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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 **JOSEPH KISHORE**, Socialist Equality
Party candidate for U.S. President; and
15 **NORISSA SANTA CRUZ**, Socialist
Equality Party candidate for U.S. Vice
16 President,

17 Plaintiffs,

18 v.

19 **GAVIN NEWSOM**, Governor of
California; and
20 **ALEX PADILLA**, Secretary of State of
California, in their official capacities,
21

22 Defendants.
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Case No.: 2:20-cv-05859

Hon. Dolly M. Gee

**PLAINTIFFS' REPLY TO
DEFENDANTS' OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants contend that the Plaintiffs’ request that the Court affirm their basic constitutional and democratic rights to participate in the upcoming presidential election will cause “frustration of the democratic process.” But it is Defendants who are frustrating the democratic process—by insisting on the enforcement of ballot access requirements that are effectively impossible for Plaintiffs to comply with without endangering the safety and lives of their supporters and the public at large.

Defendants state that “Plaintiffs could have begun signature gathering no later than May 1, 2020;” that Plaintiffs had “14 weeks out of the 15-week period to collect signatures in person;” and that Plaintiffs should have deployed “66 signature gatherers [circulators], working five days a week for 15 weeks, to obtain the requisite number of signatures,” which is nearly 200,000. *See Opp.*, at 9, 17, 12, n. 9.

Defendants suggest that Plaintiffs could collect the signatures “by mail, email, or other electronic means” (*Opp.*, at 11), attempting to obscure from the Court the fact that California law requires the “circulators” of the “nomination papers” to attest under oath that they personally physically witnessed the signature of each and every one of the “nominator” registered voters required to sign the petition. *See Cal. Elections Code* § 8409 (setting forth the format of the circulator’s affidavit). This necessarily means the circulators must be in close physical proximity to each and every one of the nominators in order to observe them signing and certify under oath that they have done so.

It is of no concrete import whatsoever that the circulators (Defendants suggest that Plaintiffs should employ 66 of these) could themselves also sign the nomination papers and have a mobile notary meet them at home, which is all that Defendants can propose by way of avoiding the necessity of in-person signature gathering. In other words, if 66 circulators sign the petitions as nominators and have the petitions

1 notarized by mobile notaries, then 196,898 of the 196,964 signatures still remain to
2 be collected.

3 The cold fact is that Plaintiffs’ circulators would have to physically approach
4 a multiple of 200,000 individuals to obtain the sufficient number of signatures. On
5 top of that, there is a vastly reduced pool of potential signers under present
6 conditions, given that large numbers of people rightly fear contracting COVID-19
7 from contact with others. Compounding this difficulty are the Defendants’ own
8 entirely justified restrictions on public gatherings and activities, which are intended
9 to combat the spread of infection. These conditions do, in fact, render it effectively
10 impossible for Plaintiffs to comply with the state’s signature requirements.

11 At the same time, contradicting their position that obtaining these signatures
12 is in any way practical, Defendants’ own submissions confirm that efforts to obtain
13 these signatures would violate the state’s own pandemic directives. When on June 5,
14 2020, Defendants for the first time advised the public that “permissible election-
15 related activities” include “collection of signatures to qualify candidates ... for the
16 ballot,” they at the same time admonished that persons engaging in such activity
17 must “of course ... adhere to physical distancing and other applicable health care
18 directives.” *See* Quirarte Decl., ¶ 9, Ex. 3 (emphasis added). Thus, even after June
19 5, 2020, it remained impossible for physical signature gathering to take place on any
20 substantial scale. The conclusion is inescapable that the state recognizes that the
21 candidates’ circulators and many hundreds of thousands of prospective nominators
22 would risk serious illness and even death in any attempt to comply with the state’s
23 ballot access regime.

24 This state of affairs cannot pass constitutional muster, especially given that a
25 presidential election is at stake. This Court would be acting well within its power in
26 granting Plaintiffs the injunctive relief sought here—and indeed it must do so to if
27 Plaintiffs’ core democratic and constitutional rights are to be given any substantial
28 effect.

1 **II. DISCUSSION**

2 **A. The state’s requirements as applied to the unique situation of the**
3 **pandemic are not politically neutral.**

4 The state claims that its requirements are “generally applicable, evenhanded,
5 politically neutral, and protect the reliability and integrity of the process.” *See Opp.*,
6 at 8. However true that may or may not be in an abstract sense, it is certainly not
7 true as applied to Plaintiffs in the concrete and immediate context of the
8 unprecedented health crisis presented by the surging pandemic.

9 This is confirmed by a hypothetical illustration. Suppose a state were to
10 impose new requirements for marriage licenses. According to these new
11 requirements, registered Democrats and Republicans can order their marriage
12 licenses by submitting a simple form. However, registered independents are required
13 to run through a mine field in order to obtain a marriage license. Such requirements
14 would not be upheld as “generally applicable,” “evenhanded,” or “politically
15 neutral.”

