

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

ERIC ESSHAKI, as candidate for
United States Congress and his
Individual capacity,

Plaintiff,

Case no. 2:20-cv-10831-TGB-EAS

Hon Judge: Terrence G. Gerg

Hon Magistrate: Elizabeth A. Stafford

VS.

GRETCHEN WHITMER, Governor of
Michigan, JOCELYN BENSON, Secretary
of State of Michigan, and JONATHAN
BRATER, Director of the Michigan
Bureau of Elections, in their official
Capacities,

Defendants,

and,

DANIEL P. FINLEY,

**AMICUS DANIEL FINLEY’S SUPPLEMENTAL BRIEF:
RESPONSE TO STATEMENT OF PROPOSED AMENDMENT**

By way of supplement to his brief, Daniel Finley (“Finley”), amicus curiae,
RESPONSES to Defendant’s statement is as follows:

1. Before the Court is the State’s proposal for a “reasonable accommodation”.
2. The ruling by the 6th Circuit Court of Appeals instructed, “*the State to select its own adjustments so as to reduce the burden on ballot access, narrow the restrictions to align*

with its interest, and thereby render the application of the ballot-access provisions constitutional under the circumstances". The Court agreed that the State must provide "reasonable accommodations".

3. Therefore, this Court Ordered submission of "proposed reasonable accommodations".
4. The State proposes to reduce the signatures by 30% based on its calculation of a "31.7% loss of circulations days", query why then the State would not propose 68.3%.

Document Continuation Errata – page 5, (ECF Dkt 39, Attachment 1)

5. The State's proposal is 70% by May 11, 2020 for a candidate otherwise meeting the criteria of the injunction.
6. Amicus expresses these concerns, in paragraphs that follow, to the Court for consideration in determining the reasonableness of the State's proposal.
7. When Defendant was Ordered on April 20, 2020 to
 - *adopt and promulgate, according to the specifications it determines to be appropriate and efficient, regulations providing for an additional optional procedure that allows the collection and submission of ballot petition signatures in digital form by electronic means such as email;*

page 40 of this Court's April 20, 2020 Order. (ECF Dkt 33)

In response, the Secretary of State scanned an 8 ½ by 11 Petition sheet that could only be printed out and signed. There is nothing "*digital form*" about it. For example, Finley emailed this form to signers who complained that the form could not be opened or required it to be printed and mailed. In other words, unless the signer has a printer, scanner and pdf program it was no good – not everyone has these items in their home.

8. In any event, Finley was able to collect and submit approximately 725 petition signatures (the majority of which were not by utilizing the new form put out by the SOS) on May 6, 2020. The “e-form” put out by the SOS did not help in any substantive way; however, the extended time most certainly helped.
9. However, because some signatures may be invalid, it is always important for a candidate to have a “cushion” of error. With the 50% signature requirement, Finley had a “reasonable” cushion.
10. Now, however, the State’s proposal would give Finley Mother’s Day weekend, to work on a “reasonable” cushion to account for any invalid signatures.
11. Also, the plain language of the instructions on the Statement of Organization indicate that it may be turned in at the time of the signature Petitions are turned in, *to wit*:

A person becomes a candidate under the Campaign Finance Act on the date he or she: files a nominating petition

Instructions on Statement of Organization, MI form CFR101 CAN SO.doc REV 04/18.

12. However, part of this Court’s injunction and the State’s proposal may prevent Finley from qualifying for the injunction exception because he did not submit a State of Organization by March 10, 2020.
13. Finley did, however, and has proof if the Court so requires, that he formed his committee on March 2, 2020, per the plain language of the Michigan statute.
14. Finley submits that it is always a challenge to determine what is “reasonable” in light of competing agendas.

15. Nevertheless, Finley requests that the Court consider guiding the State's proposal toward a "reasonable proposal" with these suggested revisions:

- a) 65% of the signatures.
- b) That the State post on their website, per the original injunction, that if a candidate's committee was formed prior to March 10, 2020 then they qualify for the injunctive relief to the ballot access issue.

16. The Amicus thanks the Court and the Defendants for the opportunity to comment and prays for a "reasonable" solution to the ballot access issue, for the sake of our shared Constitutional values.

Date: May 7, 2020

Respectfully submitted,
FINLEY LAW FIRM
By: /s/ Daniel P. Finley
Daniel P. Finley (P65454)
Attorney for and Amicus Curiae
300 N. Main St, Ste 6
Chelsea, MI 48118
Ph. (734) 475-4659; Fx. (734) 475-4672
dpfinleyesq@comcast.net

CERTIFICATE OF COMPLIANCE

I certify that this supplement to brief contains 861 additional words, as indicated by Microsoft Word. This certificate is made in accordance with Fed. R. Civ. P. 32(g).

