EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSHUA E. EISEN and GARY E. GREENBERG,

Plaintiffs,

v.

ANDREW M. CUOMO, Governor of New York, in his official capacity, PETER S.KOSINSKI, Co-Chair of the New York State Board of Elections, in his official capacity, DOUGLAS A. KELLNER, Co-Chair of the New York State Board of Elections, in his official capacity, and ANDREW J. SPANO, Commissioner of the New York State Board of Elections, in his official capacity,

Defendants.

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ORDER

20-cv-05121 (PMH)

PHILIP M. HALPERN, United States District Judge:

Counsel for all parties appeared for the hearing I scheduled at 10:00 a.m. today; defendants' counsel in my courtroom and plaintiffs' counsel by means of videoconference. Oral argument was had on the record. Neither party called any witnesses.

For the reasons indicated on the record and law cited therein, Plaintiffs' motion for a preliminary injunction (Docs. 18-21, 27) is DENIED. See transcript.

SO-ORDERED:

Dated: New York, New York
July 27, 2020

Philip M. Halpern
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOSHUA E. EISEN,
GARY A. GREENBERG,

Plaintiffs,

v. 20 CV 5121 (PMH)

ANDREW M. CUOMO, *et al*,

Plaintiffs. ORDER TO SHOW CAUSE

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New York, N.Y.
July 27, 2020
10:10 a.m.

Before:

HON. PHILIP M. HALPERN,

District Judge

APPEARANCES

VENABLE LLP
Attorneys for Plaintiffs
BY: JAMES E. TYRRELL, III

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Defendants
BY: SETH J. FARBER

ALSO PRESENT: DANIEL BASUK, Intern (AG)

(In open court)

(Case called)

MR. TYRRELL: Good morning, your Honor.

James Tyrrell, for the plaintiffs, from Venable.

THE COURT: Good morning.

THE LAW CLERK: Defense counsel, please stand and note your appearance.

MR. FARBER: Good morning, your Honor.

Seth Farber of the Office of Attorney General Letitia James. With me is Daniel Basuk, our summer intern.

THE COURT: And I assume Mr. Basuk will be doing all the speaking today?

MR. FARBER: Oh, God willing, your Honor.

THE COURT: Good morning to both of you.

Good morning to counsel.

MR. FARBER: Good morning, your Honor.

MR. TYRRELL: Good morning.

THE COURT: All right.

I have looked at and reviewed all of your filings. I'm happy to permit plaintiff to use its portion of this morning as you see fit. I don't think I need any kind of regurgitation of what I've read, but I'm happy to give you an opportunity. I wanted to give everybody an opportunity to offer whatever additional argument, proof, etc., they wanted before I consider what to do.

So, Mr. Tyrrell, it's your show. I'm happy to listen. Tell me what you want me to do next, besides sign your motion.

MR. TYRRELL: Thank you, your Honor.

Thanks to the Court for facilitating this remote appearance today. My family is very happy we didn't have to cancel vacation.

THE COURT: And I'm happy you didn't have to cancel vacation as well.

MR. TYRRELL: Your Honor, I don't want to waste the Court's time and regurgitate what we've already expressed in the papers. But I will just say that the governor's executive order and the currents requirements for plaintiffs, the executive order 2.2, 202.46, it creates a severe burden on plaintiffs. And sending out people and circulators and candidates to go gather in-person wet signatures with in-person witnesses in the middle of a pandemic, no matter the rosy picture that the defendants have painted, it simply does not -- it's a severe burden on plaintiff. And when the governor and local and state authorities, all they are saying every single day is to social distance, social distance, six feet away, it strains credulity to have the governor go out and require individuals to go get signatures, when doing that violates those very directives.

Your Honor, I can go through -- I'm not going to go through and regurgitate everything, but one thing I will say

with respect to our equal protection claim, we did a little bit of math with respect to the -- and the times provided. And I will say the following with respect to our equal protection claim:

For major party candidates for the primary, there was a 12 percent reduction in the days to collect signatures; whereas there was a 70 percent reduction in the amount of signatures required. During this period of time, your Honor, the state was not on lockdown for any portion of that signature collection. The lockdown started on March 22nd. And there was no social distancing mandate until March 20th, under New York's 10-point plan. So all of the period of time that major party candidates had to gather their signatures was not restricted, even though it was kind of ramping up into being a kind of scary situation.