16 As this brief is being filed, the COVID-19 pandemic is raging out of control
17 in California. On Monday, July 13, 2020, Defendant Newsom himself issued an
18 order rolling back the state’s efforts to “re-open” and reinstating emergency
19 limitations, listing numerous categories of businesses that ordered to cease indoor
20 and outdoor operations. In the two weeks preceding the filing of this brief, the
21 governor’s office reported 111,495 new cases and 1,137 new deaths in the state—
22 more deaths in two weeks than many countries have recorded over the entire span of
23 the pandemic. Over the same period, the state’s hospitals reported a 26.3 percent
24 increase in COVID-related hospitalizations.¹

25
26
27 ¹ *See* <https://covid19.ca.gov/roadmap-counties/>
28

1 Defendants' ballot access requirements for independent presidential
2 candidates, which do not apply to Democrats or Republicans, would require
3 Plaintiffs and their supporters to run through the equivalent of a mine field, risking
4 serious illness and death. It seems hardly necessary to argue that the right to life,
5 protected by the Fifth and Fourteenth Amendments to the U.S. Constitution (and
6 Article I of the California Constitution) should be paramount. Whatever interests the
7 state may have in avoiding ballot "clutter" and "voter confusion," these interests
8 cannot be served by requiring independent candidates and their supporters to engage
9 in activity that would involve substantial risk to human life.

10 **B. On the merits, the Court applying strict scrutiny does not need to**
11 **consider whether Plaintiffs were "reasonably diligent;" but no**
12 **"reasonably diligent" candidate could comply with Defendants'**
13 **ballot access requirements anyway.**

14 Defendants acknowledge the bipartite *Anderson-Burdick* standard for ballot
15 access cases, pursuant to which applicable standard will depend on whether the
16 state's requirements impose a "severe burden" or "severe restriction" on the
17 candidate. When the asserted rights are subject to "severe restrictions," the law must
18 be "narrowly drawn to advance a state interest of compelling importance." *Burdick*
19 *v. Takushi*, 504 U.S. 428, 434 (1992). In cases of a lesser burden on the asserted
20 electoral rights, constitutionality is "measured by whether, in light of the entire
21 statutory scheme regulating ballot access, 'reasonably diligent' candidates can
22 normally gain a place on the ballot, or whether they will rarely succeed in doing so."
23 *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (citation omitted); *see Angle*
24 *v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012).

25 Plaintiffs' position, based on the *Esshaki v. Whitmer* case, is that the burden
26 placed on them in the context of the pandemic is "severe," such that strict scrutiny
27 will apply and the Court does not need to reach the question of whether a
28 "reasonably diligent" candidate could comply with the requirements. As the district

1 court in *Esshaki* reasoned, “[u]nder these unique historical circumstances,” the
2 pandemic and the state’s countermeasures operated “in tandem to impose a severe
3 burden on Plaintiff’s ability to seek elected office, in violation of his First and
4 Fourteenth Amendment rights to freedom of speech, freedom of association, equal
5 protection, and due process of the law.” 2020 WL 1910154 at *1 (E.D. Mich. Apr.
6 20, 2020) (emphasis added). Since the burden was severe, the court proceeded
7 directly to apply strict scrutiny.

8 The Defendants’ efforts to distinguish *Esshaki* are discussed further below,
9 but Plaintiffs submit that they should prevail regardless of the standard being
10 applied, since no “reasonably diligent” candidate could comply with the
11 requirements anyway.

12 Defendants contend that it “cannot be contested that successful signature-
13 gathering campaigns are ‘impossible’ under the current circumstances with
14 reasonable diligence.” Opp., at 13. In support of this position, Defendants point to
15 ballot initiative proponents who have submitted hundreds of thousands of signatures
16 in recent months.

17 Attorney Rachelle Delucchi declares, for example, that a table submitted
18 along with her declaration shows that a proponent of a ballot access initiative
19 submitted a total of 910,293 signatures between late May and early June to qualify
20 this initiative for the November election.” Delucchi Decl., ¶ 15. Defendants cite this
21 evidence in support of the statement that “[e]ven in light of the ongoing pandemic
22 and the state and local orders, other electioneering efforts have carried on.” Opp., at
23 13. But this is misleading: the signatures on these ballot propositions were submitted
24 in late May and early June. The declarant fails to indicate when they were collected.
25 Because Defendants chose to omit the dates on which these signatures were
26 collected, Defendants’ evidence is simply irrelevant and not probative.

27 In fact, the specific ballot initiative highlighted by Defendants, titled “1877:
28 Adjusts Limitations In Medical Negligence Cases,” went through a series of

1 amendments in late 2019, and the Attorney General prepared a title and summary of
2 the chief purpose and points of the proposed measure, dated December 2, 2019.
3 Winger Decl., ¶ 2; Exhibit A. Therefore, the period of time within which signatures
4 could be gathered was the 180 days from December 2, 2019 (Elections Code §§ 336,
5 9014(a)) to June 1, 2020 (Elections Code §§ 9014, 9030(a)). Winger Decl., ¶ 3.²

6 Each of the ballot access propositions referenced by Mrs. Delucchi is easily
7 distinguished by the fact that the signature gathering period began well before the
8 COVID-19 pandemic. Initiative 1879 was circulated for signatures between
9 December 17, 2019 and June 15, 2020, as was Initiative 1880. Winger Decl., ¶ 5.
10 Initiative 1882 was circulated between December 30, 2019 and June 29, 2020. *Id.*
11 Defendants have chosen to omit the dates on which the signatures were actually
12 collected, and they make no showing that any substantial fraction were gathered
13 after April 27, 2020.

