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BY FAX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

(UNLIMITED JURISDICTION)

MICHAEL SANGIACOMO and CLEAN COASTS, CLEAN WATER, CLEAN STREETS: ENVIRONMENTALISTS, RECYCLERS, AND FARMERS AGAINST PLASTIC POLLUTION

Petitioners,

vs.

ALEX PADILLA, in his official capacity as Secretary of State of the State of California,

Respondent.

CASE NO.: 30-2020-80003413-CU-WM-GDS

Action Filed: June 23, 2020

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDATE

STATEWIDE ELECTION MATTER – JULY 6, 2020 DEADLINE

IMMEDIATE ACTION REQUESTED

Hearing:

Date: July 2, 2020
Time: 1:30 p.m.
Dept.: 17
Judge: The Honorable James P. Arguelles

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INTRODUCTION

Under California law, proponents of a statewide initiative have 180 days from the date they receive the Attorney General's title and summary to circulate the initiative petition for signatures. Cal. Elec. Code § 9014(b). After the expiration of that period, elections officials may not accept the petition, and proponents must start the process over from the beginning if they wish to pursue their measure.

The facts in this case are substantially similar to those in *Macarro v. Padilla* (Case #34-2020-80003404-CU-WM-GDS), except as addressed below. Accordingly, Petitioners in this case rely upon and incorporate by reference the legal arguments made in the Points and Authorities in Support of Petition for Writ of Mandate submitted in *Macarro* on June 23, 2020.

Similar to petitioners in *Macarro*, Petitioners in this case seek to qualify a statewide initiative for the November, 2022 ballot, but were forced to stop collecting signature in mid-March 2020 as a result of the statewide stay-at-home order issued on March 19, 2020 in response to the novel coronavirus (COVID-19). Like petitioners in *Macarro*, Petitioners in this case submit that the 180-day circulation period is unconstitutional as applied in light of restrictive state and local stay-at-home orders that effectively prohibited circulation of the Initiative for approximately 90 days, and which continue to severely limit the ability of Petitioners to circulate their petition.

Petitioners received authority to begin circulating their initiative petition ("the Initiative") in early January 2020. By mid-March, they had spent more than $3.4 million and collected approximately 789,943 signatures. They expected to reach their target number of signatures by the end of April – well before the expiration of the 180 days on July 6, 2020. **In the absence of judicial intervention suspending or extending the existing deadline, county election officials will be prohibited from accepting Initiative petitions after July 6, 2020.** While Petitioners have technically collected the requisite number of signatures needed to qualify the Initiative, historical validity rate suggest that around 30 percent of Petitioners signatures will be invalid due to signatures from duplicate signers, illegible handwriting, and unregistered voters. As a result, Petitioners currently do not have a sufficient number of signatures to ensure qualification of the measure. If Petitioners are unable to

collect the needed number of signatures by July 6, 2020, Petitioners would have to completely start over and will have lost the time and resources invested in the process to date. Further, the will of over 800,000 voters who signed the petition will have been frustrated.

RELIEF WILL NOT INTERFERE WITH THE 2020 ELECTION

The Constitution requires measures to be placed on the ballot at least 131 days before the next general election. Cal. Const. art. II, § 8(c). For November 2020, this means prior to June 25, 2020. Although this was Petitioners' original goal, it is no longer possible to meet that deadline. If the 180-day deadline is suspended or extended, and the Initiative obtains the required number of signatures, it would therefore be placed on the November, 2022 ballot. Cal. Elec. Code § 9017. As a result, suspension or extension of the deadline would not interfere with the duties of the Respondent or the county elections officials with respect to the November, 2020 election and would not interfere with the conduct of either election in any way.

Continued signature gathering activity is necessary, however, if Petitioners are to qualify for the November, 2022 election. Because continued signature gathering requires substantial effort and expenditures, Petitioners need to know as soon as possible whether they are to be allowed some additional circulation period.

RELEVANT FACTS

Petitioners in this case rely upon and incorporate by reference all facts provided in the Declaration of Angelo Paparella ("Paparella Decl.") and all facts relating to the impact of the various California state and local stay-at-home orders on signature-gathering efforts as stated in the Points and Authorities in Support of Petition for Writ of Mandate submitted in *Macarro* on June 23, 2020.

On November 4, 2020, Petitioners filed a proposed initiative statute with the California Attorney General entitled "The California Recycling and Plastic Pollution Reduction Act of 2020" (the "Initiative"). Paparella Decl., ¶ 5. Proponents included Michael Sangiacomo, Caryl Hart, and Linda Escalante. *Id.* The proposed Initiative would require CalRecycle to adopt regulations to reduce plastic waste by requiring that single-use plastic packaging be reusable, recyclable, or compostable by the year 2030. The Initiative would further prohibit polystyrene container use by food vendors. Finally,

the Initiative would impose a tax on producers of single-use plastic packaging, containers or utensils. Funds derived from the tax would be deposited into a new special fund, which is allocated for recycling and environmental programs, including local water supply protection.