For independent candidates, on the other hand, there was a 30 percent reduction in the days to collect, and a 30 percent reduction in signatures. The executive order, 202.46, opened the signature collection period on July 1st. The executive order was issued the night before, on June 30th. No opportunity for plaintiffs to plan or independents to plan for signature collection. There was a reduced submission period for independent candidates by 50 percent. And every day in the signature collection period, social distancing mandates were in effect, with enforcement by towns and municipalities.

The New York pause 10-point plan clearly says to avoid activities when they come into close contact with other people. And all of this was in effect during the independent candidate signature collection process and continues to be. We just don't believe there's a rational basis for such discrepancies.

With that, your Honor, I'm happy to answer any kind of questions.

One thing I will also note though, it is arguable that notaries are able to gather signatures remotely for candidates. The governor lifted the notary requirement that there be in-person notarization. It is somewhat unclear under the election law whether notaries would be able to do that in this context.

The petitioning process, there are two lines on ballot petition forms, one for subscribing witnesses, one for notaries public. A subscribing witness is only -- in a party primary, for instance, is only able to collect signatures if they remember that party. And once they collect signatures for one candidate, they cannot collect signatures for any other candidate, no matter what. Notaries public, on the other hand, are able to collect and witness signatures regardless.

It is somewhat unclear by the executive order, but when the governor issued an executive order lifting the requirements that notaries witness signatures in person, it sort of remains to be seen whether (inaudible) flagged in this

election context.

So what we would ask, your Honor, is that with regard to specific remedies that we would apply to the notary -- the ability of a notary to gather signatures, no matter whether they gather before, and remotely, and have that apply to subscribing witnesses as well.

We would also ask, with respect to potential remedies here, for an additional eight days to collect signatures for independent candidates, until August 7th. That's a reduction from 43 days, under the statute, to 38 days. And this reduction represents the same 12 percent reduction in collection days provided to major party candidates; whereas independents are going from 43 to 38, major party candidates went from 25 to 22 days.

Your Honor, for a 70 percent reduction in signatures -- can you hear me, your Honor?

THE COURT: I hear you.

MR. TYRRELL: I'm sorry.

We'd ask for a 70 percent reduction in signatures, which means that congressional candidates -- Mr. Eisen would need to -- would be required to gather 1,050 signatures; and Mr. Greenberg would be required, as a state senate candidate, to gather 900 signatures. We would ask for remote -- for the remote witnessing, like I said, as well.

With that, I'd be happy to answer any of the Court's

questions.

THE COURT: Well, one question that I did have is what's going on before Judge Hubert in state court? The motions are pending, motion to dismiss your amended petition is pending, and there has been no ruling by the judge; correct?

MR. TYRRELL: There's been no ruling by the judge.

Mr. Eisen requested -- and I believe we discussed this during the conference a couple weeks back. Mr. Eisen requested *mandamus* relief requiring the board of elections to allow electronic signatures. That case did not touch on any kind of, sort of, constitutional issues; did not touch on the executive order. It also did not touch on the executive order.

As far as the status of it, that's correct, there's -- a motion to dismiss is pending. And it's -- you know, Mr. Eisen has separate lawyers handling that case.

THE COURT: No, and I appreciate that.

I understand the timing, and I get the nature of the action that you've commenced. I was just curious if there's anything else going on.

Okay. Mr. Farber.

MR. FARBER: Thank you, your Honor.

Your Honor, may it please the Court, Seth Farber of the Attorney General's Office for the defendants.

When we last convened on our telephone conference on the 17th, the Court focused on two critical issues, and I'd

like to focus on them now.

One was the burden of proof applicable to the present motion for preliminary injunction; and the other was the factual question of how many signatures Plaintiff Eisen had obtained by that date.

