any state, and are not "national" candidates.

ballot, avoiding ballot overcrowding, and reducing voter confusion." *Id.* (internal citation omitted). "The right to access the ballot is important to voters, candidates, and political parties alike, but it must be balanced against California's need to manage its democratic process." *Id.*

Plaintiffs do not suggest that the State's interests in ensuring candidates appearing on ballots have a significant modicum of voter support, or in avoiding confusion, deception, and frustration of the democratic process is less important or compelling than before the pandemic. Yet, they seek to obtain the ultimate relief sought in this action by a motion for preliminary injunction without having demonstrated the bare minimum level of voter support that the Legislature deemed sufficient before placing on the ballot.[14] Here, California's independent-nomination signature requirement and deadline are reasonable and non-discriminatory, and are justified by the State's compelling interests even in light of the pandemic.

Even if the Court finds that the burden on Plaintiffs imposed by the Ballot Access Laws is severe—and it is not—the statutes are constitutional. There is no less onerous means of achieving the State's compelling interests. The signature requirements are already limited to 1% of voters who had registered in the last election, and those signatures could have been gathered over a period of several months. Notably, Plaintiffs' own delay in bringing this challenge has effectively eliminated any other alternative relief. As the Secretary of State's General Election Calendar shows, all signatures must be submitted to the county election officials by August 7, and there is then a series of deadlines that both county election officials

[14] Plaintiffs submitted a declaration from Richard Winger, who opines that states that have a requirement of 5,000 signatures to qualify for the general election do not have a crowded ballot, as there are usually less than six candidates on the ballot. Winger Decl. (ECF No. 11-8), ¶ 12. It is unclear why Plaintiffs submitted this declaration as it is not referenced in Plaintiffs' motion. In any event, this opinion lacks foundation, does not take into account the varying accompanying requirements that each state has along with its signature requirements, and does not answer the question whether the Ballot Access Laws impose unconstitutionally severe burdens on candidates. The Ninth Circuit has already found that they do not, and Mr. Winger's opinion is irrelevant. And there is also no evidence that Plaintiffs have been able to obtain even 5,000 signatures.

and the Secretary of State must meet in order to finalize and certify the list of candidates by August 27. Delucchi Decl., ¶¶ 7-14; *see id.*, Ex. 3. If the Court were to consider granting relief, the only effective option the Court would have now would be to waive the signature requirements for Plaintiffs entirely, thereby wholly subverting the State's compelling interests.[15]

II. OTHER EQUITABLE FACTORS WEIGH HEAVILY AGAINST ISSUANCE OF A PRELIMINARY INJUNCTION

In addition to failing to demonstrate a likelihood of success on the merits, Plaintiffs fail to show that they will suffer irreparable harm, that the balance of equities weighs in their favor, or that it is in the public interest to permit Plaintiffs to be placed on the November presidential general election ballot without having demonstrated significant voter support.

Any alleged irreparable harm to Plaintiffs is speculative. Plaintiffs have not shown that they would have obtained sufficient number of signatures to be placed on the November election ballot even without the pandemic or the resulting State Orders or local orders. Plaintiffs do not allege they have obtained any signatures, attempted to obtain any signatures, formulated any plans to obtain signatures, or have sufficient resources to obtain signatures. And by their own evidence, the most votes that a statewide candidate purportedly of the Socialist Equality Party has ever received in California was only 24,614 votes in the 2018 U.S. Senate election, Kishore Decl. (ECF No. 11-2) at 5, fewer than one-eighth of the 196,964 signatures required for independent nomination.

Plaintiffs' failure to bring this current challenge to the requirements for ballot access until more than two months after the nomination period opened on April 24, 2020 is also indicative of the lack of harm they face. As the U.S. District Court for

[15] Plaintiffs alternatively request decreasing the signature requirement to a nominal number or allowing for online signature gathering. *See* Pls. Mot. at 17. But Plaintiffs provided no justification for them, and "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Esshaki*, ---Fed.Appx.---, 2020 WL 2185553, *2 (citing *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)).

the Eastern District of California observed in denying a motion for injunctive relief where the plaintiffs challenged the requirements for a party to qualify for the ballot in light of the pandemic, "they waited some two months to even initiate this action to challenge [the statute] itself. If in-person solicitation was so instrumental to Plaintiffs' success, it seems they would have filed their challenge immediately rather than waiting so long during a critical time in their campaign." *Common Sense Party*, 2020 WL 3491041 at *13. The exact same observation should be made of Plaintiffs here.

On the other hand, unless a statute is unconstitutional, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Even in the midst of the COVID-19 pandemic, California would suffer irreparable harm if it was enjoined from conducting its election in accordance with its lawfully enacted ballot-access regulations, and its ballots cluttered with candidates who were unable to demonstrate any voter support. *See Thompson*, 959 F.3d at 812.

The balance of the equities and public interest also clearly favor the Secretary of State and weigh against injunctive relief. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) ("When the government is a party, these last two factors merge."). Giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest. *See Thompson*, 959 F.3d at 812. It would also be against the public interest if Plaintiffs are permitted to appear on the November election ballot for the offices of the President and Vice President without having demonstrated that they have a significant modicum of voter support or having expended any reasonable diligence to be placed on the ballot. If Plaintiffs obtain the relief they seek, then literally anyone meeting the bare qualifications of the office of the President under the Constitution would be able to do so as well, potentially opening a floodgate of prospective candidates

seeking to be placed on the ballot as independent presidential candidates for the November election without any demonstration of voter support. To wit, since this case was filed, another individual has sued the Governor and the Secretary of State in the Northern District of California with claims nearly identical to those asserted here, who also seeks to have the independent-nomination signature requirement of § 8400 enjoined so that he may appear on the November election ballot for the office of the President without having to demonstrate a modicum of voter support. *See Blankenship v. Newsom*, No. 2:20-cv-4479 (N.D. Cal.). Granting the relief Plaintiffs seek here would likely lead to an unmanageable and overcrowded ballot for the November presidential general election that would cause voter confusion and frustration of the democratic process. *See De La Fuente*, 930 F.3d at 1106; *see also supra* Section I.B.

CONCLUSION

For the reasons provided above, Plaintiffs' motion for a preliminary injunction should be denied.

Dated: July 10, 2020

Respectfully submitted,

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