UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC ESSHAKI,

Plaintiff,

MATT SAVICH and DEANA BEARD,

Plaintiff-Intervenors,

v.

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

Defendants.

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

INTERVENING PLAINTIFF HAWKINS'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

Pursuant to Rule 65(b)(1) of the Federal Rules of Civil Procedure and Local Rule 65.1, Intervening Plaintiff Shakira L. Hawkins hereby moves the Court to issue a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction enjoining Defendants from (1) enforcing the normal signature requirements set forth in Mich. Comp. Laws §§ 168.413 and 168.544 of the Michigan Election Law against

her in light of the fact that the State's Stay-at-Home Order made it a misdemeanor to collect signatures in person after March 23, and (2) preventing her from gaining the benefit of the State's relaxed signature requirement simply because she did not form a candidate committee under the separate Michigan Campaign Finance Act by March 10, 2020.

Under LR 65.1, it is not necessary to seek concurrence in this emergency *ex parte* request. Notwithstanding, on March 11, 2020, counsel sent brief emails to counsel of record indicating that a motion for injunctive relief would be filed and seeking their concurrence. Today, March 12, 2020 at approximately 7:30 a.m., undersigned counsel sent a more detailed email to all counsel of record and Plaintiff Esshaki identifying the motion and the relief sought, requesting concurrence by noon today. As of the time of this filing, Defendants and Plaintiff-Intervenor Beard do not concur, whereas amici ACLU of Michigan and Daniel Finley do concur. The other parties and participants have not yet responded, and concurrence has not been obtained.

In support of this Motion, Plaintiff relies upon the attached brief, as well as upon the movant's Verified Complaint in Intervention (*See* ECF No. 47, PageID.690.)

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Respectfully Submitted,

May 12, 2020

CLANCY ADVISORS PLC

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BRIEF IN SUPPORT OF
INTERVENING PLAINTIFF HAWKINS'S MOTION
FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

STATEMENT OF ISSUES PRESENTED

1. Should the Court grant temporary, preliminary and permanent injunctive relief to Hawkins because she is highly likely to succeed in showing that the State's selective application of relaxed signature requirements only to people who formed a Candidate Committee by March 10 is unconstitutional, and the balance of the harms, equities and interests favors Hawkins?

   Hawkins answers: Yes

MOST CONTROLLING AUTHORITY

The single most useful authority on this Motion is the Court's April 20, 2020 Order in this case, ECF No. 47, PageID.321, which, in turn, contains the most controlling authorities.

INTRODUCTION

At the hearing on Defendants' proposed modifications last Thursday, this Court reportedly made it clear to Defendants that it believed it would be unconstitutional to prevent candidates who did not form a candidate committee before March 10 from gaining the benefit of the relaxed signature requirements. Nonetheless, on Friday, Defendants ignored the Court's admonition and published new rules that contained that very provision.

As a result, unless this Court acts promptly, Intervening Plaintiff Shakira Hawkins will be denied her fundamental rights under the First and Fourteenth Amendment rights. As established below, the March 10 deadline is not narrowly tailored – or even rationally related – to any compelling state interest.

Ms. Hawkins has more than a modicum of support; she has collected nearly twice the number of valid signatures required under the state's current rule that candidates need only gather 50% of the normal number of signatures to be placed on the ballot. Additionally, she is not someone who suddenly decided to run for office to take advantage of a relaxed signature requirement. To the contrary, she started gathering signatures in November 2019, and by March 10 she had gathered approximately 3000 of the necessary 4000 signatures needed to be placed on the ballot as a judicial candidate for Wayne County Circuit Court. In fact, she did not know that there would be a relaxed signature requirement until April 20, when this Court issued

its preliminary injunction. By then, she had collected more than 4000 signatures, and if there were no challenges to her petitions, she would have qualified under the normal signature rules despite the pandemic and State-at-Home orders.

FACTUAL BACKGROUND

Plaintiff-Intervenor Hawkins's Verified Complaint in Intervention sets forth the factual basis of her rights to relief here. It is incorporated by reference.