14 The requirements for ballot initiatives therefore stand in sharp contrast to the
15 signature-gathering requirements imposed upon Plaintiffs, with which Plaintiffs
16 could not have possibly attempted to comply until after the pandemic was already in
17 full swing. *See Opp.*, at 9.

18 And as to Initiative 1877, upon closer examination, Defendants' example of
19 "other electioneering efforts" that supposedly "have carried on" turns out to be the
20 complete opposite. The proponents of this ballot access measure have apparently
21 decided to aim for putting the referendum on the 2022 ballot instead of the year
22
23

24 ² Under the above Elections Code provisions, supporters of ballot initiatives are
25 given a maximum of 180 days to collect signatures, starting from when the attorney
26 general's office provides a ballot title after reviewing the initiative's language.
27 Regardless of when the circulation period begins, signatures for an initiative must be
28 verified at least 131 days before the next general election to appear on that election's
ballot.

1 2020, in light of the pandemic.³ Mrs. Delucchi does not include Initiative 1877 on
2 her list of initiatives that have qualified for the November 2020 ballot. *See* Delucchi
3 Decl., ¶ 19.

4 Defendants also suggest that Plaintiffs should have gathered signatures “by
5 mail or email, or other electronic means” (Opp., at 3) or on “social media” (Opp., at
6 11). These phrases are similarly misleading. California has not, in fact, developed
7 any procedures for electronic signature gathering. Winger Decl., ¶ 7. On April 29,
8 2020, for example, Massachusetts became the first state to allow campaigns to
9 collect electronic signatures and remote signatures. *Id.* California has not
10 implemented any such measures. *Id.*

11 When Defendants refer to “electronic means” they are apparently referring to
12 the hypothetical procedure that a campaigner could mail or email the document to a
13 prospective signer, who could sign the document, pay a mobile notary to come
14 witness the signature, and then mail it to county election officials. *See* Delucchi
15 Decl., Ex 2.

16 Since Defendants place such emphasis on the “use of mobile notaries” (Opp.,
17 at 11), it is worth pointing out that Defendants’ own exhibit states: “California Law
18 does not provide the authority for California notaries public to perform a remote
19 online notarization. The personal appearance of the document signer is required
20 before the notary public.” Delucchi Decl., Ex. 2 (emphasis added). In San Francisco,
21 mobile notary fees range from \$55 to \$115 per signature, depending on the
22

23 ³ The *San Francisco Chronicle* reported on May 1, 2020: “Worried about the
24 effect the coronavirus pandemic may have on the November elections, backers will
25 delay until 2022 an initiative that would raise the dollar limit for damages awarded
26 in medical malpractice lawsuits.” Winger Decl., ¶ 6; Exhibit B (“ ‘We’ve been
27 agonizing over this for a month and a half, ever since we finished collecting
28 signatures’ [Consumer Watchdog president Jamie Court] said Court said his
group now plans to wait until late May to file, purposely avoiding the 2020 ballot.”).

1 geographic zone. Winger Decl., ¶ 9. At a hypothetical average rate of \$100 per
2 notarized signature, the cost of notarizing nearly 200,000 signatures would be on the
3 order of \$20 million, not including postage to and from nominator. Even making the
4 assumption that Plaintiffs’ campaigners could somehow identify and email 200,000
5 voters willing to sign as nominators without campaigning in public spaces, the
6 financial burden of such a proposal reveals the tenuous if not preposterous character
7 of Defendants’ position.

8 In *SawariMedia LLC v. Whitmer*, another recent voting rights case addressing
9 COVID-19 conditions, the district court rejected the sort of arguments the
10 Defendants make here regarding the availability of a mail campaign, citing the
11 language of *Esshaki*:

12 [T]he unforeseen nature of such an expense here surely magnifies its
13 burden: no candidate, at the time they initially declared for office, could
14 have anticipated that at the end of March, just when in-person signature
collecting might be expected to be ramping up, there would arise the
sudden need to switch to a mail-only signature campaign.

15 *SawariMedia LLC v. Whitmer*, No. 20-CV-11246, 2020 WL 3097266, at *10 (E.D.
16 Mich. June 11, 2020). Not only would the financial cost be “more than incidental,”
17 but “the efficacy of a mail-based campaign is unproven and questionable at best.”
18 *Id.* at *11.