Date: May 7, 2020

Respectfully submitted,
FINLEY LAW FIRM
By: /s/ Daniel P. Finley
Daniel P. Finley (P65454)
Attorney for and Amicus Curiae
300 N. Main St, Ste 6
Chelsea, MI 48118
Ph. (734) 475-4659; Fx. (734) 475-4672
dpfinleyesq@comcast.net

UNITED STATES DISTRICT COURT
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Defendants.

No. 2:20-cv-10831

Hon. Terrence G. Berg

Mag. Judge Elizabeth A. Stafford

**AMICUS CURIAE ACLU OF MICHIGAN'S RESPONSE TO
DEFENDANTS' PROPOSED ACCOMMODATIONS**

As amicus curiae, the ACLU of Michigan responds to the proposed accommodations submitted by Defendants yesterday as follows.

First, the proposed accommodations would maintain the component of this Court's previous order in which ballot-access requirements are not relaxed unless the individual formed a candidate committee before March 10, 2020. However, as illustrated in the attached declaration of Stephanie Witucki, this March 10 cut-off

date makes no sense for individuals running for office who collect signatures through volunteers. If there have been no campaign expenditures, such individuals do not even become “candidates” within the meaning of the Michigan Campaign Finance Act until they actually file their petitions. Accordingly, it would be improper for them to have formed a candidate committee by March 10. The March 10 requirement imposes a severe burden on the right to association and the requirement is clearly not narrowly tailored to any compelling state interest. *See* Witucki Declaration (attached as Exhibit A).

Furthermore, the purpose of the March 10 cut-off for forming a candidate committee was to ensure that individuals who were not serious candidates before that date did not suddenly decide to take advantage of the relaxed signature requirement and join a race that they had not previously intended to join. However, that requirement makes no sense when applied to candidates such as Shakira L. Hawkins who had gathered approximately 3000 of her required 4000 signatures by March 10. *See* Hawkins Declaration (attached as Exhibit B).

Second, Defendants’ proposed accommodation to reduce the number of signatures to 70%—as opposed to the 50% reduction ordered by this Court on April 20—still imposes a severe burden on the rights of individuals running for office and is not narrowly tailored to serve a compelling state interest. As illustrated by the attached Watucki Declaration, raising the number of valid signatures she needs to

20% more than required by this Court's April 20 order may well keep her off the ballot for Genesee County Circuit Court despite the fact that she is a viable candidate who would have easily qualified for the ballot but for the Governor's Stay-at-Home Order.

Accordingly, consistent with the Sixth Circuit order, amicus recommends that this Court find that the proposed accommodations are unconstitutional.

Respectfully submitted,

/s/ Michael J. Steinberg
Michael J. Steinberg (P43085)
Civil Rights Litigation Initiative
University of Michigan Law School
701 South State Street, Suite 2020
Ann Arbor, MI 48109
(734) 615-2407
mjsteinb@umich.edu

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund
of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Attorneys for Amicus Curiae
American Civil Liberties Union of Michigan

Dated: May 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2020, I filed this document using the ECF system, which will send electronic notice of this filing to all counsel of record.

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)

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Exhibit A: Witucki Declaration

Exhibit B: Hawkins Declaration

Exhibit A: Witucki Declaration

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC ESSHAKI, as candidate for
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No. 2:20-cv-10831

Plaintiff,

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v

Mag. Judge Elizabeth A. Stafford

GRETCHEN WHITMER, Governor of
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JONATHAN BRATER, Director of the
Michigan Bureau of Elections, in their
official capacities,

Defendants.

_____ /

DECLARATION OF STEPHANIE A. WITUCKI

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am a running for a regular term, non-incumbent position with the 7th Judicial Circuit Court, in Genesee County, in the primary election on August 4, 2020.

2. I have been a member of the State Bar of Michigan since 1996 and meet the statutory and constitutional requirements for this judicial position.

3. I am a resident of Genesee County where I was born and raised and have lived for the majority of my life.

4. The judicial position for which I am running is a position on the family bench.

5. I have vast experience in family law having devoted approximately the last 20 years of my legal career to family law.

6. I have experience in family law in the capacity of a private attorney as well as in a quasi-judicial role.

7. I was a candidate for Genesee County Circuit Court Judge in the 2018 election and easily collected well above the requisite number of signatures.

8. The position for which I am running requires a minimum of 1,000 signatures.

9. I began collecting signatures on March 10, 2020 when I became aware that a judicial position would be open on the family bench.

10. My plan for collecting signatures included collecting signatures in person from family, friends, neighbors, and acquaintances and canvassing door-to-door throughout Genesee County neighborhoods. I also planned to seek signatures at well-attended functions in my community, including: church gatherings, school functions and sporting events at my children's schools (elementary, middle and high schools), various union hall meetings, city/county/township meetings throughout Genesee County, various club events, Chamber of Commerce meetings throughout Genesee County, gatherings at restaurants, markets, and various other events scheduled throughout my community. Finally, I planned to circulate my petitions throughout local large and small businesses, including hair and nail salons, manufacturing plants, and restaurants. I would also be relying on the assistance of family and friends who volunteered to help me collect signatures.