As to the burden of proof, actually, both parties agree that in the present case, because plaintiffs seek a mandatory injunction, changing the status quo with respect to governmental action and policy and the preliminary injunction would probably constitute the ultimate relief in the case. This motion is subject to a heightened standard. Plaintiff must make a clear showing of entitlement on all the elements of preliminary injunction.

As to the other question, at the time on the 17th, plaintiffs' counsel candidly answered the Court by stating that Plaintiff Eisen had obtained around 1,000 signatures. I observed that we were around halfway through the petition inquiry then, and that was around halfway through the -- halfway of the signatures needed.

At the moment, we have no additional information at all as to how many signatures Plaintiff Greenberg has; and we have no further information as to whether Mr. Eisen has obtained another thousand signatures, another 2,000 signatures, no signatures.

The question for this hearing, as raised by the Court,

persists: Have the plaintiffs met their heightened burden of proof to obtain the extraordinary relief of mandatory injunction against the government. I would have hoped that we could address the question with further evidence from the plaintiffs, establishing their specific efforts to obtain signatures: How much time they had to put in themselves; how many volunteers were dispatched; what efforts they undertook; whether either or both plaintiffs relied on paid campaign staff to canvass for signatures; when they started; what did they try on social media; did they do direct mail, telephone, newspaper advertising, personal solicitations at supermarkets and shopping centers. And with all these efforts, how many signatures have they obtained to date?

Unfortunately, none of this is before the Court. Even the 1,000 figure that Mr. Tyrrell provided last time was just *ipse dixit*; it is not evidence.

So what we have are two categories of documentary evidence that the plaintiffs have offered in their three declarations. They've offered evidence about the difficulties associated with the coronavirus in New York. And we have plaintiffs' carefully worded accounts of their difficulties in gathering signatures. I had no doubt that everyone in this room, probably in this state, and probably in this country -- if not the world -- are aware of how devastating the coronavirus has been to date. So this isn't really in play.

The problem for plaintiffs is that their presentation doesn't meet their evidentiary burden, let alone the heightened burden. No one disputes that getting petitioners -- petition signatures now is challenging in the best of times, and obviously more challenging than if we were not in this pandemic.

Defendants offered the declaration of Todd Valentine of the state board of elections for the purpose of demonstrating that despite plaintiffs' protestations, there are means consistent with social distancing and health and safety measures by which they can obtain signatures. It is undisputed that all the regions in which the plaintiffs are seeking petitions are in phase IV. Defendants do not dispute that this does not mean normal or business as usual; but it does mean a vast improvement in terms of the amount of committed business activity compared to just a few weeks ago, especially in March and April, when we were at the height of this pandemic.

So the question before the Court is not whether the executive order 202.46 and its reduction of signature requirements by 30 percent makes signature gathering easy or is the ideal number in a perfect world. The question is whether it is so burdensome on these plaintiffs as to be unconstitutional. On this record, the answer is no.

I note that Plaintiff Eisen uses carefully worded statements in his declaration:

It is more likely that voters residing in the 17th district will refuse to open doors to my petition circulators and me; or members of the public are reluctant to participate in the conversations necessary to facilitate petition signing, let alone actually perform the physical act of signing.

This, however, is not evidence; it's conjecture.

For his part, Mr. Greenberg at least offers the active voice and states: Since July 1st, I have worked tirelessly to gather the signatures required for independent candidate ballot access in New York State Senate District 46, in listing over 35 volunteers and friends and family to circulate my nominating petitions.

And for his part, again, more directly than Mr. Eisen, Mr. Greenberg states: Members of the public have consistently refused to sign my petition sheets for fear of contracting COVID-19, as people refuse to answer their doors, touch pens used to sign my petitions, or allow strangers to approach them altogether. And adds for emphasis: Virtually every individual who has refused to sign my petition sheets has asked if he or she is able to sign electronically or do virtual witnessing in order to avoid any exposure to COVID-19.