19 Such a mail-only signature gathering campaign assumes both a fully
20 operational postal service and a public willing to walk to the mailbox, open
21 physical envelopes, sign a petition, and deposit the envelope back into a
22 mailbox or make a trip to the Post Office. Today, sadly, ample reasons exist
23 to question the plausibility of each of those assumptions. For one, the United
24 States Postal Service has itself been affected by the COVID-19 virus: As of
25 April 7, 2020, more than 386 postal workers have tested positive for the virus
26 nationwide and mail delays have been confirmed in Southeast Michigan.
27 Media reports extensively discuss the risks of contracting COVID-19 from
28 mail, suggesting, at least anecdotally, that the issue may be of widespread
public concern or even fear. Getting voters to return signatures by mail in
normal times is difficult. In these unprecedented circumstances, the efficacy
of a mail-only signature gathering campaign is simply an unknown. Forcing
candidates—through little fault of their own—to rely on the mails as their
only means of obtaining signatures presents a formidable obstacle of
unknown dimension.

1 *Id.* The same reasoning should apply here.

2 As to the allegation that “social media” could be used by Plaintiffs to
3 campaign, Plaintiffs do indeed make use of social media. But they hasten to point
4 out that, as a factual matter, they have been waging a campaign for years against
5 censorship on these platforms. *See* Kishore Decl., ¶¶ 5-16. The private technology
6 monopolies claim that they are not state actors, such that Plaintiffs’ speech can be
7 censored on these platforms without regard for First Amendment protections. For
8 this reason, the exercise of Plaintiffs’ core democratic and constitutional rights
9 should not be made contingent on the whims and caprices of the private owners of
10 the social media platforms.

11 Defendants rely on *De La Fuente v. Padilla*, 930 F.3d 1101, 1105-06 (9th Cir.
12 2019), which acknowledged that the “the number of signatures the Ballot Access
13 Laws require may appear high” but otherwise upheld California’s ballot access
14 regime for independent presidential candidates against a constitutional challenge.
15 *De La Fuente*’s reasoning has no application to the facts of this case. In 2019, a
16 campaigner could stand outside a supermarket and collect signatures by holding
17 brief conversations with voters. In 2020, a campaigner would risk death in doing so,
18 both for the campaigner and for the prospective signer. Moreover, Defendants do
19 not explain what to do about the fact that voters who are approached in public under
20 present conditions are likely to walk away from the campaigner—or reprove the
21 campaigner for violating social distancing norms.

22 Defendants’ own exhibits establish a qualitatively more onerous burden on
23 candidates than the regime that was upheld by the Ninth Circuit in 2019 in the *De*
24 *La Fuente* case. In 2019, the process of gathering a signature consisted of a brief
25 conversation in a grocery store parking lot taking no more than a minute with no
26 threat of contagion. In 2020, Defendants’ proposal would require each signer to (1)
27 be contacted by a stranger over the internet or by phone and agree to support the
28 campaign; (2) provide his or her postal address to receive the documents by mail, or

1 have a printer with which to print out the documents after they are emailed; (3)
2 agree to arrange for a mobile notary, spend the time necessary to accomplish a
3 notarized signature, and incur the cost of such notary (at \$55 to \$115 or more per
4 signature); and (4) mail the document back to the campaigner or directly to elections
5 officials. Winger Decl., ¶¶ 8-9. As a burden on the exercise of the constitutional
6 rights of Plaintiffs and their supporters, this scenario is many orders of magnitude
7 more onerous than the regime upheld in *De La Fuente*.

8 In the final analysis, Defendants' vision of a candidate fulfilling the 200,000-
9 signature requirement in the year 2020 is simply a fantasy. Defendants cannot point
10 to, and will not be able to point to, any independent candidate who is expected to
11 fulfill these requirements. In fact, the only other similarly-situated candidate that
12 Defendants mention is Constitution Party candidate Don Blankenship, who
13 subsequent to Plaintiffs' complaint in this matter has filed a similar challenge. *See*
14 *Blankenship v. Newsom*, No. 2:20-cv-4479 (N.D. Cal); Opp., at 22.

15 **C. Ballot access is all or nothing; gathering "some" signatures would**
16 **not have resulted in "some" ballot access.**

17 Plaintiffs frankly acknowledge in their Complaint in this matter: "At this
18 point, through no fault of their own, Plaintiffs have collected zero signatures
19 towards the total." Compl., ¶ 32. It is Plaintiffs' position that it would be
20 unconstitutional to enforce a requirement that Plaintiffs gather physical signatures
21 under these pandemic conditions.

22 Defendants fault Plaintiffs for failing to "attempt" to gather some fraction of
23 the required total number of signatures. Defendants write that "Plaintiffs have failed
24 to demonstrate any diligence in attempting to gather the requisite number of
25 signatures to secure an independent nomination to the general election ballot." Opp.,
26 at 10. This argument is a non-sequitur and contrary to all common sense. If
27 Plaintiffs had gathered 5 percent of the required number of signatures, Defendants
28 would not have printed their names on 5 percent of the ballots. Defendants will deny

1 ballot access unless all of the required signatures are gathered and validated.
2 Moreover, in addition to being a pointless and futile exercise in light of the
3 unfeasibility of gathering the required number, any such “attempt” would have
4 created a pronounced risk to public health.

5 In contrast to *Libertarian Party of Fla. v. Florida*, 710 F.2d 790, 940 (11th
6 Cir. 1983), cited at Opp., at 10, Plaintiffs and their supporters did not decline to
7 undertake a petition drive because they viewed the signature requirement as simply
8 too high, but because under conditions of the coronavirus pandemic, it would been
9 dangerous and irresponsible to do so.