Title and summary for the Initiative was received from the State Attorney General on January 8, 2020, the "official summary date." Paparella Decl., ¶ 6; Cal. Elec. Code § 9004. As a proposed initiative statute, the petition must obtain valid signatures of 5 percent of voters in the last gubernatorial election to qualify for the ballot. Cal. Const. art II, § 8(b). That number is currently 623,212, although substantial additional signatures are necessary to ensure that number of valid signatures. Paparella Decl., ¶¶ 7-8. The Elections Code requires all signatures to be submitted within 180 days of the "official summary date." Cal. Elec. Code §§ 9014(b), 9030(a).

In obtaining signatures on an initiative petition, each section of the petition must contain the name of the person circulating the petition and a statement made under penalty of perjury that the circulator personally witnessed each signature. Cal. Elec. Code §§ 9020-9022. In other words, an actual signature witnessed by a circulator is a legally required aspect of the initiative process in California.

Upon receiving the title and summary, petitions were immediately printed, and circulation began. Paparella Decl., ¶ 6. Based on the January 8 official summary date, the 180-day deadline is July 6, 2020. *Id.* ¶ 9. However, Petitioners wished to qualify for the November, 2020 election and therefore intended to submit early enough to qualify on or before June 25, 2020. *Id.*, ¶¶ 8-9; *see* Cal. Const. art. II, § 8(c) (measures must qualify at least 131 days prior to the election). Qualification by June 25 would also require proponents to submit enough signatures to exceed the 110 percent threshold for qualification using the random sample technique (or 685,534 signatures).[1] Paparella Decl., ¶ 8; Cal. Elec. Code § 9030. As a result of these various requirements, Petitioners set a goal of obtaining approximately 950,000 to 1,000,000 signatures before May 1, 2020, the date

[1] If an initiative fails to qualify under the random sample method, it may still qualify but the petition would require examination of each signature for validity. Cal. Elec. Code § 9031. This would have precluded the Initiative from consideration on the November 2020 ballot, although it could still be presented to voters at the November, 2022 election (assuming it qualified). Cal. Elec. Code § 9017.

recommended by the California Secretary of State to ensure qualification for the November 2020 ballot. *Id.* ¶ 9.

From January 10 until mid-March 2020, proponents collected approximately 789,943 signatures on the initiative petition. Paparella Decl., ¶ 10. On average, Petitioners were collecting between 90,000 and 110,000 signatures each week and were well on their way to submit signatures by May 1, 2020 – well in advance of the July 6 deadline. *Id.*, ¶ 26. Although proponents needed to submit 685,534 signatures to reach the 110 percent threshold for qualification using the random sample technique, proponents set an internal goal of approximately 950,000 to 1,000,000 signatures in order to account for any found invalid. *Id.*, ¶ 8. Professional signature gathering firms generally advise that campaigns need to collect 30 percent more than the required number of signatures to account for signatures that will be found invalid. Duplicate signatures, illegible handwriting, non-registered voters, and voters who are registered at a different address than the one listed on the petition are some of the most common reasons that signatures are invalidated. *Id.*, ¶¶ 8, 30.

As a result of the stay-at-home orders summarized in the Paparella Declaration and the *Macarro* Points and Authorities, incorporated here by reference, Petitioners were required to stop collecting signatures on March 19, 2020. Although restrictions have loosened somewhat, it varies by county, and significant restrictions continue to restrict signature gathering and signature verification efforts. Paparella Decl., ¶¶ 16-25.

To date, Petitioners have collected 806,114 signatures. Paparella Decl., ¶ 30. This number compares favorably to other statutory initiatives circulating during the same period. *Id.*, ¶ 26. While this number exceeds the total number of signatures needed to qualify for the ballot by random sample, the number of signatures is not enough to ensure that the measure will qualify when historical validity rates are taken into account. *Id.*, ¶ 8. In the absence of suspension of extension of the 180-day deadline, that deadline, when combined with the stay-at-home orders, constitutes an insurmountable burden that will very likely prevent Initiative proponents from qualifying that measure for consideration by the voters. *Id.*, ¶ 31.

ARGUMENT

I. THE COURTS HAVE CONSISTENTLY APPLIED A LIBERAL CONSTRUCTION TO PROCEDURAL REQUIREMENTS AS NECESSARY TO PRESERVE THE RIGHT TO ACT BY INITIATIVE

Article IV, section 1 of the California Constitution vests the legislative power of the State in the Legislature, "but the people reserve to themselves the power of initiative and referendum." Cal. Const. art. IV, § 1. Article II, section 8(a) of the Constitution provides: "The initiative is the power of electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const. art. II, § 8(a).