Aside from potential hearsay problems with those statements, we don't know if those statements were made to Mr. Greenberg or his volunteers. But even if that wasn't an issue, we're still missing a critical fact: How many people

were involved in those statements? Was that one member of the public, 10, 100, 1,000? Well, we don't know and we're not going to know, because none of this is in the record.

Further, Mr. Greenberg does not tell us how many of these people said this with respect to his current independent run, or said it with respect to his previous effort to obtain the democratic nomination, as reflected in his letter to the governor.

These are open questions that we cannot answer from this record and, as such, they are fatal to show a likelihood of success on the merits as to whether or not it is virtually impossible to obtain signatures to obtain a place on the ballot.

We would argue that it's also fatal to the equal protection claim as absent a compelling evidentiary showing of current difficulties, entirely absent from this record, it's impossible to ascertain if plaintiffs' suggested comparators -- that would be candidates seeking party nominations last March -- are equal in all relevant respects as compared to the plaintiffs here.

The district court in the Connecticut case of *Gottlieb v. Lamont*, which has been cited by all parties here, asked very similar questions on the record before it, and came to the conclusion that this does not meet the burden of proof in a case raising similar issues. And in this case, where plaintiff

bears a heightened burden, we submit that this is a fundamental failure of proof that warrants denial of the motion.

Similarly, plaintiffs have failed to meet their heightened burden on the other elements of the claim. They argue that merely raising a First Amendment issue is enough to constitutionally show irreparable harm, but they haven't shown a First Amendment violation. Plaintiffs are still permitted to use all means of speech to obtain signatures to get on the ballot. Neither of their district is under a stay-at-home order.

And while no one questions that COVID-19 is a concern -- and a deadly serious concern -- with all due respect, their rights to engage in obtaining signatures and obtain valid access has not been so impaired by actions of the state to result in the virtual impossibility of their obtaining a place on the ballot. They have not met the heightened standard for showing irreparable harm.

Similarly, plaintiffs contend that balancing of equities in the public interest favors them because their interests of getting on the ballot and giving the voting public the choice of their candidacies and obtaining this Court's relief to obtain any of the three methods they propose: Lowering the signature requirement, extending the petitioning period, or permitting electronic signature gathering verification, outbalances the state's interests in avoiding

ballot cast and voter confusion in establishing a minimal threshold of public support.

We can infer that plaintiffs believe that their interests outweigh those of the state. But the state offered Mr. Valentine's declaration for the proposition that at least two of those three remedies, as suggested by the plaintiffs, would actually work extraordinary hardship on the state defendants, especially as a result of the compressed time involved.

Plaintiffs don't dispute that the September 9th ballot certification date is a hard deadline. Ballot lineups have to be ready by then to ensure ballot preparation in time for both early voting and the general election. Either remedy suggested by plaintiff -- adding an electronic option or literally extending the additional period -- will, in turn, cause delays in the remainder of the process, and will take critical time. Because between now and September 9th is when all ballot challenges have to be brought and adjudicated; and then litigation, through appeal, up to the State Court of Appeals, resolves in about six -- five or six weeks. This is already many weeks shorter than the normal time, which would have run from about May, and realistically cannot be shortened further without causing extreme disruption of this election.

Again, the Connecticut district court in *Gottlieb* noted the state's critical interest maintaining its electoral

schedule, in light of other obligations associated with ballot information and distribution. And similarly, adding an electronic option would create the necessity for further delay as the state figured out how to implement it.

On the record before this Court, the plaintiffs have failed to meet their heightened burden; they have not made a clear showing of entitlement to preliminary injunction here, and their motion should be denied.

If your Honor has no further questions of me, thank you.

THE COURT: Thank you.

I want to ask both of you -- I guess we left off in our last telephone conference, everything has been as expedited as my calendar has permitted. I asked both of you to consider if there was a resolution here, short of the judge ruling. And I haven't heard anything about that this morning.

So either of you or both of you, have you engaged, as I requested, in a good-faith discussion about how to resolve this, short of the judge ruling on plaintiffs' application for a preliminary injunction?