10 **D. Defendants fail to distinguish the *Esshaki* case.**

11 According to Defendants, the *Esshaki* case is “inapplicable because, as a
12 decision by an out-of-circuit court, it did not apply the Ninth Circuit reasonable-
13 diligence analysis set out in *Nadar* and *Angle*.” Opp., at 16-17. This is a remarkable
14 argument for Defendants to make, since Defendants’ own brief relies on out-of-
15 circuit decisions in *Libertarian Party of Fla.*, *supra*, and *Murray v. Cuomo* No.
16 1:20-CV-03571-MKV, 2020 WL 2521449 (S.D.N.Y. May 18, 2020).

17 Defendants go on to attempt to distinguish the *Esshaki* case by pointing out
18 that signature gathering was already underway in Michigan at the time that the
19 pandemic and the state’s countermeasures brought signature-gathering to a halt. In
20 contrast, in Plaintiffs’ case, the pandemic and the state’s countermeasures cover the
21 entire signature-gathering period. This is indeed a fact that distinguishes *Esshaki*
22 from this case, and it only makes signature-gathering by Plaintiffs and their
23 supporters that much more impossible and the consequent burden on Plaintiffs all
24 that more severe. The plaintiff in *Esshaki* could have, hypothetically, gathered the
25 signatures before the pandemic; Plaintiffs could not have done so. If the burden was
26 “severe” in *Esshaki*, warranting strict scrutiny, it is only more “severe” here.

27 One theme in Defendants’ brief, and a ground on which they attempt to
28 distinguish the *Esshaki* case, is that signature-gathering in California was

1 supposedly prohibited only for one week. In support of this claim, Defendants point
2 to a handful of vague orders and statements that they contend indicate that
3 signature-gathering by Plaintiffs and supporters would have been exempt from the
4 general lockdown. These hardly support Defendants' position.

5 One document is dated March 28, 2020 and titled, "Advisory Memorandum
6 On Identification Of Essential Critical Infrastructure Workers During Covid-19
7 Response." Chang Decl., Ex. 4. This document was issued by the Department of
8 Homeland Security Cybersecurity & Infrastructure Security Agency, and states with
9 emphasis: "This list is advisory in nature. It is not, nor should it be considered, a
10 federal directive or standard." Chang Decl., Ex. 4, *1. On the twelfth page, the
11 document lists the following workers as critical infrastructure workers: "Elections
12 personnel to include both public and private sector elections support." Chang Decl.,
13 Ex. 4, *12. This document does not define "elections personnel" or "elections
14 support." The plain meaning of this language is a reference to governmental
15 election workers and private persons who assist at polling stations. This document
16 advances Defendants' argument not one whit.

17 The same is true as to the second document cited by Defendants: a March 22,
18 2020 list of categories of workers designated as "essential" under Defendant
19 Newsom's March 19, 2020 Executive Order N-33-20, under a heading labeled,
20 "Government Operations and other community-based essential functions" which
21 includes the same undefined phrase "elections personnel." Chang Decl., Ex. 5.

22 Finally, Defendants point to a "Q&A" document posted online on May 1,
23 2020 indicating that "Elections are an essential activity" under a heading described
24 as "protected activities." Quirarte Decl., ¶ 5. This document on its face does not
25 reference signature-gathering. And at any rate, Plaintiffs never saw any of these
26 documents before they were attached to Defendants' opposition. Kishore Decl., ¶¶
27 2-4; Santa Cruz Decl., ¶¶ 2-4.

1 The document that Defendants believe triggers Plaintiffs' obligation to begin
2 collecting signatures on May 1, 2020 merely consists of an online webpage that lists
3 "permissible activity" as "the collection and dropoff of ballots, or other election-
4 related activities." *See* Quirarte Decl., ¶ 5. Plaintiffs are not "elections personnel"
5 and were not engaged in "the collection and dropoff of ballots," so there is little to
6 reassure them and their supporters against the threat of criminal prosecution.

7 Indeed, if Plaintiffs had seen the documents, a reasonable inference would
8 have been that this language is a reference to the "elections personnel" mentioned in
9 the earlier documents. In sum, the uploading of these vague phrases to an obscure
10 Q&A web page never viewed by Plaintiffs is not sufficient to trigger an obligation
11 for Plaintiffs to begin collecting signatures. Only on June 5, 2020 did the cited web
12 page specify collecting signatures as an exempt category of activity, and even then,
13 it was accompanied by inconsistent and contradictory language about physical
14 distancing.

15 Most importantly, none of this has any bearing on whether signature-
16 gathering was safe. At most, these documents could have provided a defense in the
17 event of criminal prosecution for that activity. But as stated by Mrs. Kuzay, she not
18 only would have risked criminal prosecution in gathering signatures, she would have
19 risked her own health as well as spreading the deadly infection to others. *See* Kuzay
20 Decl., ¶¶ 5-6. For these reasons, Plaintiffs did not have "14 weeks out of the 15-
21 week period to collect signatures in person," but zero weeks, and Defendants are not
22 able to distinguish the *Esshaki* case on this basis.