1. Hawkins is an Established, Motivated, Grassroots Candidate With Substantial Public Support.

Hawkins is a properly qualified judicial candidate running for one of two non-incumbent, full-term positions in the criminal division of the Wayne County Circuit Court. (ECF No. 47, PageID.691-692.) Were it not for the global COVID-19 pandemic and the resulting Stay-at-Home orders that made it a misdemeanor to collect signatures in person, she would be on the ballot in the August 2020 primary election. Hawkins is also a properly registered voter who wants to vote for herself that election.

Hawkins is an experienced criminal law practitioner, and she is passionate about the law, justice and her work in defending the Constitutional rights of the accused. (ECF No. 47, PageID.692.) She was excited about the chance to serve the community, and she started her efforts early in the campaign season, i.e., in November 2019. (ECF No. 47, PageID.693.) According to Plaintiff-Intervenor Beard, petitions were hard to come by during the early months, (ECF No. 17,

PageID.292), but Hawkins persisted. She braved the cold winter, financial difficulties and all the other hardships of grassroots campaigning to give the voters a choice. (ECF No. 47, PageID.693-694.)

By staging an effective grassroots campaign, Hawkins also came closer to clinching a place on the ballot under the normal signature requirements than the original Plaintiff and the intervening Plaintiffs, all of whom are now properly getting relief from the State's new rules. Although Esshaki started his race at least one month earlier (i.e., October 2019), he collected only approximately 700 of the 1000 signatures necessary. (ECF No. 1, PageID.6.) Plaintiff-Intervenor Savich had approximately 200 of the 400 he needed. (ECF No. 11-1, PageID.184.) Plaintiff-Intervenor Beard came closest with 3557 of the 4000 needed. (ECF No. 17, PageID.293.) Hawkins, however, gathered 4283 signatures – 3885 of which are unchallenged and 231 more that could have been counted under relaxed requirements. (ECF No. 47, PageID.698-699.) But for the pandemic and this State's Stay-at-Home Orders, Hawkins easily would have qualified for the ballot and would have likely submitted at least 5000 signatures.

2. Extraordinary Statewide Circumstances Disrupt the Campaign, and State Laws Fail to Adapt.

Most of the common problems that yielded a shortfall for the parties are now part of the established common record. Rather than repeating them, Hawkins incorporates them here by reference. The Court correctly concluded in its

April 20, 2020 Order that in light of the COVID-19 pandemic, "these are not normal times." (ECF No. 23, PageID.322.) Instead, the extraordinary threat arguably required Defendants to impose widespread lockdown measures that have never been seen in Michigan in our lifetime. "[W]orking closely with health care experts and epidemiologists," the Governor and State officials surmised that the facts required almost every ordinary and routine activity of daily communal life to come to a complete halt. Gov. Gretchen Whitmer, *Governor Whitmer Details Six Phases of Her MI Safe Start Plan* May 7, 2020 (available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-528453--,00.html (last accessed May 11, 2020). Each of the plaintiffs' campaigns here suffered as a result. Moreover, as Defendants maintain, we are not yet beyond the danger or the restrictions. *Id.*

Our democratic election laws were not built for a stay-at-home, locked down citizenry. Instead, under extraordinary circumstance, the restrictions effectively prevented the parties from gaining access to the ballot. (*E.g.*, ECF No. 47, PageID.695-697.)

3. Proceedings in this Court and the Sixth Circuit

This Court found the normal signature requirements to be a severe burden on the constitutional rights of candidates and their supporters in light of the Stay-at-Home Order. Applying strict scrutiny, it struck down the requirements and imposed a remedy to fit the unusual circumstances. Although the Sixth Circuit

affirmed the injunction, it found that this Court did not have the plenary authority to institute its own rules and that the State should have an opportunity to create accommodations before this Court took further action.

On remand, the Court asked Defendants to submit proposed accommodations and gave the parties and amici the opportunity to respond or object. There were two major objections to the State's proposed accommodations. First, the State offered to reduce the number of signatures required by 30%, and many argued that it should be reduced to 50%. Second, some individuals objected to the proposal that would only allow those who formed their candidate committees by March 10 benefit from the relaxed signature requirement. Amicus ACLU of Michigan argued that the March 10 cutoff was not narrowly tailored or even reasonably related to the articulated state interests of ensuring that (1) only those with a modicum of support would be placed on the ballot, and (2) candidates who did not plan to run for office before the April 20 Order relaxing the signature requirements would not unfairly benefit.