11. My plan for collecting signatures for this 2020 election was the same as the plan I used to collect more than enough signatures when I ran in the 2018 election.

12. From March 10, 2020 through March 23, 2020 (13 days), I gathered approximately 467 signatures (almost half of the required 1,000 minimum

signatures) before the state's first Stay-at-Home Order that took effect on March 24, 2020 at 12:01am.

13. The Stay-at-Home Order caused significant hardship for collecting signatures because all of the large gatherings and events at which I planned on collecting signatures were canceled, church gatherings and all school functions and sporting events were canceled, I was prevented from canvassing door to door, all large meetings that would have typically taken place throughout Genesee County were canceled, public gatherings were prohibited, in-person attendance at church was prohibited, dine-in restaurants were prohibited, and hair and nail salons were forced closed, as were many other large and small businesses.

14. I was hoping to collect more signatures in person after the last Stay-at-Home Order expired on April 30, 2020, but the Stay-at-Home Order was then extended through May 15, 2020 after the current deadline for signatures.

15. Mass mailing petitions to collect the requisite number of signatures was cost prohibitive for me.

16. Collecting signatures electronically, when that method became available, was challenging for individuals who either lack proper equipment and/or lack knowledge of technology.

17. The State's revised petition can now be emailed to individuals, but they cannot sign electronically.

18. Rather, the voters must print out the petition at home.

19. Many residents of Genesee County do not have printers.

20. Even if they do, they must not only sign the petition, but also (1) sign as a witness, and (2) either scan and email the petition back or take a photo and email it back.

21. Only a small percentage of residents have scanners.

22. Many residents are not skilled at emailing photos on a smartphone.

23. There is a much greater burden and time commitment for electronic signers of petitions than just signing one in person.

24. Despite the extreme difficulties of collecting signatures during a pandemic, I have been able to collect approximately 350 additional signatures since the first Stay-at-Home Order for a total of approximately 817 signatures.

25. I believed that, because of this Court's order of April 20, I would be able to qualify for the August primary ballot.

26. However, without the 50% reduction of signatures in this Court's April 20 order that I was relying on, I would not be able to collect both the

requisite number of signatures to qualify for the ballot and have a comfortable cushion.

27. I am quite certain that if I lack a significant cushion above the required number of signatures, an opposing candidate will challenge my signatures.

28. Even with the proposed 30% reduction, I would need 700 valid signatures.

29. I understand that the average signature validity rate is only about 75%, but that it is often much less than 75%. See, e.g., https://ballotpedia.org/Initiative_Petition_Signature_Validity_Rates.

30. Further, I understand that a campaign's signature goals should be 33% to 100% more than the actual number of signatures needed to ensure that there is an adequate cushion. See, e.g., *Successful Citizens' Initiatives* at 21, <http://www.greenbelt.org/wp-content/uploads/2012/01/Successful-Citizens-Initiatives.pdf>.

31. In order to have a satisfactory cushion to ensure that I have 700 valid signatures, I estimate that I would need to submit approximately 1000 signatures.

32. Due to the obstacles caused by the Stay-at-Home Order, I cannot collect 1000 signatures by May 11.

33. Accordingly, Defendants' proposed accommodation that would require 70% of the total valid signatures is still a severe burden and may well keep me off the ballot.

34. Additionally, the March 10, 2020 deadline for the filing of the formation of a campaign committee and filing of a Statement of Organization is a severe burden and is unrelated to advancing any interest of the State.

35. Under this Court's April 20 order, the relaxed signature requirement only apply to candidates for state office who "established a candidate community under the Michigan Campaign Finance Law, Mich. Comp. Laws, §§ 169.201 *et seq.*, before March 10, 2020." Order Granting Prelim. Inj., ECR No. 23, PageID.39.

36. Nothing in Defendants' proposed accommodations changes this provision of the April 20 Order.

37. Under Defendants' proposed accommodations, I would not be able to submit my signatures on May 11, 2020 because I did not form my campaign committee and file my Statement of Organization by March 10, 2020.

38. In fact, when I attempted to file my petitions, containing 770 signatures at that time, in Lansing at the Bureau of Elections on the original deadline of April 21, 2020, the Bureau of Elections declined to accept my

signatures stating that the reason was because I had not filed a Statement of Organization by March 10, 2020.

39. However, there was no legal reason for me to form my campaign committee and file my Statement of Organization until after I filed my signatures.

40. Under Michigan law, I do not have to form a campaign committee until 10 days after I become a candidate, MCL 169.221(1), and I don't have to file a Statement of Organization with the state until 10 days after forming a campaign committee MCL 169.224(1).