23 Defendants rely on *Common Sense Party v. Padilla*, No. 2:20-cv-01091-
24 MCE-EFB, 2020 WL 3491041 (E.D. Cal. 2020) (Opp., at 13). In that case, the
25 plaintiff Common Sense Party was required to gather approximately 68,000 voter
26 registrations, but only managed to gather 5,519 by October 1, 2019; 9,819 by
27 January 3, 2020; and 10,859 by February 18, 2020. *Id.*, *5. On these facts, the
28 district court concluded that the fact that the plaintiff had gathered only 15,010 by

1 June 9, 2020 was not the result of the pandemic, since the Plaintiff had plenty of
2 time prior to the pandemic to gather the signatures.

3 The *Common Sense Party* case, like the case of *Thompson v. Dewine*, 959
4 F.3d 804, 810 (6th Cir. 2020), are distinguished by the fact the plaintiffs in those
5 cases had a meaningful opportunity to gather signatures before the onset of the
6 pandemic. Plaintiffs' case here is different in that the statutory signature-gathering
7 period did not open until late April, well after the pandemic had developed into an
8 unprecedented worldwide crisis.

9 While *Common Sense Party* and *Thompson* are easily distinguished on their
10 facts, Plaintiffs submit that these two decisions are also poorly reasoned and
11 unpersuasive. Both of these decisions coincided with the misguided and premature
12 efforts to "re-open" the economy, during which time the dangers posed by the
13 COVID-19 disease were being minimized. *See Common Sense Party v. Padilla*,
14 2020 WL 3491041, at *6 ("... even now when much of California is
15 re-opened . . ."); *Thompson*, 959 F.3d at 809 (citing the Ohio Department of Health
16 "Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay
17 Healthy and Safe at Home Order"). These "re-opening" efforts have now backfired
18 and resulted in a national catastrophe. With the death toll spiraling over 140,000
19 nationally and over 7,200 in California, and in light of Defendant Newsom's own
20 order reversing course on July 13, 2020, it is clear that this ill-conceived "re-
21 opening" has been overtaken and superseded by events.

22 The Ninth Circuit's evolving views on these questions are suggested by an
23 order earlier this month denying a stay of the district court's award of injunctive
24 relief in *Idaho v. Little*, No. 20-35584 [Doc. No. 14, *1] (July 9, 2020). The district
25 court in that case had granted ballot access relief to an Idaho statewide initiative,
26 due to the health crisis, ordering the state to extend the deadline and permit
27 signatures to be gathered electronically (District Court Case No. 1:20-cv-00268).
28 The Ninth Circuit panel refused to stay the injunction, over a dissent claiming that

1 the plaintiffs had not been “diligent” and that the order permitting electronic
2 signatures violated the separation of powers. *Idaho*, No. 20-35584 [Doc. No. 14,
3 **3-4].

4 **E. There is no objective basis to find that Plaintiffs do not meet the**
5 **test for a “bare modicum of voter support.”**

6 Defendants point to the state’s interests in the conduct of the elections, which
7 involve a determination of whether a candidate enjoys a “bare modicum of voter
8 support.” Opp., at 19. But Defendants overstate their case when they claim that
9 Plaintiffs have not demonstrated “even a bare modicum of voter support” and did
10 not make “any effort to solicit such support.” Opp., at 2 (emphasis added). This
11 statement requires Defendants to ignore all of the declarations that were submitted
12 along with this motion, as well as the factual evidence of the Plaintiffs’ campaign
13 activities in the state before the pandemic.

14 The Plaintiffs are not just “anyone,” as Defendants suggest. They are
15 candidates who have secured the nomination of a well-established political party
16 with a long history and a widely-read political newspaper. Defendants do not
17 dispute that Plaintiffs timely filed their statements of candidacy with the federal
18 election commission, or that Plaintiffs and their supporters organized and held three
19 campaign meetings in California in the space of several days in March. This shows
20 that prior to the signature-gathering period, the Plaintiffs were diligently soliciting
21 and winning support—in California and around the country.

22 Contrary to the Defendants’ speculative suggestions, the Plaintiffs belong to a
23 well-ordered and professional party that could deploy dozens of signature-gatherers
24 throughout the state on any given day. Santa Cruz Decl., ¶ 5. Plaintiffs are ready to
25 satisfy any of the Defendants’ ballot access requirements besides the signature
26 requirements, and they have 55 electors pledged to serve. Santa Cruz Decl., ¶ 6.

27 By launching their campaign in January and holding meetings throughout the
28 state, Plaintiffs were working early and diligently to recruit additional support for

1 their campaign. Santa Cruz Decl., ¶ 7. In other words, Plaintiffs expected to conduct
2 their campaign not only with their existing supporters as of January 2020, but with
3 supporters that they would win over in the course of the campaign. Santa Cruz
4 Decl., ¶ 8.

5 It is undisputed that the pandemic cut these efforts short. Plaintiffs cancelled
6 planned meetings around the country for safety reasons. These are the facts. Against
7 this objective evidence, Defendants can only offer their own speculation about what
8 could have, should have, or might have (or might not have) happened but for the
9 pandemic.