The Court, consistent with the Sixth Circuit's ruling, declined to order a specific remedy. Nonetheless, it indicated on the record what it thought the State must do to remedy the problem. Specifically, the Court said the State needed to address the problem with the March 10 deadline and it believed that 50% of the signatures was a necessary accommodation for the rules to pass constitutional muster.

4. The State Refuses to Allow Candidates Who Did Not Create a Candidate Committee Before March 10 to Gain the Benefit of 50% Reduction in Signatures.

The next day, on May 8, the Secretary of State posted a "Special Announcement" on its website, at https://www.michigan.gov/sos/0,4670,7-127-1633---,00.html. Of the two constitutional problems the Court specifically discussed, the announcement only redressed one: the Secretary of State reduced the signature requirement to 50%. However, the announcement made it clear that the 50% reduction *only* applied to those candidates who "established a candidate committee under the Michigan Campaign Finance Act by March 10, 2020."

Notably, this March 10 cutoff ("*Arbitrary Campaign Committee Deadline*") does not appear in any Michigan statute, and the Michigan legislature did not pass emergency legislation setting this deadline. Nor did the Governor institute the cutoff by an Executive Order under her emergency powers. Instead, the Secretary of State exercised plenary power by setting the cutoff.

5. Ms. Hawkins Did Not Form Her Candidate Committee Until After She Submitted Her Signatures.

The Michigan Campaign Finance Act is separate from the Michigan Election Law statute that imposes signature requirements. It instructs "candidates" to form a "candidate committee" within 10 days of becoming a candidate, Mich. Comp. Laws § 169.221(1), but the Act mainly defines a "candidate" in terms of fundraising or filing petitions, *id.* § 1679.203(1), and its purpose is to govern financial matters, not to determine who is a viable political candidate. While a

person running for office will meet the definition of "candidate" at *some* point in an election, the Campaign Finance Law specifically recognizes that a person might not be a candidate until they file their petitions. Many grassroots candidates take this approach. Nothing in § 169.221 disqualifies a person from being on the ballot without forming a committee by March 10. (See also ECF No. 50, PageID.713-717.)

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 added).

As of March 10, 2020, Hawkins had not raised campaign money, she had not yet gathered 4000 signatures for her nominating petition to secure a place on the ballot, and she had not consented to have anyone else make an expenditure on her behalf. As far as she knew, she was not officially a "candidate" for

purposes of campaign finance. Now, as the candidate who worked early and hard to gather more signatures than any other party and to do so without fundraising, she is the lone person who stands to lose her place on the ballot. Preventing Hawkins 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 her rights to ballot access and to association.

ARGUMENT

1. Applicable Legal Standards

This Court is familiar with the standards for granting a temporary restraining order or a preliminary injunction. *See, e.g., Stein v. Thomas*, 222 F. Supp. 3d 539, 542 (E.D. Mich. 2016) (granting TRO in case impacting the right to vote). It recently applied the familiar four-factor test in its April 20, 2020 Order. (ECF No. 23, PageID.329-330.) Especially where, as here, the balance of the harms weighs much more burdensomely and irreparably upon Hawkins, preliminary injunctive relief is appropriate "even where [she] fails to show a strong or substantial probability of ultimate success" so long as she "at least [also] shows serious questions going to the merits." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009) (quoting *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982)).

2. The Court Should Grant Hawkins's Motion for Injunctive Relief Because Applying the Relaxed Signature Requirements Only to Those Who Formed a Candidate Committee by March 10 is Unconstitutional and the Balance of the Equities Favors Intervening Plaintiff Hawkins.

a. Plaintiff Is Likely to Succeed on the Merits Because Arbitrarily Barring Candidates from Benefiting from the Relaxed Signature Requirements Unless They Formed a Candidate Committee by March 10 is Not Narrowly Tailored – Or Even Rationally Related to – Any State Interests.