MR. TYRRELL: Yes. Yes, your Honor, we did have a discussion. Unfortunately, there was not followup from the state, but there was a discussion about potential settlement. It was largely with respect to a reduction in signatures. And last that I heard from the state was that Mr. Farber was going

to consult with his colleagues to discuss that, but I had not heard back yet.

THE COURT: Okay.

Mr. Farber?

MR. FARBER: That's essentially correct, your Honor.

We have not -- I don't know how to characterize it, whether I haven't made the sale, but we have -- we have not been able to reach further basis for -- we have not been able to reach an agreement, is how I will put it, your Honor.

THE COURT: Have you discussed the settlement proposal with the "client"?

MR. FARBER: Yes, your Honor.

THE COURT: And your client has no interest in pursuing the settlement proposal.

MR. FARBER: No, your Honor.

THE COURT: All right.

You have nothing else, Mr. Farber?

MR. FARBER: I do not, your Honor.

THE COURT: You have nothing else.

The record is very clear here.

Okay. We're going to take a few-minute recess, and I'll be back out momentarily.

The timing of this, I assume, is -- from your point of view, Mr. Tyrrell, one way or the other, you need to know where you stand. And so ordinarily what I would do, frankly, is I

would take everything on submission and I would write an opinion on this very important issue. And I don't know whether that's something that helps you or hurts you, but I'm assuming that however this shakes out, you need to know as soon as I can give you an answer as to what's going on; correct?

MR. TYRRELL: That's correct, your Honor.

The sooner, the better, to have some sort of expectations for our client would be -- the sooner, the better, would be great.

THE COURT: And I just want to be also clear that there's no witnesses coming from either side. I gave you the opportunity, I set aside the day. We had no witnesses from the defendant, correct, and none from the plaintiffs. So, okay.

Correct?

MR. FARBER: Yes, your Honor.

THE COURT: Correct?

MR. TYRRELL: Correct. Correct.

THE COURT: Okay.

We'll stand in recess for a few minutes, and I'll be back.

(Recess)

THE LAW CLERK: We're back on the record.

THE COURT: First of all, I want to say how much I appreciate the ardor with which counsel has presented their arguments to me. As a new judge, I'm remarkably pleased each

and every time I run into competent counsel who care deeply about their issues and may disagree with each other, but nevertheless have a very strong sense of obligation to the Court -- albeit from an adversarial point of view -- to educate me on what it is I need to know. So I appreciate both of you, all of you, for your good hard work.

By way of background, there is a state court action that was commenced April 20th, 2020 entitled *Eisen v. Cuomo* Index 54542 of 2020 in Westchester County Supreme Court. There -- though the plaintiffs here -- sought temporary relief from Judge Hubert, who actually declined to sign plaintiffs' order to show cause concerning reductions in number of signatures and the nature of the signature being electronic.

Respondents there filed a motion to dismiss the petition May 18th. Petitioner then filed an amended pleading on June 3rd, and respondents replied on June 10th. Thereafter, the respondents wrote advising the issuance of Executive Order 202.46 on July 8th.

This action, the action before me, was commenced on July 3rd, 2020. On July 7th, I granted *pro hac vice* admission to plaintiffs' counsel.

On July 17th, 2020, an order to show cause was signed by me, with an expedited briefing schedule in scheduling a hearing for 10 a.m. today. Service was effectuated by ICF, and opposition was received by ICF on the 23rd -- on the 21st of

July, and a reply on the 23rd at 5 p.m.

We adjusted the dates along the way, and all briefs were filed by July 24th. An amended complaint was filed by the plaintiff on July 20th, and adding an additional Plaintiff Greenberg to this case.

The action in its present amended complaint form involves two plaintiffs: One running for the congressional seat in the 17th congressional district, and another running for the New York State Senate seat in district 46.

The amended complaint includes two claims for relief, each pursuant to 42 U.S.C., Section 1983.

The first claim for relief is an alleged violation of the First and Fourteenth Amendment; and the second claim for relief is a violation alleged to be the equal protection clause of the Fourteenth Amendment.