41. According the Michigan Bureau of Elections:

An individual does not legally become a candidate under the Michigan Campaign Finance Act until he or she:

- Files a fee, Affidavit of Incumbency or nomination petition for elective officer; **OR**
- Is nominated as a candidate for elective office by a political party convention or caucus and certified to the appropriate filing official; **OR**
- Gives consent to someone else to receive a contribution or make and expenditure in an attempt to be nominated or elected to office.

See Bureau of Elections Publication,
<https://mertsplus.com/mertsuserguide/index.php?n=MANUALCAN.TheStatementOfOrganizationFormingAndRegisteringACandidateCommittee#candef>. (Emphasis in original).

42. Additionally, Michigan law specifically allows that a candidate may file his or her statement of organization up to 30 days late by simply paying a \$10/day late fee. MCL 169.224(1).

43. Within the meaning of the Michigan Campaign Finance Act, I have not become a “candidate” yet because I have not yet filed my petitions and I have not yet expended money on the campaign.

44. My entire signature collecting campaign has been a volunteer effort.

45. Since, legally, I am not yet a candidate, it would not have been proper for me to form a campaign committee or file a Statement of Organization before March 10, 2020.

46. As demonstrated above, I was working diligently to qualify for the August 4 ballot long before this Court’s order of April 21, 2020.

47. I was not a candidate who decided to run just because the change in signature requirement that resulted from this Court’s April 21 order.

48. In fact, but for the pandemic and this state’s stay at home order, I would have easily qualified for the ballot as I did in 2018.

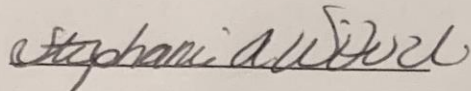
49. However, if I am not able to gain the benefit of this Court’s order or Defendants’ proposed accommodations, I will not qualify for the ballot.

50. Preventing me from gaining the benefit of the relaxed signature requirement based on the arbitrary March 10 deadline for forming a candidate committee and filing a Statement of Organization creates a severe burden on my right to ballot access and my right to association.

51. Preventing me from gaining the benefit of the relaxed signature requirement based on the arbitrary March 10 deadline for forming a candidate committee is not narrowly tailored to advancing any state interest. In fact, it is not even rationally related to any state interest.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of May, 2020, by:

A handwritten signature in cursive script, appearing to read "Stephanie A. Witucki", written in dark ink.

Stephanie A. Witucki

Exhibit B: Hawkins Declaration

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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ERIC ESSHAKI,

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Michigan, JOCELYN BENSON,
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JONATHAN BRATER, Director of the
Michigan Bureau of Elections, in their
official capacities,

Defendants.

_____ /

DECLARATION OF SHAKIRA L. HAWKINS

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am a judicial candidate running for one of two non-incumbent, full-term positions on the Wayne County Circuit Court in the primary election on August 4, 2020. To my knowledge, both open positions are in the criminal division.

2. I am required to gather a minimum of 4,000 signatures, and may submit up to a maximum of 8,000 petition signatures, of qualified and registered voters, in order to be listed on the August 4, 2020 primary election ballot for the Third Circuit Court judicial positions. Mich. Comp. Laws § 169.544f.

3. I am a member in good standing with the State Bar of Michigan, I have been a resident of Wayne County for over 20 years and I am qualified to seek nomination for the office of Judge of the Third Circuit Court. Mich. Comp. Laws § 168.411.

4. I have practiced criminal law for over 10 years. I began my legal career at Legal Aid in the Civil Division in 1999. I then briefly served as executive director of My Sisters Place, a domestic violence shelter for women. I then spent several years away from the practice of law to care for my minor child who had been diagnosed with a developmental disability, which, gratefully, he has overcome.

5. I returned to the practice of law in 2010 and since then have been an active member in good standing working primarily as a court-appointed defense attorney. The vast majority of the cases I handle are criminal case assignments from the Third Circuit Court as a member of the Wayne County Criminal Defense Bar Association. I am passionate about the law and justice and defending the Constitutional rights of the accused.

6. I have a broad base of community support and was very excited for this opportunity to serve the community as a circuit court judge.

7. I decided early on that I wanted to run for judge in the current election cycle and began gathering signatures in December or January.

8. By March 10, 2020, I had gathered approximately 3000 signatures, give or take a few hundred signatures.

9. Prior to the pandemic, I collected signatures at work and churches. I asked family, friends and co-workers, as well as strangers, to circulate my petitions. My volunteers and I collected signatures during the May 10 presidential primary election by standing outside of polling places. I also stood outside busy businesses with the owner's approval and solicited signatures from patrons.

10. In the initial stages of the pandemic, I stopped collecting signatures. I called the Bureau of Elections at the Secretary of State regularly to see if there would be any accommodations for those seeking access to the ballot. I was told that the matter was being discussed but no decisions had been made and that any changes would be posted on the SOS website. I checked online daily and even called to ask how we were expected to solicit signatures during the pandemic.

