In The Supreme Court of the United States

No. 19-A____

CHAD THOMPSON; WILLIAM T. SCHMITT;
DON KEENEY,
Plaintiffs - Appellees - Applicants

v.

RICHARD MICHAEL DEWINE,
in his capacity as the Governor of Ohio;
AMY ACTON, in her official capacity as Director of Ohio
Department of Health; FRANK LAROSE, in his official
capacity as Ohio Secretary of State,
Defendants - Appellants - Respondents

OHIOANS FOR SECURE AND FAIR ELECTIONS;
DARLENE L. ENGLISH; LAURA A. GOLD;
ISABEL C. ROBERTSON; EBONY SPEAKES-HALL;
PAUL MOKE; ANDRE WASHINGTON; SCOTT A. CAMPBELL;
SUSAN ZEIGLER; HASAN KWAME JEFFRIES,
Proposed Intervenors - Appellees

OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL;
JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,
Proposed Intervenors - Appellees

Application to the Honorable Sonia Sotomayor
Associate Justice of the United States
Circuit Justice for the Sixth Circuit

APPENDIX

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Attachment 1

Sixth Circuit Stay Order, May 26, 2020

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0162p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellees,

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; AMY ACTON, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE, in his official capacity as Ohio Secretary of State,

Defendants-Appellants,

OHIOANS FOR SECURE AND FAIR ELECTIONS; DARLENE L. ENGLISH; LAURA A. GOLD; ISABEL C. ROBERTSON; EBONY SPEAKES-HALL; PAUL MOKE; ANDRE WASHINGTON; SCOTT A. CAMPBELL; SUSAN ZEIGLER; HASAN KWAME JEFFRIES; OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL; JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,

Intervenors-Appellees.

No. 20-3526

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:20-cv-02129—Edmund A. Sargus, Jr., District Judge.

Decided and Filed: May 26, 2020

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

COUNSEL

ON MOTION: Benjamin M. Flowers, Michael J. Hendershot, Stephen P. Carney, Shams H. Hirji, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants. **ON RESPONSE:** Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus,

Ohio, for Plaintiffs-Appellees. Donald J. McTigue, Derek Clinger, MCTIGUE & COLOMBO LLC, Columbus, Ohio, for Intervenors-Appellees.

ORDER

PER CURIAM. By all accounts, Ohio's public officials have admirably managed the problems presented by the unprecedented COVID-19 pandemic. This includes restricting Ohioans' daily lives to slow the spread of a highly infectious disease. Nearly every other state and the federal government have done the same. And these are the types of actions and judgments that elected officials are supposed to take and make in times of crisis. But these restrictions have not gone unchallenged. *See, e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020). Our Constitution, of course, governs during both good and challenging times. Unlike those cases, however, the Plaintiffs and Intervenors here do not challenge the State's restrictions per se. Rather, they allege that COVID-19 and the State's stay-at-home orders have made it impossibly difficult for them to meet the State's preexisting requirements for initiatives to secure a place on the November ballot—violating their First Amendment rights. So they challenge Ohio's application of its general election and ballot-initiative laws to them.

Ohio's officials have not been unbending in their administration of the State's election laws. Indeed, they postponed the Ohio primary election, originally scheduled during the height of the pandemic. That exercise of judgment is not before us. Rather, Plaintiffs challenge the Ohio officials' decision not to further modify state election law in the context of this case. The district court agreed with Plaintiffs and granted a preliminary injunction, finding that, as applied, certain provisions of the Ohio Constitution and Ohio Code violate the First Amendment. Defendants now ask for a stay of that injunction to preserve the status quo pending appeal.

The people of Ohio vested their sovereign legislative power in the General Assembly. Ohio Const. art. II, § 1. But they also retained the power to amend the State Constitution, enact laws, and enact municipal ordinances by initiative and referendum. *Id.* art. II, §§ 1a, 1b, 1f. The Ohio Constitution and the Ohio Code establish the process for proposing an initiative to the

State's electors and impose many requirements for ballot access. Relevant here, a petition to put an initiative before Ohio's electors for referendum must include signatures from ten percent of the applicable jurisdiction's electors that voted in the last gubernatorial election, each signature must "be written in ink," and the initiative's circulator must witness each signature. *Id.* art. II, § 1g; *see id*. art. II, § 1a; Ohio Rev. Code Ann. § 731.28. And the initiative's proponents must submit these signatures to the Secretary of State 125 days before the election for a constitutional amendment and 110 days before the election for a municipal ordinance. Ohio Const. art. II, § 1a; Ohio Rev. Code Ann. § 731.28.