Claims for relief center on the content of Executive Order 202.46, signed by Governor Cuomo on June 30th, 2020, and Election Law Section 6-140.

Executive Order 202, as it relates to nominations by independent candidates, requires two things which plaintiffs find offensive and suggest they are unconstitutional.

First -- and I'm quoting from 202.46: "A signature made earlier than July 1, 2020, or later than July 30, 2020, shall not be counted upon a petition for an independent nomination for an office appearing on the general election

ballot or at a village election."

The second item reads: "For any election in 2020, the signature requirements on an independent nominating petition for an independent nomination for the general election for any office that is not determined by a statewide election shall be -- " and then I'm skipping some language -- "a number equal to 70 percent of the statutory number provided for by subdivision 2 of Section 6-142 of the election law.

In addition, plaintiffs take issue with the requirement under New York Election Law, Section 6-140(1)(a) and (b), that the signatures of supporters and witnesses be in ink.

For Plaintiff Eisen, he must obtain, according to the papers before me, 2,450 signatures, for approximately .536 percent of the 456,834 voters in the 17th congressional district in New York.

Plaintiff Greenberg, he must obtain 2100 signatures, or 1.1 percent of the 190,347 voters in the 46th senate district in New York.

Before me today is plaintiffs' application for a preliminary injunction. I scheduled the hearing for the day, and have heard now from counsel for both sides summarizing that which is set forth in their motion papers and papers in opposition. Neither side had any witnesses.

Plaintiffs' motion for preliminary injunction seeks an

order to enjoin defendants during the pendency of this action "from enforcing New York's current ballot qualification requirements for independent candidates for Congress [and I resume the New York Senate] pursuant to New York's election law, Section 6-100 et seq., and Executive Order 202.46."

Plaintiffs' application raises a number of substantive and procedural issues which are significant. Both sides argue that on this application for preliminary injunction, and because the nature of the preliminary injunction sought is mandatory, there is a heightened standard for the plaintiff to make a "clear" showing of entitlement to the relief requested. *People of the State of New York ex rel. Schneiderman v. Actavis, PLC,* 787 F.3d 638, 650 (2d Cir. 2015).

The appropriate standard of a review for preliminary injunction includes recognition that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. To obtain a preliminary injunction, plaintiff must demonstrate irreparable injury absent injunctive relief, either a likelihood of success on the merits or a serious question going to the merits to make them fair ground for trial, with a balance of hardships decidedly tipping in the plaintiffs' favor, and that the public interest weighs in favor of granting an injunction.

The Court will first consider the likelihood of

success on the merits of plaintiffs' two claims for relief.

Plaintiffs' first claim for relief involves analysis of the ballot access rules under 202.46, and Election Law Section 6-140(a) and (b).

Plaintiffs contend that because of the restrictions put in place in response to COVID-19, ballot access rules set forth as I've indicated are unconstitutional.

The administration of the electoral process is a matter that the Constitution largely entrusts to the state. The Supreme Court has clearly stated that election laws may so impinge upon freedom of association to run afoul of the First and Fourteenth Amendment if they are unduly restricted. And that's *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). That prohibition includes state laws governing which candidates may appear on a ballot, including primary ballots.

Ballot access laws place burdens on two different -- although overlapping -- types of rights. The right of the individuals to associate for the advancement of political beliefs, and the right of qualifying voters -- regardless of their political persuasion -- to cast their votes effectively. That's recognized in the Supreme Court decision of *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

There's no litmus test here that will separate valid ballot access provisions from invalid ones; instead, courts conduct the two-step analysis that derives from *Anderson v.*

Celebrezze, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and being the Second Circuit has recently -- and thankfully -- described in detail the test, the two-part test in *Yang v. Kosinski*, 960 F.3d, 119 (2d Cir. 2020).

The Second Circuit has articulated the test this way:

"First, we ascertain the extent to which the challenge restriction burdens the exercise of the speech and associational rights at stake. The restriction could qualify as reasonable and nondiscriminatory, or as severe.