11. I was told to try collecting signatures by mail, but I could not afford to gather signatures that way.

12. Once I realized there would be no accommodations, I renewed my efforts utilizing any free and legal means available to gather signatures. Under the Stay-at-Home Order, individuals were able to go outside for exercise. I would take long daily walks and ask anyone I encountered outside if they would help me get on the ballot. Some collected signatures when using public transportation. One volunteer who lives in an apartment complex asked those passing through the lobby or doing laundry in the community laundry room to sign petitions.

13. Despite our efforts, the Stay-at-Home Order and social distancing rules severely hampered my efforts to gather signatures.

14. Prior to the quarantine, I was on schedule to easily meet my goal of 5000 signatures by the original April 21 deadline, including a comfortable cushion.

15. The filing deadline for me to submit my signed petitions with the Michigan Department of State, Bureau of Elections in Lansing was April 21, 2020 at 4:00 p.m.

16. On April 21, 2020, I filed my nonpartisan nominating petitions bearing approximately 4283 signatures.

17. My name was then placed on the 2020 Michigan candidate unofficial primary ballot where it currently remains.

18. However, on April 29, 2020, I was notified by the Secretary of State that a sworn complaint was filed challenging my candidacy stating that of the

4283 petition signatures I submitted, only 3885 were valid, causing me to fall short of the required minimum by 115 signatures.

19. As of today, I have collected an additional 231 signatures, 70 of which were acquired prior to April 21, 2020, but they were not filed because my volunteer canvassers had difficulty returning them to me before the April 21, 2020 deadline.

20. Under Defendants' proposed accommodations, I cannot gain the benefit of the relaxed signature requirements, including the provision allowing candidates to submit 70% of the ordinary number of required signatures and the provision that allows candidates to submit additional signatures until May 11.

21. The sole reason I cannot gain the benefit of these relaxed signature requirements is because I did not form my candidate committee before March 10, 2020.

22. Under this Court's April 20 order, the relaxed signature requirement only apply to candidates for state office who "established a candidate community under the Michigan Campaign Finance Law, Mich. Comp. Laws, §§ 169.201 *et seq.*, before March 10, 2020." Order Granting Prelim. Inj., ECR No. 23, PageID.39.

23. Nothing in Defendants' proposed accommodations changes this provision of the April 20 Order.

24. I formed my candidate committee on May 1, 2020, ten days after filing my petition signatures, and I filed my statement of organization, on May 6, 2020, six days after forming my candidate committee.

25. The purpose of including the March 10 cutoff in this Court's order of April 20 was to ensure that individuals who were not serious candidates did not suddenly decide to take advantage of the relaxed signature requirements and join a race that they had not intended to join before this Court's order.

26. However, as demonstrated above, I was working diligently to qualify for the August 4 ballot long before this Court's order of April 21, 2020.

27. I was not a candidate who decided to run just because the change in signature requirement that resulted from this Court's April 21 order.

28. In fact, but for the pandemic and this state's Stay-at-Home Order, I would have been able to collect my target of 5000 signatures and would have easily qualified for the ballot.

29. If I am not able to gain the benefit of this Court's order or Defendants' proposed accommodations, I will not qualify for the ballot.

30. Preventing me from gaining the benefit of the relaxed signature requirement based on the arbitrary March 10 deadline for forming a candidate

committee and filing a Statement of Organization creates a severe burden on my right to ballot access and my right to association.

31. Preventing me from gaining the benefit of the relaxed signature requirement based on the arbitrary March 10 deadline for forming a candidate committee is not narrowly tailored to advancing any state interest. In fact, it is not even rationally related to any state interest.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of May, 2020, by:

/s/Shakira L. Hawkins

Shakira L. Hawkins

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**AMICUS CURIAE BRIEF
OF THE MICHIGAN REPUBLICAN PARTY**

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AMICUS CURIAE STATEMENT OF INTEREST

Amicus Michigan Republican Party (the “Michigan Republican Party,” or “MRP”) is a major political party under Michigan law, and an unincorporated association that actively and extensively participates in campaigns, elections, and public policy debate. A state organization of the Republican Party, MRP exists in large part to foster political debate and the exchange of ideas among its members and the public, and in expressing, promoting, and supporting its members’ political beliefs and ideas with respect to public policy issues. Elections are the cornerstone of the MRP’s activities; consequently, when the laws and rules for gaining access to the ballot are materially changed by executive fiat in the midst of a pandemic and on the eve of Michigan’s primary elections, MRP must act to protect the interest of its candidates and voting members.

MRP seeks to ensure that Michigan’s primary ballot maintains integrity by representing candidates that have followed Michigan’s long-established rules to gain ballot access, some of which are designed to ensure a strong candidate as the party’s standard-bearer. MRP is concerned with the accommodations proposed by Defendants on the eve of Michigan’s primary elections, specifically, the use of electronic signatures on nominating petitions, which is a sweeping change to Michigan’s ballot access requirements that was not even requested by Plaintiff.