The ability of voters to propose legislation by initiative was added to the California Constitution in 1911. The Constitution speaks of the initiative and referendum "not as a right granted to the people, but as a power reserved to them." *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976) ("*Associated Home Builders*"). In *Associated Home Builders*, the Court described the right to act by initiative as "one of the most precious rights of our democratic power." *Id.* The courts have consistently declared it their duty to 'jealously guard' and liberally construe the right so that it 'be not improperly annulled'." *Cal. Cannabis Coalition v. City of Upland*, 3 Cal. 5th 924, 934 (2017); *see also Amador Valley Joint Union High School v. State Bd. of Equalization*, 22 Cal. 3d 208, 241 (1978) ("power of initiative must be liberally construed to promote the democratic process"). "[W]hen weighing the tradeoffs associated with the initiative power, we have acknowledged the obligation to resolve doubts in favor of the exercise of the right whenever possible." *Id.* (quoting *Associated Home Builders*).

The California Constitution also provides for freedom of speech and the right to petition government for redress of grievances. Cal. Const. art. I, §§ 2, 3. After discussing the importance of petition circulation in the context of free speech concerns, the Supreme Court has observed that petition circulation is bound up with the right to petition: "That right [i.e., to petition] in California is, moreover, vital to a basic process in the state's constitutional scheme – direct initiation of change by the citizenry through initiative, referendum, and recall." *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 907 (1979); *see also City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 73 (2005).

II. ELECTIONS CODE SECTION 9014(b), WHEN COMBINED WITH THE STATE'S STAY-AT-HOME ORDERS, VIOLATES THE RIGHTS OF PETITIONERS AND INITIATIVE SUPPORTERS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

A. A Procedural Requirement That Imposes a Severe Burden on Access to the Ballot Must Be Justified By A Compelling State Interest That Is Narrowly Tailored to the Circumstances

The First Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. Although the U.S. Constitution does not require states to provide the right of initiative, "a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First amendment rights of its citizens who support the initiative." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *see also Meyer v. Grant*, 486 U.S. 414, 423-24 (1988).

In *Meyer v. Grant*, the Supreme Court held that "[t]he circulation of an initiative petition of necessity involves both the expression of desire for political change and a discussion of the merits of the proposed change . . . the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'." The Court found that Colorado's ban on paid signature gatherers imposed "a limitation on political expression subject to exacting scrutiny." *Id.* at 422-23 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)). The Court found that the ban on paid circulators significantly restricted political expression and concluded that "statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed." *Id.* at 423 (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (1983)). The Court concluded that the State's asserted interests in assuring sufficient grass roots support for initiatives or protecting the integrity of the initiative process were either insufficient to justify the statute's significant imposition on political speech or were adequately addressed by existing fraud laws. *Id.* at 437-38.

In evaluating ballot access restrictions for initiatives, the Ninth Circuit has described the standard thusly:

> . . . as applied to the initiative process, we assume that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot.
>
> This is similar to the standard we apply to ballot access restrictions regulating candidates. In that setting, we have held that "the 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 whether they will rarely succeed in doing so."
>
> *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (state law requiring signatures from 10 percent of voters in each Congressional district not shown to constitute severe burden and outweighed by state interest in ensuring statewide support for all initiatives).

In *Fair Maps Nevada v. Cegavske*, 2020 U.S. Dist. LEXIS 94696, at *29 (D. Nev. May 29, 2020), the U.S. District Court for Nevada found *Angle* to be the appropriate framework for analyzing the constitutionality of Nevada's statutory deadline for signature gathering (fifteen days after the primary election) and its in-person signature requirements in light of the state's COVID-19 restrictions. *Id.* at *19. *Fair Maps* concluded that strict scrutiny is required under *Angle* (1) when initiative proponents have been reasonably diligent (as compared to other initiative proponents) and (2) the restrictions significantly inhibit the proponents' ability to place the measure on the ballot. *Id.* at *31.

The Court concluded that strict scrutiny was appropriate because the proponents in that case had been reasonably diligent and the circulation deadline and in-person signature requirements, when combined with the COVID-19 stay-at-home orders, prohibited proponents from placing their initiative on the ballot. *Id.* at *31-41. Having found that strict scrutiny was required, the Court examined the state's interests to determine whether they were narrowly tailored to advance a compelling state interest. *Id.* at *41-45. It concluded that the administrative convenience argument relied upon to support the deadline was neither narrowly tailored nor compelling, but it concluded that

the in-person signature requirements were well-supported by fraud concerns and that attempting to craft an alternative would require the federal court to become impermissibly involved with the state's election processes. *Id.* at *25-30. As a result of its analysis, the court granted plaintiffs' request to extend the circulation deadline for six weeks – approximately the length of time the stay-at-home order was in effect in Nevada.