Given the COVID-19 pandemic, three individuals and two organizations, who are obtaining signatures in support of initiatives to amend the Ohio Constitution and propose municipal ordinances, challenged these requirements, as-applied to them. They claim Ohio's ballot-initiative requirements violate their First and Fourteenth Amendment rights and moved to enjoin the State from enforcing these requirements against them. The district court granted their motion in part, enjoining enforcement of the ink signature requirement, the witness requirement, and the submission deadlines, and denied their motion in part, upholding the number of signatures requirement. The court also directed Defendants to "update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements so as to reduce the burden on ballot access" as well as ordered them to "accept electronically-signed and witnessed petitions from [the organizational plaintiffs] collected through the on-line signature collection plans set forth in their briefing" and to "accept petitions from [the organizational plaintiffs] that are submitted to the Secretary of State by July 31, 2020[.]"[1] (R. 44, Op. & Order at PageID # 675–76.) And the court ordered Defendants and the organizational plaintiffs to "meet and confer regarding any technical or security issues to the on-line signature collection plans" and "submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020." (*Id*.) Defendants now move for an administrative stay and for a stay pending appeal.

[1]The district court chose this date because it is also the deadline for petition proponents to submit additional signatures if the Secretary of State determines that the original submissions were insufficient. (R. 50, Op. & Order at PageID # 718.) The Secretary of State would then have less than a month, until August 30, to determine whether the petitions satisfy the requirements for ballot access, Plaintiffs would need to file any legal challenge to the Secretary of State's determination by September 9, the Secretary of State would have to certify the form of official ballots by September 14, and the Supreme Court would have to rule on any challenge by September 19. (*Id.*)

"[I]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions" are immediately appealable. 28 U.S.C. § 1292(a)(1). And the district court has already denied Defendants' motion for a stay pending appeal in that court. So we have jurisdiction and Defendants' motion is ripe for our review.

A movant must establish four factors to obtain a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When evaluating these factors for an alleged constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) ("In First Amendment cases, however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action." (internal quotation marks and alteration omitted)). So we turn first to that.

I.

"[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution[.]" *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("[I]nitiatives and referenda . . . are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action."). As Defendants concede, our precedent dictates that we evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework.[2] *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019);

[2]Defendants contend that *Anderson-Burdick* shouldn't apply to ballot initiative requirements because restrictions on the people's legislative powers (rather than political speech or voting) don't implicate the First Amendment. At least two other Courts of Appeals have held as much. *See Initiative & Referendum Inst. v. Walker*,

Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members & Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 885 F.3d 443, 448 (6th Cir. 2018). First, we determine the burden the State's regulation imposes on the plaintiffs' First Amendment rights. When States impose "reasonable nondiscriminatory restrictions[,]" courts apply rational basis review and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, (1983)). But when States impose severe restrictions, such as exclusion or virtual exclusion from the ballot, strict scrutiny applies. *Id.* at 434; *Schmitt*, 933 F.3d at 639 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot."). For cases between these extremes, we weigh the burden imposed by the State's regulation against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

We have regularly upheld ballot access regulations like those at issue. *See Schmitt*, 933 F.3d at 641–42 (upholding Ohio's provision of only mandamus review for challenges to a Board of Elections' ruling over compliance with ballot initiative requirements against a First Amendment challenge); *Ohio Ballot Bd.*, 885 F.3d at 448 (upholding Ohio's single-subject requirement for ballot initiatives against a First Amendment challenge); *Taxpayers United*, 994 F.2d at 296–97 (upholding Michigan's number-of-signatures requirement for ballot initiatives against a First Amendment challenge). But these are not normal times. So the question is whether the COVID-19 pandemic and Ohio's stay-at-home orders increased the burden that Ohio's ballot-initiative regulations place on Plaintiffs' First Amendment rights.