"Once we have resolved this first question, we proceed to a second step, in which we apply one or another pertinent legal standard to the restriction. If the restriction is reasonable and nondiscriminatory, we apply a standard that has come to be known as the Anderson-Burdick balancing test.

"We must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate; and then identify and evaluate the precise interest put forward by the state as justifications for the burdens imposed.

"If the restriction is severe, then we are required to apply the more familiar test of strict scrutiny. Whether the challenged restriction is narrowly drawn to advance the state interest of compelling importance, it follows then that the rigorousness of our inquiry into the propriety of the state election law depends upon the extent to which a challenged

restriction burdens the First and Fourteenth Amendment rights."

As to the first step, the Anderson-Burdick test requires the Court to analyze the burden on plaintiffs' rights. The hallmark of a severe burden is exclusion or virtual exclusion from the ballot. *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016).

I, therefore, turn to the two-step analysis required by the *Yang* case.

With respect to Step 1, I believe the plaintiff has failed to demonstrate clearly that obtaining the signatures is impossible or virtually impossible to obtain. For the Plaintiff Eisen to comply, he needs .536 percent of the 456,834 voters in the 17th congressional district, for approximately 82 signatures a day. The 17th congressional district is in phase IV of the governor's reopening plan, and Eisen has failed to offer any proof on this score, other than conclusory generalities and self-serving broad statements of fact.

Plaintiff Greenberg fares no better. He needs 1.1 percent of 190,347 voters in his 46th district, or approximately 70 signatures a day.

In either case, there is no proof in this record as to how many signatures each plaintiff has actually obtained. They also fail, each plaintiff, to state more than generally, or carefully worded statements, what efforts that they have engaged in to attempt to collect the signatures, or whether

other independent candidates have met the signature requirement. There was no proof before me that such a number of signatures was impossible or virtually impossible to obtain.

There is no question that COVID-19 has undoubtedly made plaintiffs' efforts much more difficult. The governor's executive order 202.46 has significantly eased the burden on each of these independent candidates. Therefore, I find the restrictions are reasonable and nondiscriminatory.

Having determined that the restrictions are not severe, but reasonable and nondiscriminatory, the Court is required to consider the balancing test under Anderson-Burdick, a balance between plaintiffs' asserted First Amendment injuries, against the precise interests put forward by the state as justifications for the burdens imposed, just what *Yang v. Kosinski*, 960 F.3d at 129 (2d Cir. 2020) requires.

Under this test then, the state's reasonable and nondiscriminatory restriction will be generally sufficient to uphold the provisions if they serve important state interests.

For their part, plaintiffs generally point to the COVID-19 pandemic's impact on the process, and how the legislatures in other states, such as Florida, New Jersey, Utah, Minnesota, Michigan, Massachusetts, Rhode Island, and Maryland, have eliminated some or all of these requirements. Plaintiffs claim that these restrictions unnecessarily burden plaintiffs' First Amendment right of individuals to associate

for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast votes effectively. They cite *Williams v. Rhodes*, 390 U.S. at 30 (1968).

Defendants argue that these ballot restrictions are plainly constitutional. Defendants maintain they have strong interests in assuring that there is a modicum of public support for independent candidacy, and substantial regulation of elections if they are to be fair, honest, and orderly.

I find that 202.46 actually reduces the valid burdens on plaintiffs and does not further restrict plaintiffs. Were I to enjoin and suspend any of the requirements plaintiffs seek suspended, the state's legitimate interest in an orderly election process in determining that there is public support for independent candidates could be jeopardized.

Plaintiffs' argument that their own interests in obtaining a place on the ballot outweigh the state's interests in overseeing its election process, ensuring the public support for these plaintiffs is simply, in my view, wrong. As to the first claim for relief, plaintiffs have failed to make a clear showing of likelihood of success.

Analysis of plaintiffs' second claim for relief on equal protection fares no better.

To state a claim for relief under the equal protection clause, plaintiffs must allege:

One, there is an intentional discrimination by the state adopting the rule which is facially neutral, but has a discriminatory effect; or by applying a facially neutral policy in a discriminatory manner.