A number of courts have applied the "*Anderson-Burdick*" framework to ballot access restrictions in light of COVID-19 restrictions, referring to *Anderson v. Celebrezze*, 460 U.S. 786 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under this line of cases, state restrictions that restrict access to the ballot impact both the right of association and speech and courts must examine the "character and magnitude of the asserted injury" to the plaintiff's constitutional rights. *Anderson,* 460 U.S. at 789. Restrictions that impose a "severe" burden on those rights will only be upheld if they are narrowly drawn to advance a compelling state interest. i.e., they must satisfy "strict scrutiny." *Burdick*, 504 U.S. at 433. If regulations do not significantly burden plaintiff's rights, a state's important regulatory interests will typically be sufficient to justify "reasonable, nondiscriminatory regulations." *Id.*

Applying this approach, the U.S. District Court for the Eastern District of Michigan considered a Michigan statute that required a candidate for Congress to turn in 1,000 signatures on or before April 21, 2020 to be included on the primary ballot in light of COVID-19 stay-at-home orders that went into effect in Michigan on March 23, 2020. *Esshaki v. Whitmer*, 2020 U.S. Dist. LEXIS 68254 (E.D. Mich. April 29, 2020), aff'd in part and rev'd in part, *Esshaki v. Whitmer*, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020). The Court began by observing that plaintiff's challenge was to the combination of Michigan's election law and the stay-at-home orders: "Our inquiry is not whether each law individually creates an impermissible burden but rather whether the combined effect of the applicable election regulations creates an unconstitutional burden on First Amendment rights." *Id.* at *12 (quoting *Libertarian Party of Ohio v. Blackwell*, 462 F.2d 579, 586 (6th Cir. 2006)).

The Court found that the combined effect was indeed severe. "The reality on the ground for Plaintiff and other candidates is that state action has pulled the rug out from under their ability to collect signatures .... Absent relief, Plaintiff's lack of a viable, alternative means to procure the signatures he needs means that he faces virtual exclusion from the ballot." *Id.* at *19-20. The Court specifically found that attempting to gather the signatures by mail would be excessively expensive and of questionable effectiveness. *Id.* In contrast, the Court found that the state's proffered interests – ensuring that candidates can show a modicum of support and ensuring sufficient time for state and local officials to meet ballot deadlines – were important government interests but were "not narrowly tailored to the context of the COVID-19 pandemic," which would be necessary to satisfy strict scrutiny. *Id.* at *23.

The *Esshaki* Court also noted the interest of voters: "[i]f a candidate should fail to obtain enough signatures because she had relied on the somewhat standard and eminently reasonable assumption that she would be able to ramp up signature collecting in the spring, Michigan voters may lose the ability to vote for a candidate who, absent a pandemic, would have easily been included on the ballot. This would cause injury to the First Amendment rights of an innumerable number of Michigan voters." *Id.* at *29. The Court enjoined the Secretary of State from enforcing the signature requirements without accommodating the stay-at-home orders and specifically reduced the number of required signatures by 50 percent, extended the time for signatures to May 8, 2020, and permitted signatures by email.[2] The Court also noted that several other states had already taken action to accommodate stay-at-home orders by altering signature requirements in various ways. *Id.* at *34.

Relying on *Esshaki*, the Eastern District of Michigan subsequently enjoined strict enforcement of Michigan's signature requirements. *Sawarimedia LLC v. Whitmer*, 2020 U.S. Dist. LEXIS 102237 (E.D. Mich. June 11, 2020); *see also Faulkner for Virginia v. Va. Dep't of Elections*,

[2] The Sixth Circuit agreed that the burden was severe and that the provisions were not narrowly tailored "*to the present circumstances*" and it therefore upheld the prohibitory aspect of the trial court's injunction. *Esshaki v. Whitmer*, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020). However, the Court found the trial court's specific directives unduly interfered with the state's constitutional authority to run its own elections conferred by article I, section 4 of the U.S. Constitution, and it remanded for the trial court to allow the state to fashion an accommodation.

CL 20-1456 (Va. Cir. Ct. Mar. 25, 2020) (finding Virginia's signature requirements imposed severe burden and state's interests, even if compelling, were "not narrowly tailored to advance those interests as [the requirement] does not provide for emergency circumstances, like those that currently exist").[3]

B. The 180-Day Deadline, Combined With the State's COVID-19 Orders, Severely Burdens Petitioners' Ability to Propose Legislation By Initiative As Provided in the State Constitution

The impact of the stay-at-home orders is described in detail in the Declaration of Angelo Paparella, who was in charge of signature gathering for the Initiative. The bottom line is that gathering signatures on a petition requires person-to-person contact and the stay-at-home orders completely prohibited that activity for approximately two months, have significantly limited it since May 2020, and continue to limit the ability to make interpersonal contact through today's date. Paparella Decl., ¶¶ 11-32. Indeed, there has recently been public discussion about rolling back the amount of contact allowed in light of increasing COVID-19 numbers in the state.