10 Signature-gathering is only one of many ways a state can make a
11 determination as to whether a candidate possesses the required level of support. In
12 Colorado, for example, an independent candidate can demonstrate the requisite
13 degree of voter support by gathering physical signatures or by paying a \$1,000 filing
14 fee. Winger Decl., ¶ 10.

15 Defendants describe an apocalyptic scenario, wherein allowing the Plaintiffs
16 onto the ballot would result in an “unmanageable and overcrowded ballot for the
17 November presidential general election that would cause voter confusion and
18 frustration of the democratic process.” Opp., at 22. But this argument is significantly
19 undermined by the fact that the state already has in place a Top Two Open Primary
20 system for other candidates for federal office. As Mr. Winger explained in his
21 original declaration, which is undisputed:

22 Since 2012, California has implemented a Top Two Open Primary
23 system, which means that all candidates running for state constitutional,
24 U.S. Congressional, and state legislative offices are listed on a single
25 statewide primary election ballot. Voters can vote for the candidate of
26 their choice for these offices, regardless of how they are registered. The
27 top two candidates, as determined by the voters, advance to the general
28 election in November. This procedure, which has been in place since
2012, diminishes any concern that the state may assert as to a
“cluttered” or “crowded” ballot. This open procedure, in which any
candidate can participate by paying a filing fee, is also incongruous on
its face with the large signature gathering total that the state requires as
to independent candidates for president.

1 Winger Decl. (July 1, 2020), ¶ 6. In other words, the state of California allows any
2 candidate to participate in these races by paying a filing fee, without regard for the
3 danger of an “unmanageable and overcrowded ballot.” These elections proceed in an
4 orderly fashion, and the state has deemed that its interests are served by allowing
5 free and open access in this manner.

6 As to ballot access for Plaintiffs, whatever interests the state may have in
7 avoiding ballot “clutter” and “voter confusion,” they are wholly overstated here.

8 First, there is no objective basis for Defendants’ concern about an avalanche
9 of candidates cascading onto the 2020 ballot. At this point Defendants can point to
10 exactly two independent candidates: Plaintiffs and Don Blankenship. Adding a
11 single presidential ticket to the ballot hardly threatens significant ballot clutter.
12 Only five presidential tickets (Democrats, Republicans, Greens, Libertarians, and
13 the Peace and Freedom Party candidates) were on the California presidential ballot
14 in 2016 (and no independents). No candidates without voter support will be
15 permitted to “clutter” the ballot.

16 Nor is there any plausible danger that an independent socialist candidate will
17 be confused with other party candidates. As to the issue of “voter confusion,” in his
18 concurrence in *Williams v. Rhodes*, 393 U.S. 23 (1968), Justice John Marshall
19 Harlan indicated that a ballot with eight candidates on it would carry no significant
20 risk of such confusion: “Ohio law would permit as many as six additional party
21 candidates to compete with the Democrats and Republicans . . . And with
22 fundamental freedoms at stake, such an unlikely hypothesis cannot support an
23 incursion upon protected rights, especially since the presence of eight candidacies
24 cannot be said, in light of experience, to carry a significant danger of voter
25 confusion.” *Williams*, 393 U.S. at 46; *see also* Winger Decl. (July 1, 2020), ¶ 5.

26 Defendants suggest with emphasis that if Plaintiffs prevail, “*anyone* . . . can
27 seek to be placed on the ballot during the pandemic.” Opp., at 2. No, not *anyone*. An
28 independent presidential candidate wishing to access the ballot in California would

1 still have to demonstrate the requisite minimum degree of support, as Plaintiffs
2 have.

3 As Plaintiffs indicated in a previously-filed brief, an important point of
4 reference is the decision in *Hall v. Austin*, 495 F. Supp. 782, 784 (E.D. Mich. 1980).
5 In that case, it was undisputed that Michigan had no statutory method by which
6 independent candidates for president and vice-president could gain access to the
7 Michigan general election ballot. The plaintiffs were Gus Hall and Angela Davis,
8 the Communist Party's presidential and vice-presidential candidates, who sought
9 ballot access as independent candidates.

10 The *Hall* case is a helpful reference point because California in the year 2020,
11 like Michigan in the *Hall* case, is effectively failing to provide a means for
12 independent presidential candidates to access the ballot. Here, California has one
13 method, existing only on paper, which is for all practical purposes impossible to
14 utilize under current conditions. In *Hall*, the district court acknowledged that the
15 plaintiffs must still demonstrate the requisite degree of support to obtain the
16 requested affirmative relief. The district court considered the appropriate factors and
17 concluded that they met that standard: "Reviewing the candidacies of Hall and
18 Davis . . . the Court easily concludes that 'there is reason to assume' that Hall and
19 Davis have 'the requisite degree of community support.'" *Hall*, 495 F. Supp. at 790
20 (citations omitted).