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450 F.3d 1082, 1099–100 (10th Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002). And this court has often questioned whether *Anderson-Burdick* applies to anything besides generally applicable restrictions on the right to vote. *Daunt v. Benson*, 956 F.3d 396, 423–24 (6th Cir. 2020) (Readler, J., concurring) (acknowledging that "*Anderson-Burdick* is a poor vehicle" for evaluating First Amendment challenges to public service qualification regulations; *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020) (recognizing that applying *Anderson-Burdick* to Equal Protection claims "takes some legal gymnastics"); *Schmitt*, 933 F.3d at 644 (Bush, J., concurring in part) ("[T]he Court's precedents in *Anderson* and *Burdick*, though concerning election regulation, similarly do not address the key question raised in this case: is the First Amendment impinged upon by statutes regulating the election mechanics concerning initiative petitions?" (citation omitted)). But until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this.

We must answer this question from the perspective of the people and organizations affected by Ohio's ballot initiative restrictions and considering all opportunities these parties had to exercise their rights. *Mays*, 951 F.3d at 785–86.

The district court held that Ohio's strict enforcement of its ballot initiative regulations imposed a severe burden on Plaintiffs' First Amendment rights, given the pandemic. Not so. The district court based its order, in part, on this court's recent order in *Esshaki v. Whitmer*, --- F. App'x ----, 2020 WL 2185553 (6th Cir. May 5, 2020). But there are several key differences between this case and *Esshaki*. At bottom, a severe burden excludes or virtually excludes electors or initiatives from the ballot. *See Mays*, 951 F.3d at 786; *Schmitt*, 933 F.3d at 639. But Ohio law doesn't do that.

In *Esshaki* we held that "the *combination* of [Michigan's] strict enforcement of [its] ballot-access provisions and [its] Stay-at-Home Orders imposed a severe burden on the plaintiff's ballot access[,]" 2020 WL 2185553, at *1 (emphasis added). In other words, Michigan still required candidates seeking ballot access by petition to procure the same number of physical signatures as a non-pandemic year, "without exception for or consideration of the COVID-19 pandemic or the Stay-at-Home Orders." *Id*. What's more, Michigan's stay-at-home orders remained in place through the deadline for petition submission. *Id*. So Michigan abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures that they had gathered to that point.

On the other hand, Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders. From the first Department of Health Order issued on March 12, Ohio made clear that its stay-at-home restrictions did not apply to "gatherings for the purpose of the expression of First Amendment protected speech[.]" Ohio Dep't of Health, Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio ¶ 7 (March 12, 2020). And in its April 30 order, the State declared that its stay-at-home restrictions did not apply to "petition or referendum circulators[.]" Ohio Dep't of Health, Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order ¶ 4 (April 30, 2020). So none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions.

Unlike the Ohio orders, the Michigan executive orders in *Esshaki* did not specifically exempt First Amendment protected activity. To be sure, executive officials in Michigan informally indicated that they would not enforce those orders against those engaged in protected activity. *See* Mich. Dep't of Health & Human Servs., Executive Order 2020-42 FAQs (Apr. 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html. Of course, that promise is not the same as putting the restriction in the order itself. *Cf. Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (We "must presume that [the] legislature says in a statute what it means and means in a statute what is says there."); *Sosna v. Iowa*, 419 U.S. 393, 399–400 (1975) (noting, in the context of the capable of repetition yet evading review exception to mootness, that just because a state official says they won't enforce a statute against a party now doesn't mean they won't exercise their discretion to enforce the statute at a later time). But in any event, we did not address the significance of exemptions in *Esshaki* at all. By contrast, we believe that Ohio's express exemption (especially for "petition or referendum circulators" specifically) is vitally important here.

What's more, Ohio is beginning to lift their stay-at-home restrictions. On May 20, the Ohio Department of Health rescinded its stay-at-home order. Ohio Dep't of Health, Director's Order that Rescinds and Modifies Portions of the Stay Safe Ohio Order (May 20, 2020). We found a severe burden in *Esshaki* because Michigan's stay-at-home order remained in effect through the deadline to submit ballot-access petitions. Considering all opportunities Plaintiffs had, and still have, to exercise their rights in our calculation of the burden imposed by the State's regulations, *see Mays*, 951 F.3d at 785–86, Plaintiffs' burden is less than severe. Even if Ohio's stay-at-home order had applied to Plaintiffs, the five-week period from Ohio's rescinding of its order until the deadline to submit an initiative petition undermines Plaintiffs' argument that the State has excluded them from the ballot.