As numerous cases have already found in other states, the stay-at-home orders leave Petitioners with virtually no ability to obtain the requisite signatures. Although the right to initiative is to be "jealously guarded," it cannot realistically be effectuated during a period in which people are required to be at home with limited interpersonal contact and with social distancing requirements for the few allowed communications. The Secretary of State's own website urges people to remain six

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[3] The Southern District of Ohio applied the *Anderson-Burdick* analysis and concluded that Ohio's signature gathering requirements imposed a severe burden in light of the state's COVID-19 stay-at-home orders and that even if the state's interests were compelling, they were not narrowly tailored to the circumstances presented by the stay-at-home orders. *Thompson v. DeWine*, 2020 U.S. Dist. LEXIS 87773, at *50-54, (S.D. Ohio, May 19, 2020), *req. for stay [granted], Thompson v. DeWine*, 2020 U.S. App. LEXIS 16650 (6th Cir. 2020). Although the Sixth Circuit reversed, it did so because it concluded that the burden was not severe because Ohio's stay-at-home orders specifically exempted signature gathering activity and there was sufficient time after the orders were lifted for proponents to obtain the necessary signatures. *Thompson v. DeWine*, 2020 U.S. App. LEXIS 16650, at *13 (6th Cir. 2020). Neither of those circumstances exist here. Although the state's "Stay Home" FAQ (https://covid19.ca.gov/stay-home-except-for-essential-needs/#top) apparently allowed signature gathering sometime in June (with social distancing), the orders themselves never described it as an essential activity. And while some time remains until the expiration of the July 6 deadline, Petitioners have only been able to obtain about 10 percent of the pre-COVID number of signatures, and they need approximately 200,000 more signatures in order to account for the number of invalid signatures that are typically experienced in these circumstances. Paparella Decl., ¶ 8.

feet apart (https://www.sos.ca.gov/adminstration/covid-19/) and while the state's website permitted signature gathering sometime in early June, it also requires persons to "adhere to social distancing." https://covid19.ca.gov/stay-home-except-for-essential-needs/#top. These directives are obviously in tension.

Petitioners have done everything reasonably possible to exercise their right to act by initiative. They began circulation promptly and obtained signatures of almost 800,000 voters – more signatures than other statutory initiative petitions circulating at the same time. Paparella Decl., ¶ 26. The number to the number of signatures needed in *Esshaki* (1,000) and *Sawarimedia* (1,000 for candidates and 340,000 for initiatives) are significantly less than the signature requirement for a constitutional amendment in California: more than 600,000. Although Petitioners has obtained enough signatures to meet the constitutional requirement assuming every signature is valid, in fact approximately 30 percent of signatures are invalidated; Petitioners therefore need 150,000-200,000 more signatures in order to account for potential invalid signatures. *Id.* ¶ 30.

The continuing restrictions on interpersonal activities and commerce effectively make it impossible for Petitioners to obtain the necessary number of signatures within 180 days. Paparella Decl., ¶¶ 31-32. As the *Esshaki* Court noted, "[A]bsent relief, Plaintiff's lack of a viable, alternative means to procure the signatures he needs means that he faces virtual exclusion from the ballot." 2020 U.S. Dist. LEXIS 68254, at *20. Mail is prohibitively expensive and email is ineffective. Paparella Decl., ¶ 24. Without some form of relief, elections officials will not accept petitions after July 6, 2020 and the Initiative will be considered "dead" – not just for the November 2020 election, but for good. Even though Petitioners have spent more than $3 million to gather signatures, and approximately 800,000 voters have signed the petition, Petitioners will be forced to begin completely anew by filing a new petition and starting the process over. Because of the money already spent and the vicissitudes of politics, Petitioners may realistically not have another opportunity to qualify their proposal for the ballot. In addition, the will of almost a million voters who have signed the Initiative petition will be frustrated. By any measure, the impact of the COVID-19 orders on Petitioners' (and

their supporters') ability to exercise their rights under article II of the State Constitution have been severely impacted.

C. The History of the 180-day Deadline Indicates No Compelling Justification in Light of Present Circumstances

As noted above, initiative and referendum were added to the Constitution in 1911. Although the original language was fairly prescriptive in terms of requirements, it did not provide a deadline for circulation of initiative petitions. RJN, Ex. L (1966 ballot materials).[4] In 1940, an initiative petition was circulated which failed to qualify because it failed to obtain the requisite number of signatures to be included on the 1940 ballot. Proponents waited several years and then submitted a few additional signatures; because the intervening 1942 election had low voter turnout, the number of required signatures dropped and the initiative would have qualified for inclusion in the 1944 ballot. Opponents challenged the qualification. *Gage v. Jordan*, 23 Cal. 2d 794 (1944).

In *Gage v. Jordan*, the Supreme Court concluded that the various deadlines in the Constitution, and particularly the provision requiring the measure to be placed on the ballot at least 130 days before the next election, indicated an intent for measures to either qualify or end circulation, except as otherwise then provided in former section 1 of article IV of the Constitution (now Elections Code section 9017).