The Defendants' agreement to create from whole cloth, and under severe time constraints, an option for submitting electronic signatures for nominating petitions both opens the door for fraudulent activity in an area as sensitive as the ballot for political office, and also undermines longstanding and well-settled laws passed by *both* the legislative and executive branches of Michigan's government. Additionally, and regardless of the merits of implementing an electronic signature option, the law frowns upon sudden changes to election laws, *especially in a time of crisis*, and therefore any accommodations approved by this Court should be as narrowly tailored as possible to the facts and parties of this case.

The Michigan Republican Party seeks enforcement of Michigan's long-standing ballot access laws, and objects to the creation and implementation of any system permitting the electronic submission of signatures for nominating petitions. Accordingly, the unique, direct interests and perspective of the Michigan Republican Party as Amicus will assist this Court in its deliberations of this matter.

INTRODUCTION

Just yesterday, and in response to the Court of Appeals' decision to stay, in part, this Court's preliminary injunction, Defendants were ordered to submit proposed accommodations for the sake of reducing those burdens put on Plaintiff by the confluence of the Governor's stay-at-home Orders, *see* Mich. Exec. Order 2020-21, et al., and the duly-enacted laws governing ballot access in Michigan, *see*

M.C.L. § 168.133 (requiring potential primary candidates to obtain a certain number of valid signatures by April 21); § 168.544c (requiring that each signature on a nominating petition be signed in the presence of a circulator); and § 168.544f (specifying the number of signatures required for individual races).

In response, Defendants propose awarding the following accommodations:

- A. That candidates need only submit 70% of the signatures required under § 168.544f;
- B. That the filing deadline for nominating petitions be further extended from 5:00 p.m. on May 8, 2020, to 5:00 p.m. on Monday, May 11, 2020; and
- C. That the State permit the collection of signatures through the use of electronic mail.

See Defendants' Proposed Amendment to April 20, 2020 Order Granting Preliminary Injunction, ECF No. 38 at 4-5 (PageID.594-595).

The Michigan Republican Party believes that no adjustment of the signature threshold in law is necessary, but supports a 70% (or higher) adjustment of signatures if one is going to be made. The Michigan Republican Party further submits that no further extension of the filing deadline for nominating petitions to May 11, 2020 is necessary. Finally, and for the reasons stated below, the Michigan Republican Party strenuously objects to the collection of signatures by electronic mail.

ARGUMENT

First, the proposed accommodations cause substantial harm to the integrity of the ballot by opening the door for fraudulent activity. Second, the proposed accommodations violate separations of powers principals to the extent that the accommodations rewrite statutes that were duly enacted by *both* the legislative and executive branches of our state government; the executive Defendants cannot, alone, create their own scheme to alleviate the unconstitutional conditions found by that court. Third, the proposed accommodations harm the many candidates in Michigan who met the signature requirements through diligence and forethought.

Therefore, and for the reasons further stated below, the Michigan Republican Party respectfully objects to the Defendants' proposed accommodations to the extent they leave intact a newly created avenue for electronically gathering signatures. The Michigan Republican Party instead submits that extending the deadline to May 8, 2020, alleviated any burdens on Plaintiff, and, if the Court finds it necessary to decrease the signature requirements to 70%, then those two accommodations (*i.e.*, extending the deadline to May 8, and lowering the signature requirement to 70% of the statutory requirement) combine to provide relief greater than necessary to cure any harm evidenced before the Court.

1. Permitting Electronic Signatures on Nominating Petitions Opens the Door for Fraud

The proposed electronic signature accommodation requires the executive branch of the State of Michigan to create a new law by concocting from whole cloth an electronic option for gathering signatures. The proposed framework for gathering signatures is underdeveloped and opens the door for fraudulent behavior. Indeed, the “new” guidelines for circuiting online nominating petitions, which, even now, are only 2 weeks old, lack the long-standing legal requirement that petition circulators witness all signatures, in-person, *see* MCL 168.544c, and otherwise allow petition signers to self-certify their own signatures. BUREAU OF ELECTIONS, MICHIGAN DEPT. OF STATE, OPTIONAL PROCEDURE FOR COLLECTION AND SUBMISSION OF CANDIDATE PETITION SIGNATURES IN DIGITAL FORM (Apr. 21, 2020). Combine the lack of such longstanding safeguards with the fact the information required to sign a nominating petition—an individual’s name and address—is easily obtainable through a simple Google search, and any bad actor could easily devise a scheme to falsify and forge ballot petition signatures under the electronic signature framework proposed by the Defendants’ accommodations.