This Court and the Sixth Circuit have already recognized that enforcing the normal signature rules during the pandemic when the Stay-at-Home Orders made it a misdemeanor to collect signatures in person severely burdens fundamental First and Fourteenth Amendment rights.[1] The Court and the Sixth Circuit have further recognized that the appropriate standard to apply here is strict scrutiny. Thus, the question for the Court is whether precluding people running for office from

[1] *E.g.*, ECF No. 23, PageID.331-332: "While there is no fundamental right to run for elective office, the Supreme Court has recognized that ballot access laws such as Sections 168.133 and 168.544f "place burdens on two different, although overlapping, kinds of rights – the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). Ballot access restrictions affect candidates and individual voters alike because absent recourse to state-wide proposals or referenda, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). As the Supreme Court explained in the seminal ballot access case of *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983), "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters." (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

obtaining the benefit of the new 50% signature requirement is narrowly tailored to advancing a compelling state interest.

The State has asserted two interests during these proceedings when justifying the March 10 cutoff: (1) ensuring that only individuals who have a modicum of support reach the ballot, and (2) preventing individuals who were not planning to run for office from launching a new run only by being able to take advantage of the new accommodations. As established below, even assuming these two interests are compelling, the means chosen to advance them are not narrowly tailored and flunk strict scrutiny.

1. The March 10 Cutoff Is Not Narrowly Tailored to Advancing the Interest of Ensuring that Only Candidates with a Modicum of Support Appear on the Ballot.

As this Court noted in its April 20 order, states have "an important interest in ensuring that candidates demonstrate a 'significant modicum of support,' before gaining access to the ballot, primarily in order to avoid voter confusion, ballot overcrowding, and frivolous candidacies." (ECF No. 23, PageID.343 (quoting *Libertarian Party of Ky. v. Grimes,* 835 F.3d 570, 577 (6th Cir. 2016)).)

Given that the state of Michigan allows about half the candidates for state office to qualify by paying $100,[2] it is not clear that this interest is compelling. But

[2] Many candidates for office have the option of dispensing with signature-gathering altogether by paying a $100 fee. Those candidates include for the following offices: Both houses of the state legislature (M.C.L. § 168.163); all county offices, including

even assuming that it is, the March 10 cutoff clearly is not the least drastic means to achieve the interest. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (A state must utilize "the least drastic means" to achieve its electoral interests, with this tailoring requirement being "particularly important where restrictions on access to the ballot are involved.").

For those candidates who are not allowed to qualify for the ballot by paying $100, support is established by gathering a certain number of signatures. Under the state's "special announcement" of May 8, the number of signatures that indicate a modicum of support for Wayne County Circuit Court is 2000 or 50% of the statutorily mandated 4000 signatures. Indeed, another intervenor, Ms. Beard, who is running for the same offer, need only submit 2000 valid signatures. Ms. Hawkins submitted approximately 4283 signatures on April 21, 2020, and just under 4000 are valid. (ECF No. 47, PageID.698.) Clearly, she has a modicum of support.

Indeed, if the only state interest at issue were the modicum of support, it would not matter when candidates collected their signatures. A candidate could conceivably decide to run for office five days before the deadline, collect twice the number of signatures in four days, and submit them by the deadline. The fact that the

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County Clerk, County Treasurer, Registrar of Deeds, Prosecutor, Sheriff, Drain Commissioner, Surveyor, and Coroner (M.C.L. § 168.193); County Road Commissioner (M.C.L. § 168.254); School Board (M.C.L. § 168.303), and any Township Office (M.C.L. § 168.349).

candidate had not yet formed a candidate committee has absolutely no bearing on the candidate's modicum of support. In short, March 10 cannot be used as a proxy for level of support or whether a candidate is a serious candidate.

2. The March 10 Cutoff Is Not Narrowly Tailored to Advancing Any State Interest in Ensuring that Only Individuals Who Were Serious Candidates Before the Relaxed Signature Requirements Were Imposed Gained the Benefit of the New Rules.