Apparently in response to the 1940 initiative, and shortly before the Supreme Court's decision in *Gage*, the Legislature added a 90-day circulation deadline. Stats. 1943, ch. 248, § 3 ("SB 699"). The main purpose of SB 699 was to prevent proponents (or opponents) from keeping a measure open indefinitely and to provide reasonable assurance that submitted signatures on a petition are "live signatures," i.e., persons who are still eligible to vote. Ninety days appears to have been chosen by analogy to the 90-day limit for referendum measures and not for any other specific purpose. RJN, Ex. H, p. 8 (1943 legislative materials).

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[4] Much of the original detail in the Constitution was eliminated in a broad constitutional revision in 1966. *Id.* After that amendment, most of the detail was moved to the Elections Code, where it remains today. "The Legislature shall provide for the manner in which a petition shall be circulated, presented, and certified, and the manner in which a measure shall be submitted to voters." Cal. Const. art. II, § 10 (former art. IV, § 24(e)).

In response to concerns that imposing a deadline on signature gathering would unduly restrict the power of initiative, the Office of Legislative Counsel ultimately opined to the Governor that the bill would likely pass Constitutional muster because the purported benefits of the time limit could be seen as facilitating rather than restricting the right to the initiative process. *Id.*, pp. 8-10.

At the time, the Constitution also contained a specific timeframe for "supplemental" signatures to be filed 40 days after the Secretary of State confirmed the number of signatures from county elections officials. Former Cal. Const. art. IV, § 1. The new 90-day limit was therefore in addition to the 40-day supplemental window, for a total of 130 days. The 1966 constitutional revision deleted the language allowing supplemental signatures to be filed. RJN, Ex. L, p. 6. The statute was subsequently amended to provide a 150-day deadline.[5] Stats. 1973, ch. 1125, § 1. No specific reason was given, although the analysis noted that a "continuous 150 days" was being substituted for the 90-day period plus 40 days for supplemental signatures. RJN, Ex. I, p. 2 (Ass. Comm. on Elections and Reapportionment).

In 2014, the Legislature adopted the current 180-day deadline. Stats. 2014, ch. 697, § 2(b)(3) ("SB 1253"). SB 1253 sought to provide more legislative oversight over the initiative process, and extending the deadline was considered one way to extend the qualification process to allow the Legislature and the public to be involved. The bill also allowed a period for initiatives to be amended, allowed initiatives to be withdrawn after signatures are presented to the Secretary of State, and required legislative hearings on proposed measures.[6] The legislative findings in the bill stated that

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[5] In 1970, the statute was recodified at California Elections Code section 3507, but was not substantively changed, maintaining the 90-day requirement. Stats. 1970, ch. 81, § 1. The statute was recodified again at California Elections Code section 3513 in 1976, maintaining the 150-day requirement but not enacting any substantive change. Stats. 1976, ch. 248, § 3. In 1994, the statute was again recodified at California Elections Code section 336 without substantive changes to the law. Stats. 1994, ch. 920, § 2.

[6] The Attorney General is now required to post the proposed measure online and allow 30 days for public comment, and amendments are allowed. Cal. Elec. Code § 9002. The Department of Finance and Legislative Analyst have 50 days to prepare a fiscal impact statement. Cal. Elec. Code § 9005. The Attorney General's title and summary must be issued within 15 days of the fiscal impact. Cal. Elec. Code § 9004(b). These changes have the effect of lengthening the process over-all. To illustrate, the Initiative in this case was filed November 4, 2019 but the title and summary was not issued until January 8, 2020, and Petitioners could not commence circulation until the latter date.

"[b]y extending the time for gathering signatures, this act would give the Legislature the opportunity to hold earlier public hearings to review initiative measures." RJN, Ex. J, p. 1. A Senate committee analysis stated: "*The current 150 days to gather signature does not provide enough time for public input or changes to the initiative language.* SB 1253 extends the time allowed to gather signatures and establishes a prequalification process." RJN, Ex. K (Sen. Comm. on Elections and Constitutional Amendments, p. 5, emphasis added).

As the foregoing illustrates, the 180 days currently in statute has not been the result of careful legislative deliberation, but has evolved over time largely in response to other developments. That time has increased only modestly, although the number of signatures required has grown substantially since 1943. Once the stay-at-home orders went into effect, Petitioners were effectively limited to approximately 60 days – far fewer than the original 130 days when the deadline was first imposed in 1943.

Only two purposes have historically been identified for the deadline: First, there was a desire to prevent open-ended circulation which might lend itself to abuse of the type illustrated in *Gage*. No such concerns are raised here and Petitioners are not suggesting returning to an unlimited circulation period. Second, there was a concern that signatures on a petition be relatively "fresh" to avoid one group of voters qualifying a measure that they were no longer eligible to vote on. Again, some change in the make-up of the electorate is unavoidable in a process that can take more than a year to complete; a reasonable extension of the deadline to take into account the COVID-19 orders is unlikely to significantly change that composition.