Plaintiffs' claim effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds) as they would without the pandemic. But that's not necessarily true. There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them and bring the petitions to the

electors' homes to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.

Moreover, just because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot. And we must remember, First Amendment violations require state action. U.S. Const. amend. I ("*Congress* shall make no law . . . ." (emphasis added)); 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, *of any State* . . . ." (emphasis added)). So we cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe. *See Schmitt*, 933 F.3d at 639.

Despite the pandemic, we believe that the more apt comparison is to our burden analysis in *Schmitt*. The plaintiffs there made a First Amendment challenge to Ohio's restriction of judicial review for board of elections ballot decisions to petitions for a writ of mandamus. And we held that the burden was intermediate because there are some costs associated with obtaining legal counsel and seeking mandamus review. *Id*. at 641. So this prevents some proponents from seeking judicial review of the board's exclusion of their initiative and constitutes more than a de minimis limit on access to the ballot. *Id. Schmitt* concluded that a burden is minimal when it "in no way" limits access to the ballot.[3] *Id*. (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 577 (6th Cir. 2016)). Thus, the burden in *Schmitt* had to be intermediate. Same here. Requiring Plaintiffs to secure hundreds of thousands of signatures

[3]To be sure, this statement arguably conflicts with other articulations of what constitutes a minimal burden. *See Burdick*, 504 U.S. at 434–39 (because Hawaii's election laws were reasonable and nondiscriminatory they imposed a minimal burden on the plaintiff's First Amendment rights, even though they prevented the plaintiff from casting a vote for his preferred candidate); *Daunt*, 956 F.3d at 408 (classifying regulations that are "generally applicable [and] nondiscriminatory" as imposing a minimal burden); *Taxpayers United*, 994 F.2d at 297 (finding Michigan's ballot initiative regulations minimally burdensome because they were "content-neutral, nondiscriminatory regulations that [were] reasonably related to the purpose of administering an honest and fair initiative procedure."). Indeed, it's hard not to conclude that the signature requirements in *Taxpayers United* necessarily limited ballot access. And in *Burdick*, the Supreme Court remarked that all "[e]lection laws will invariably impose some burden on individual voters." 504 U.S. at 433. But the State doesn't argue that its ballot initiative regulations impose only a minimal burden. And because those regulations satisfy intermediate scrutiny, they would survive under the framework for regulations that impose a minimal burden. So we proceed under the intermediate burden analysis discussed in *Schmitt*. 933 F.3d at 641.

in support of their initiative is a burden. That said, Ohio requires the same from Plaintiffs now as it does during non-pandemic times. So the burden here is not severe.

Whether this intermediate burden on Plaintiffs' First Amendment rights passes constitutional muster depends on whether the State has legitimate interests to impose the burden that outweigh it. *See Burdick*, 504 U.S. at 434. Here they offer two.[4] Defendants claim the witness and ink requirements help prevent fraud by ensuring that the signatures are authentic. And the deadlines allow them time to verify signatures in an orderly and fair fashion, while also providing initiative proponents time to challenge any adverse decision in court.

These interests are not only legitimate, they are compelling. *John Doe No. 1*, 561 U.S. at 186 ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008) ("[E]liminating election fraud is certainly a compelling state interest[.]"); *Austin*, 994 F.2d at 297 ("[S]tate[s] ha[ve] a strong interest in ensuring that its elections are run fairly and honestly," as well as "in maintaining the integrity of its initiative process." (internal quotation marks omitted)). The district court faulted Defendants for not narrowly tailoring their regulations. But *Anderson-Burdick*'s intermediate scrutiny doesn't require narrow tailoring. Because the State's compelling and well-established interests in administering its ballot initiative regulations outweigh the intermediate burden those regulations place on Plaintiffs, Defendants are likely to prevail on the merits.

II.