At oral arguments in this matter, the State has asserted an interest in not allowing candidates who were not serious about running before the pandemic to somehow obtain an unfair windfall by jumping into a race after the relaxed signature requirement was in place. In other words, the State wants to prevent "Johnny-come-latelies" from unfairly benefiting from the accommodation. Even assuming that this interest is compelling, the means chosen to advance it are not narrowly tailored.

First, the premise of the argument is false. The idea that it is somehow easier to collect 2000 signatures during the middle of a pandemic than it is to collect 4000 signatures in person during normal times is contradicted by the record. (*See* ECF Nos. 15-2, 35-1 and 42-2: Decls. of Anne Bannister, Dennis Donahue and Stephanie Witucki.)

Second, the earliest any office seeker could have known that there would be a relaxed signature requirement was this Court's preliminary injunction order on April 20, 2020 -- one full month after the State's March 10 cutoff for forming a candidate

committee. An office-seeker cannot possibly take advantage of a relaxed signature requirement after-the-fact until she knows about it.

Third, Ms. Watkins was a serious candidate long before March 10. In fact, she collected approximately 3000 signatures by March 10 – which, under the newly announced rules on Friday, is 150% of the number she needed to qualify for the ballot. There is no doubt that she was a serious candidate, not a "Johnny-come-lately."

At oral argument on Thursday, counsel for the State said that the March 10 cutoff for forming a candidate committee was rational because that was when the Governor declared a state of emergency. Apparently, candidates should have known that they should gather all their signatures quickly before a possible Stay-at-Home Order. However, that argument was already made and rejected by this Court in the context of the preliminary injunction motion.

> Defendants contend that Governor's March 10, 2020 State of Emergency Declaration "should have acted as a wake-up call to Plaintiff and his stat to double down on signature collection efforts" before the March 23, 2020 Stay-at-Home Order. ECF No. 6, PageID111. This argument both defies good sense and flies in the face of all other guidance that the State was offering citizens at the time.

Order Granting Preliminary Injunction, ECF No. 23, PageID.336.

In short, the March 10 cutoff for forming a candidate committee is not narrowly tailored to advancing any of the State's asserted interests and therefore it flunks strict scrutiny.

As a result, Plaintiff Intervenor Hawkins is highly likely to succeed on the merits of her challenge.

b. Hawkins's Constitutional Injury is Presumed to be Irreparable Harm.

Unless this Court acts quickly to enjoin the enforcement of the arbitrary March 10 cutoff for forming a candidate committee, Plaintiff will suffer a loss of her fundamental right of access to the ballot. As the Court has already noted, when fundamental rights are violated, such as a candidate's access to the ballot, irreparable harm can be presumed. (ECF No. 23, PageID.347.)

c. The Harm to Other Parties and the Public Interest Favor an Injunction.

Finally, while the State has the same interest in vindicating its laws as it did in the Court's first Order, neither applies to Hawkins or meaningfully supports the arbitrary March 10 cutoff. (*Id.* PageID.347-351.) In fact, there is no Michigan statute that has a March 10 cutoff for forming a candidate committee. Defendants made up the date without any legislative authority. It appears to have *no* basis in law and to be ultra vires.

No public interest weighs against an injunction. Hawkins is a viable candidate who enjoys more than a modicum of support. She started her efforts in November 2019 to get on the ballot, walked "the turf" during the cold winter months to gather signatures, and enlisted a dedicated group of volunteers to seek signatures on her behalf. She is not a "Johnny-come-lately" trying to take advantage of relaxed

signature requirements after they have been imposed. For the same reasons the Court articulated in its April 20, 2020 Order, the balance weighs strongly in favor of injunctive relief here. (*Id.*)

CONCLUSION

For each of these reasons, Hawkins respectfully asks the Court to enter a TRO, a preliminary injunction and a permanent injunction barring Defendants from enforcing or applying their arbitrary March 10 cutoff for forming a candidate committee or otherwise denying her access to the same accommodations they made available for the other parties in this case.

Respectfully submitted,

May 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I electronically filed the foregoing paper and attached exhibits with the Clerk of the Court using the ECF system, which will send notification and copies of these filings to all counsel of record.

Respectfully Submitted,

May 12, 2020

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