In any event, although these purposes may support *some* deadline, they provide no specific justification for a 180-day deadline. Moreover, the Legislature found not that long ago that 150 days was *insufficient*; the stay-at-home orders have resulted in significantly fewer than 150 days being available for circulation. At the end of the day, regardless of whether the concerns about stale petitions are reasonable or possibly even compelling, as the courts pointed out in *Esshaki* and *Sawarimedia*, the current limitation is not narrowly tailored *to meet the current circumstances* and

legislative interests are therefore insufficient to justify the severe restriction on Petitioners' First Amendment rights.

III. ELECTIONS CODE SECTION 9014(b), WHEN COMBINED WITH THE STATE'S STAY-AT-HOME ORDERS, DEPRIVES PETITIONERS AND INITIATIVE SUPPORTERS OF THEIR RIGHT TO PROPOSE AN INITIATIVE AS PROVIDED IN THE CALIFORNIA CONSTITUTION

As noted at the outset, the courts have consistently "acknowledged the obligation to resolve doubts in favor of the exercise of the right whenever possible" (*Associated Home Builders, supra*, 18 Cal. 3d at 591) and that the rights of free speech and petition are "vital" to initiative, referendum, and recall. *Pruneyard Shopping Center*, 23 Cal. 3d at 907.

The California Supreme Court has also stated that although California's constitutional free speech protections are in some ways broader than the federal counterpart, California courts will not depart from the U.S. Supreme Court's construction of similar federal constitutional provisions without cogent reasons to do so. *Edelstein v. City and County of San Francisco*, 29 Cal. 4th 164, 168 (2002). For election law cases, California courts have therefore often followed the analysis of the United States Supreme Court. *See, e.g., Peace & Freedom Party v. Shelley*, 114 Cal. App. 4th 1237 (2004) (independent party qualification requirements imposed minimal burden and were justified by reasonable state interests); *Cal. Justice Comm. v. Bowen*, 2012 U.S. Dist. LEXIS 150424 (C.D. Cal. Oct. 18, 2012) (invalidating early qualification deadline for independent party candidates based on substantial burden).

The nature of the burden and the state's interests lead to the inexorable conclusion that the burden on Petitioners is severe and the state's interests do not justify strict enforcement of the 180-day in the present circumstances facing the state. As discussed above, the burden imposed by the 180-day deadline with the COVID-19 orders is virtually insurmountable and prevents qualification of the Initiative; no compelling state interests exists and no reasonable interests are narrowly tailored to accommodate the current circumstances. Several other state cases are also of interest.

In *Gray v. Kenney*, 67 Cal. App. 2d 281 (1944), the Court considered the constitutionality of a $200 filing fee for initiatives – a fee that was apparently returned if the measure

qualified. The Court discussed *Chesney v. Byram*, 15 Cal. 2d 460, 464 (1940), a case in which the Court observed that while legislation may be desirable to protect or regulate the right secured by the Constitution, "all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." The *Gray* court upheld the fee, finding that it was a "reasonable requirement designed to prevent an abuse of the right [of initiative] and the circulation of frivolous petitions." *Id.* at 285-86. The court found that the fee was not disproportionate, did not "impose an unreasonable burden on its proponents" (particularly since it was returned if the measure qualified), and did not "unduly or unreasonably, or at all, narrow[ ], limit[ ] or embarrass[ ] the right to initiate legislation pursuant the State Constitution." *Id.* at 287.

In *Hardie v. March Fong Eu*, 18 Cal. 3d 371 (1976), the California Supreme Court considered a challenge to the 150-day circulation deadline then in effect. The petitioner did not challenge the deadline as an undue restriction – nor could he have since the measure had already qualified. Instead, it was challenged as inconsistent with the constitutional requirement that qualified measures be placed on the ballot at least 131 days prior to the election. Cal. Const. art. II, § 8(c) (former Cal. Const. art IV, § 24). The Court found that the two could be harmonized and therefore upheld the requirement. Although the Court did not consider the burden imposed by the circulation deadline, in the portion of the opinion invalidating a spending limit on circulation gathering, the Court reiterated that signature gathering was core political speech activity subject to strict scrutiny in the event of serious infringement. *Id.* at 376 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). Finding no compelling state justification, the Court invalidated the spending limitation. *Id.* at 377-78; *see also San Francisco Forty-Niners v. Nishioka*, 75 Cal. App. 4th 637, 647 (1999) (initiative petition circulation is core political speech for which First Amendment protection is at its zenith).