To establish intentional discrimination, plaintiffs must allege and show there are similarly situated persons having been treated differently. *Gagliardi v. The Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994).

Plaintiffs argue that Executive Order 202.46 treats independent candidates different from major party candidates. For example, independent candidates got a 30 percent reduction in signature requirements, whereas major party candidates got a 70 percent reduction. Major party candidates got an extra 11 days -- or a 12 percent reduction -- to collect signatures; and independent candidates did not get any.

Independent candidates were notified on June 30th of the requirements commencing on July 1st. During the signature collection for major party candidates, there was no social distancing; whereas for independent candidates, they had social distancing requirements during the entire time.

These arguments simply do not meet the requirement for clear showing of likelihood of success. Simply put, Executive Order 202.46 treats all independent candidates equally. And the Second Circuit has clearly found that differential treatment under New York law between ballot signature

requirements for independent candidates and party-nominated candidates is simply not an equal protection violation. *Kunz v. New York State Senate*, 113 F.3d 326, 328 (2d Cir. 1997). *Also, Ruston v. Town Board for the Town of Skaneateles*, 610 F.3d 55, 59-60, (2d Cir. 2010). There is simply no similarly situated comparator which creates a likelihood of success on plaintiffs' second claim for relief.

Having found no likelihood of success on both claims for relief, the motion for a preliminary injunction is denied.

I have a few additional points I believe are appropriate to complete my decision, first with respect to irreparable injury.

While I recognize that under certain circumstances an assertion of a First Amendment and/or a Fourteenth Amendment loss may create a presumption of irreparable injury, here I find no such presumption because there's no clear showing of a constitutional violation, making the claim of irreparable injury, therefore, in my mind, remote and speculative.

With respect to the balance of equities, the balance of equities, in my view, do not clearly tip in plaintiffs' favor. The state has strong interests in assuring adequate support for independent candidates, maintaining its regulatory election scheme, avoiding voter confusion and valid potential chaos.

Indeed, were I to issue an injunction as plaintiffs

have sought, there would be severe problems in the administrative and judicial challenges period already statutorily in place leading up to the September 9th hard date referred to this morning in the November 3rd election.

The relief sought by these plaintiffs is ultimate. Just comparing the order to show cause to the wherefore close in the amended complaint makes that point. This is simply not one of those rarest of situations where ultimate relief should be given at the preliminary injunction stage.

Finally, I note that I also have a real concern that because there is a state court action pending which seeks the same relief as to the number of signatures, or signature requirement being original as opposed to electronic, there's a possibility that a ruling by me could end up in conflict with the state court judge. In any event, and for all the reasons indicated, plaintiffs' motion for a preliminary injunction is denied.

Okay. That's my ruling.

What we need to do now is consider the next steps.

The amended complaint was filed on July 20th. My rules require that before you move or seek permission to move on any basis, we need to have a conference. I don't know whether the state intends to move to dismiss.

And I should say, frankly, I'm denying this preliminary injunction, but it has nothing whatsoever to do

with my separate obligation to consider by a preponderance of the evidence the claims of constitutional law violations. So while I'm ruling today in an expedited fashion on a motion for preliminary injunction by discharging my obligation in considering a clear showing, that has nothing whatsoever to do with the trial on the merits here and the burden of proof associated therewith.

So I'd like to hear from you, Mr. Farber. Are you intending to file an answer, in which case we'll get a discovery order in place, or do you want to move to dismiss? Do you know yet what you are doing?

MR. FARBER: We do not. We do not know yet, your Honor.

THE COURT: Okay.

MR. FARBER: We will probably consider that very quickly. But at the moment I --

THE COURT: Okay. As I get it, the complaint was filed on July 20th; so you have plenty of time within which to address the issue. I'd ask you to consult my rules. They are pretty precise and straightforward.

Okay. When I get back to chambers, I will issue an order denying the motion for the reasons set forth in the extremely well-handled transcript by our court reporter, who I'm certain got every word, as she always does.

All right. Anything else?

MR. FARBER: No, your Honor.

THE COURT: Okay. Thank you.

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