To be clear, the Michigan Republican Party’s concerns are reasonable and based in reality. Not even a decade ago, several political staffers in Michigan were involved in a fraudulent signature scheme in which they photocopied signatures from nominating petitions used in prior election cycles for the sake of meeting the

same exact statutory provisions that, ironically, Plaintiff and Defendants alike seek to relax in this case. See Kevin Robillard, Four McCotter staffers face charges, POLITICO (Aug 9, 2012) available at <https://www.politico.com/story/2012/08/report-charges-in-mccotter-case-079509>.

Even with the so-called “safeguards” in place under the Defendants’ electronic signature scheme—such as comparing the signature on a petition against the corresponding signature in a voter’s file—a candidate could pull off the same scheme as that which took place back in 2012, and get away with it. The Michigan Republican Party is right to be concerned about the many opportunities for fraud under the Defendants’ unproven and unvetted electronic signature system, and the parties in this case should be concerned about that, too.

Setting aside the potential for fraud, evidence from other states indicates that electronic signature submission mechanisms take years to implement. Indeed, while Michigan was ordered, and now voluntarily offers, to implement an electronic signature system at the drop of a hat, other states that have been attempting to implement electronic signatures for years continue to face significant difficulties with their electronic signature systems, even in normal times. For example, Arizona created its electronic signature system, E-Qual, *four years ago*, and has yet to fully implement the system for municipal, county, and precinct candidates, even though it was required to do so when the system was established.

See ARIZ. REV. STAT. ANN. § 16-317 (2016). If states are unable to fully implement a comprehensive, fully functional system in four years during normal times, it is inconceivable that a state could create and effectively implement such a system during a national crisis and on such a short time frame.

It is also difficult to square that a mail-only signature campaign was met with such skepticism as compared to an electronic signature system. Through the course of these proceedings, for example, a mail-based signature campaign was characterized as “unproven and questionable at best.” Order Granting Motion for Preliminary Injunction, ECF No. 23 at 19, (PageID.339). But if using the United States Postal Service to circulate nominating petitions is unproven and questionable, it is pure folly to instantly implement an underdeveloped and unproven internet method for the same purpose. Even Plaintiff noted that an electronic-signature system is “untested, complicated, and unlikely to yield results.” *Id.* at 20. The Michigan Republican Party agrees, and further submits that it is just plain dangerous.

Implementation of an electronic-signature system in the midst of a pandemic and on the eve of an election thrusts uncertainty into the electoral process. Any change in election laws, especially during a time of crisis, sets dangerous precedent for future events. Everyone’s lives have been impacted by the COVID-19 pandemic, some in more ways than others. That does not, however, mean that

generally-applicable laws should be overturned, especially election-related laws. As the Supreme Court has recently stated, “lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Republican National Committee v. Democratic National Committee*, 589 U.S. ___, 2 (2020) (citing *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U. S. 929 (2014); *Veasey v. Perry*, 574 U. S. __ (2014)).

It is especially imprudent to rewrite election laws during a time of crisis. Emergencies are precisely when critically important constitutional and statutory rules that are “structured to maintain the integrity of the democratic system” should be most strictly adhered to. *Burdick v. Takushi*, 504 U. S. 428, 441-442 (1992). Even in the darkest moments of American history, such as the Civil War and the 1918 Spanish Flu outbreak, election laws remained unchanged. See Joel Achenbach, *The Election of 1864 and the Last Temptation of Abraham Lincoln*, THE WASHINGTON POST (Sept. 11, 2014) available at https://www.washingtonpost.com/national/health-science/the-election-of-1864-and-the-last-temptation-of-abraham-lincoln/2014/09/11/e33f99aa-345b-11e4-9e92-0899b306bbea_story.html; Geoffrey Skelley, *This Isn’t The First Time American Has Weathered a Crisis in an Election Year*, FIVETHIRTYEIGHT (Mar. 23, 2020), available at <https://fivethirtyeight.com/features/this-isnt-the-first-time-america-has-weathered-a-crisis-in-an-election-year/>. This instance is no different, and it

would be unwise to set a precedent that otherwise constitutional rules governing elections can be dispensed with in times of emergency, and replaced with an underdeveloped and unproven scheme such as the electronic signature system being implemented by Defendants.

2. The Decision of Whether to Allow Electronic Nominating Petitions Should Not be Made by Executive Fiat.

By proposing that Michigan accept electronic signatures on ballot petitions, Defendants attempt to replace long-standing statutes and rules regulating ballot access in the State of Michigan. Specifically, the proposed scheme for accepting electronic signatures on nominating petitions amounts to a unilateral rewrite of Michigan's ballot access laws, which otherwise require that each signature on a nominating petition be signed in the presence of a circulator. *See* M.C.L. § 168.544c. *See also* Nominating Petition under new Electronic Signature Scheme, (permitting circulators to witness signatures remotely under Executive Order 2020-41).