The California courts have exercised authority to extend elections deadlines on at least one occasion. In *Assembly v. Deukmejian*, 30 Cal. 3d 638 (1982), the Court was faced with old legislative districts that had been determined to run afoul of equal protection requirements, new districts adopted by the Legislature, and a referendum on the new districts. The Court's validation of

the referendum petition (thus allowing the referendum election to go forward on the new districts) forced it to decide whether to use the old districts or the new ones stayed by the referendum for the upcoming election. The Court concluded that use of the new districts on a temporary basis was "the most constitutional and least disruptive choice" and would "best ensure[ ] equal protection of the law to the citizens of this state while doing the least violence to the election process this year." *Id.* at 674. Because the litigation had caused the Secretary of State and county elections officials to delay providing candidates with the necessary forms to run in the new districts, the Court extended the statutory deadlines for candidates to file in the districts by 24 days in order to ensure that all potential candidates had the opportunity to file. Although the Court did not elaborate specifically on its authority to extend the statutory deadlines, the guiding principle seemed to be that, having resolved the constitutional issues, it issued the remedial relief necessary to implement its constitutional pronouncement.

Like the federal courts and the state cases applying the *Anderson-Burdick* analysis, the state court decisions in *Gray v. Kenney* and *Hardie v. Eu* confirm that petition circulation is protected political activity and that restrictions that significantly burden such activity are subject to strict scrutiny that can only be justified by a compelling government interest. For reasons discussed above, that test cannot be met here.

Several California cases considering procedural requirements for initiatives have employed a "substantial compliance" analysis. For example, in *Costa v. Superior Court*, 37 Cal. 4th 986 (2006), the Court considered discrepancies between the version of the initiative submitted to the Attorney General and the version circulated for signatures, in violation of several constitutional and statutory requirements. The court held that the "substantial compliance" doctrine must be applied to determine whether the defect in the petition will frustrate the purpose of the applicable election requirement, and that a petition should not be invalidated because of an inadvertent, good-faith human error unless it is determined that the particular defect in the petition would pose "a realistic danger of misleading those who signed the petition or voted for the measure" or "adversely affect the integrity of the electoral process." *Id.* at 1028-29.

Similarly, in *Assembly v. Deukmejian*, 30 Cal. 3d 638, the Court considered a statewide redistricting referendum petition that failed to comply with several elections requirements. The most significant was that signers were asked to use the address where they were registered rather than their residence as required by law. Considering the "unique circumstances" – primarily erroneous information from the Secretary of State that affected several petitions – the Court declined to invalidate the petitions. *Id.* at 652. As to noncompliance with several other procedural requirements (pre-printed circulation dates, errors in the text and type-size), the Court observed that it had "stressed that technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in 'substantial compliance' with statutory and constitutional requirements" and that a "paramount concern" is whether the purpose of the technical requirement has been frustrated by the alleged defect. *Id.* at 652-53 (citing *California Teachers Association v. Collins*, 1 Cal. 2d 202, 204 (1934) ["The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law."]). The Court concluded that none of the errors "interfered with the statutory purpose." *Id.* at 653.

While this case is not technically a "substantial compliance" case in that it does not challenge the validity of the petition, the practical effect of strict enforcement of the 180-day deadline will similarly cause the Initiative petition to fail. It is apparent that Petitioners have satisfied the "technical" requirements of the law by obtaining almost a million signatures in a relatively short period of time. An extension of the circulation period to respond to the emergency stay-at-home orders would in no way adversely affect the integrity of the electoral process. Nor would an extension interfere with the statutory purpose as the only purpose identified in the history was to prevent open-ended and potentially stale initiatives.

THE APPROPRIATE REMEDY

If the Court finds that current 180-day limitation of Elections Code section 9014(b) unconstitutional in light of the state's COVID-19 restrictions, Petitioners believe the Court has the authority to fashion an equitable remedy. The remedy chosen should preserve Petitioners' rights to propose legislation by initiative and take into account the ongoing nature of the restrictions imposed by the various state and county orders, particularly the "social distancing" requirements.

Dated: June 29, 2020

Respectfully submitted,

OLSON REMCHO, LLP

By: Deborah B. Caplan

Deborah B. Caplan

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PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 1901 Harrison Street, Suite 1550, Oakland, CA 94612.

On June 29, 2020, I served a true copy of the following document(s):

Memorandum of Points and Authorities in Support of Verified Petition for Writ of Mandate

on the following party(ies) in said action:

Leslie R. Lopez
Deputy Attorney General
Office of the Attorney General
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Sacramento, CA 95814
Phone: (916) 210-6486
Email: Leslie.Lopez@doj.ca.gov

Attorney for Respondent Secretary of State Alex Padilla

☐ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☐ placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in Oakland, California, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional messenger service for service.

☐ **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.

☒ **BY EMAIL TRANSMISSION:** By emailing the document(s) to the persons at the email addresses listed based on a court order or an agreement of the parties to accept service by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 29, 2020, in Kings Beach, California.

Nina Leathley
Nina Leathley

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