21 Hall and Davis can hardly be compared to the defendants' examples of
22 frivolous candidates who have attempted to qualify as independent
23 candidates. They are earnest and experienced politicians who are
24 recognized, interviewed and written about by the news media and
25 invited to speak and participate by many organizations. They espouse a
26 serious political program and address important issues pertaining to
27 race, economics, and government. In short, there is no indication that
28 the addition of Hall and Davis will in any way impair the ability of the
electorate to make rational decisions at the polling booth. On the
contrary, their participation as candidates may well assure that the
electorate is better informed as to crucial issues and alternative
positions which the voter may accept, reject or utilize for comparison.
After all, this is the meaning and strength of democracy and the
formula for its perpetuation and growth.

1 *See Hall*, 495 F. Supp at 792.

2 As to the issue of whether Plaintiffs have the requisite degree of community
3 support, Plaintiffs submit that they have established that they do. As demonstrated
4 by the declarations submitted together with this application, Plaintiffs Kishore and
5 Santa Cruz are far from frivolous candidates. They are experienced politicians who
6 are recognized throughout the country and who have each written extensively on a
7 broad range of political issues. The political newspaper of their organization, the
8 *World Socialist Web Site* (wsws.org) is the most widely read socialist newspaper on
9 the internet, read by millions of people around the world. The declarations that were
10 filed together with the application point to the political ideas that have won them
11 support among teachers, health care workers, students, and other sections of the
12 state's population.

13 As in the *Hall* case, the fact that Plaintiffs Kishore and Santa Cruz espouse a
14 serious political program militates strongly in their favor. Just as in *Hall*, including
15 their names on the ballot will not in any way impair the ability of the electorate to
16 make rational decisions at the polling booth.

17 Indeed, placing these socialist candidates with their distinct program on the
18 ballot will inform rather than confuse voters as to important issues, including those
19 who otherwise might not vote. The fact that sample ballots are mailed to voters prior
20 to election day further diminishes any concern about voter confusion, since voters
21 will have an opportunity to research the candidates and their platforms in advance.
22 There is no realistic threat that these avowedly socialist candidates will be confused
23 with the other party candidates.

24 Concluding that it was "necessary to emphasize again that the rights at stake
25 here . . . are crucial to our democracy," *Hall*, 495 F. Supp. at 792, the court in *Hall*
26 ultimately awarded injunctive relief, ordering Michigan to place Hall and Davis on
27 the ballot.
28

1 **III. CONCLUSION**

2 For the reasons above, the state’s requirements impose a “severe burden” and
3 a “severe restriction” on Plaintiffs, and as such strict scrutiny should apply. In the
4 alternative, no “reasonably diligent” candidates would be able to fulfill the state’s
5 requirements anyway, so Plaintiffs should prevail regardless of what standard is
6 applied.

7 As Plaintiff Santa Cruz has stated: “I think it is pure insanity that our
8 campaign should be expected to collect some 200,000 signatures in the midst of a
9 deadly pandemic, especially as cases continue to skyrocket in California and
10 throughout the region.” Santa Cruz Decl., ¶ 10. She explains:

11 For my part, I would not be able to live with myself if, as a result of my
12 decision, one of my supporters were to contract the virus and perish. I
13 am appalled at the suggestion that we should have sent our supporters
out to face a deadly virus when we could not ensure their safety. No
responsible person in my position would have done so.

14 *Id.*, ¶ 11.

15 It is not just a question of the circulators, who must be careful of themselves
16 and of their families, but of the threat posed to the whole public—by these
17 approaches to countless individual voters who would otherwise just be cautiously
18 venturing out of their homes to try to get their groceries without bringing something
19 deadly back to their families. Each rendezvous would be a lethal game of chance.
20 Since vastly more people would have to be contacted than would ultimately sign,
21 any attempt to comply with the state’s requirements would be virtually certain to
22 result directly in more cases of the virus, frustrating the valiant efforts of health care
23 workers to contain the disease and treat the many victims. Indeed, the Plaintiffs are
24 campaigning on criticisms of the official countermeasures to the pandemic as
25 inadequate; the state would have them violate their deeply-held political convictions
26 by forcing them to play a role in spreading the disease.

27 California will not be harmed by allowing Plaintiffs to exercise their
28 constitutional rights. The requested relief is indeed extraordinary, but the conditions

1 are extraordinary. One certainly hopes that a pandemic on the scale of the current
2 disaster will not occur again. At any rate, the requested relief is specific to the
3 Plaintiffs, to this November ballot, and to the extraordinary circumstances of the
4 COVID-19 pandemic.

5 Any discomfort or disruption that results from Plaintiffs' success in this
6 lawsuit will be the fault of state officials, not Plaintiffs. The conduct of the elections
7 is Defendant Padilla's affirmative responsibility. *See* Cal. Gov't Code § 12172.5.
8 Nothing prevented the state from implementing, in response to the pandemic, an
9 alternative procedure for ballot access. Instead, state officials in California sat on
10 their hands for months and refused to change an administrative requirement that had
11 become effectively impossible to fulfill. Since California refuses to provide a way
12 for Plaintiffs to access the ballot, in violation of Plaintiffs' core democratic and
13 constitutional rights, Plaintiffs have no choice but to petition this Court to grant the
14 relief they request.

15
16 Respectfully Submitted,

17 Dated: July 15, 2020

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