While the supplanted statute was the product of the political process—that is, it was enacted by the legislature and executive *together*, and in accordance with the Michigan Constitution—the Defendants' new electronic signature scheme originates from the Defendants alone, all whom are members of the executive branch, and with no input whatsoever from the legislature. A unilateral rewrite of ballot access laws through the guise of accommodations in a federal lawsuit is not

only inconsistent with the separation of powers as set forth in Michigan's Constitution, *see* Mich. Const. Art. II Section 4(2) (“[T]he legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, [and] to guard against abuses of the elective franchise”), but also completely unnecessary given that the accommodations in questions were not even requested by Plaintiff.

3. Reducing the Signature Requirement Harms Candidates Who Were Diligent and Adequately Prepared.

The Michigan Republican Party further objects to any accommodation that reduces the number of signatures required to gain access to the ballot, and believes that any reduction should be as minimal as possible. The signature threshold for ballot access has been long-established, and the vast majority of qualified candidates across Michigan diligently expended resources and collected necessary signatures well in advance of the April deadline. Of note, all fourteen congressional districts and the US Senate candidate had at least one Republican candidate that turned in more than the statutory required signature amount with no need for reduction. Reducing the number of signatures needed to gain access to the ballot is contrary to the plain language of Michigan law, and contrary to the intent of the threshold requirement, which is designed to ensure strong candidates as the party's standard-bearer.

There is no doubt that the outbreak of COVID-19 detrimentally impacted political campaigns across the country, including those in the State of Michigan. That has not, however, precluded candidates from gaining access to the ballot—including in the case of Plaintiff, who appears to have surpassed the non-adjusted legal signature requirement well in advance of May 8th. To that end, dozens of Congressional candidates in Michigan had no problem obtaining the signatures required to secure access to the ballot, including at least three candidates for the 11th District, *the same District in which Plaintiff is running*. See State of Michigan’s Response to Plaintiff’s Motion for TRO/Preliminary Injunction, ECF No. 6 at 5 (PageID.103). Modifying the ballot access requirements due to COVID-19 is unfair to the many candidates within the State of Michigan who followed the rules, built support, and expended resources in advance of the legal deadline in a diligent manner.

Further, every candidate was aware of the likelihood that COVID-19 would arrive in the United States, as the federal government was warning individuals to prepare for an outbreak long before any confirmed cases occurred.¹ Importantly,

¹ For example, on February 25, 2020, the Center for Disease Control (CDC) warned about the likely spread of COVID-19 in the United States, and told citizens to “prepare for the expectation that this might be bad.” Dr. Nancy Messonnier, director at the National Center for Immunization and Respiratory Diseases, cautioned during a press briefing: “It’s not so much of a question of if this will happen anymore but rather more of a question of exactly when this will happen.”

the Governor's stay-at-home orders that precluded candidates from interacting with individuals to collect signatures was issued mid-March, well after Plaintiff, and most other candidates, decided to run for office. The Governor's stay-at-home order is not the reason why candidates cannot gain access to the ballot; rather, any candidate that fails to secure ballot access due to a lack of signatures met that fate by lack of diligence and forethought, or just by plain not having public support.

Any change to the ballot access laws that reduces the legal signature requirement rewards candidates that did not prepare properly for potential setbacks. That being said, allowing ballot access with only 70% of the otherwise required signatures is better than a 50% reduction. As this Court acknowledged, the State has an important interest in preventing ballot overcrowding and voter confusion, *see* Order Granting Motion for Preliminary Injunction, ECF No. 23 at 23 (PageID.343), and any accommodation should be as close as possible to the existing law that diligent candidates relied upon when they expended resources to obtain signatures in January, February, and March. Allowing individual candidates to access the ballot with only 70% (or worse yet 50%) of the otherwise required signatures, and/or by gathering signatures electronically, would permit candidates to gain access to the ballot who otherwise would have had difficulty meeting the statutory requirements in the first place.

Jenny Lei Ravelo and Sara Jerving, *COVID-19 — a timeline of the coronavirus outbreak*, DEVEX (last updated May 5, 2020).

CONCLUSION AND RECOMMENDED RELIEF

For the foregoing reasons, the Michigan Republican Party respectfully objects to the Defendants' proposed accommodations to the extent they leave intact an avenue for electronically gathering signatures. Rather, the Michigan Republican Party submits that extending the deadline to May 8, 2020, alleviated any burdens on Plaintiff. If, however, that deadline extension was not enough of an accommodation, then a minimal decrease of the signature requirement is most appropriate.

Respectfully submitted,

By: /s/ Robert L. Avers
Charles S. Spies (P83260)
Robert L. Avers (P75396)
Dickinson Wright PLLC
*Attorney for Michigan Republican
Party*
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com

Dated: May 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2020, I filed the foregoing was electronically filed with the Clerk of the Court using the ECF System; which will send notification to all counsel of record by CM/ECF.

/s/ Robert L. Avers
Robert L. Avers

Dated: May 7, 2020