Unless the statute is unconstitutional, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Defendants have shown they are likely to prevail on the merits. Serious and irreparable harm will thus result if Ohio cannot conduct its

[4]Defendants also claim a third state interest: ensuring that each initiative on the ballot has a threshold amount of support to justify taking up space on the ballot. This interest is more appropriately related to Ohio's number of signatures requirement. *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012) (A State may legitimately "avoid[ ] overcrowded ballots" and "protect the integrity of its political processes from frivolous or fraudulent candidacies."). But the district court did not enjoin the State's enforcement of that regulation so it's not properly before us in this motion for a stay pending appeal.

election in accordance with its lawfully enacted ballot-access regulations. Comparatively, Plaintiffs have not shown that complying with a law we find is likely constitutional will harm them. So the balance of the equities favors Defendants. Finally, giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006). With all four factors favoring Defendants, we grant their motion for a stay pending appeal.

III.

Last, even though we grant Defendants' motion for a stay pending appeal, we note that the district court exceeded its authority by rewriting Ohio law with its injunction. Despite relying heavily on *Esshaki*, the district court failed to apply its primary holding: "federal courts have no authority to dictate to the States precisely how they should conduct their elections." ---F. App'x ----, 2020 WL 218553 at *2. In *Esshaki* we granted a stay for the affirmative portion of the district court's injunction that (1) reduced the number of signatures required to appear on the ballot, (2) extended the filing deadline, and (3) ordered the State to permit the collection of signatures by electronic mail. While it may not have done the first of these, the court below did the second and third. The district court extended the filing deadline by almost a month, to July 31, and ordered Defendants to accept petitions electronically signed, under the plan Plaintiffs drafted.

Federal courts can enter positive injunctions that require parties to comply with existing law. But they cannot "usurp[] a State's legislative authority by re-writing its statutes" to create new law. *Id*. The district court read this holding too narrowly; recognizing it could not modify the Ohio Code but remained free to amend the Ohio Constitution. Instead of simply invalidating Ohio's initiative deadline and signature requirement, the district court chose a new deadline and prescribed the form of signature the State must accept. The Ohio Constitution requires elector approval for all amendments. Ohio Const. art. II, § 1a; *id.* art. XVI, §§ 1, 2. By unilaterally modifying the Ohio Constitution's ballot initiative regulations, the district court usurped this authority from Ohio electors.

The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections. And because that's where the decision-making authority is, federal courts don't lightly tamper with election regulations. These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into unchartered waters. It may well be that the new methods for gathering signatures and verifying them proposed by Plaintiffs (using electronic signatures gathered online by third parties and identified by social security number) will prove workable. But they may also pose serious security concerns and other, as yet unrealized, problems. So the decision to drastically alter Ohio's election procedures must rest with the Ohio Secretary of State and other elected officials, not the courts.

One final point, rewriting a state's election procedures or moving deadlines rarely ends with one court order. Moving one piece on the game board invariably leads to additional moves. This is exactly why we must heed the Supreme Court's warning that federal courts are not supposed to change state election rules as elections approach. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). Here, the November election itself may be months away but important, interim deadlines that affect Plaintiffs, other ballot initiative proponents, and the State are imminent. And moving or changing a deadline or procedure now will have inevitable, other consequences.

There is no doubt that the COVID-19 pandemic and Ohio's responsive restrictions to halt the spread of that disease have made it difficult for all Ohioans to carry on with their lives. But for the most part we are letting our elected officials, with input from public health experts, decide when and how to apply those restrictions. The election context is no different. And while the Constitution provides a backstop, as it must—we are unwilling to conclude that the State is infringing upon Plaintiffs' First Amendment rights in this particular case.

For these reasons, we **GRANT** Defendants' motion for a stay pending appeal and **DISMISS AS MOOT** their motion for an administrative stay.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Attachment 2

District Court Preliminary Injunction, May 19, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHAD THOMPSON, et al.,

Plaintiffs,

v.

CASE No. 2:20-CV-2129
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsea M. Vascura

GOVERNOR OF OHIO MICHAEL DEWINE, et al.,

Defendants.

OPINION AND ORDER

The instant matter is before the Court for consideration of three Applications for a Temporary Restraining Order and/or three Motions for Preliminary Injunction filed by each of the groups of Plaintiffs in this matter. (ECF Nos. 4, 15, 17-2.) The Court held several telephone conferences with the parties, who unanimously indicated that they did not need an evidentiary hearing, instead requesting that the Court rely on their agreed stipulated facts, their non-contested affidavits, and their briefing. Defendants filed their Memorandum in Opposition (ECF No. 40) and Plaintiffs filed their Replies (ECF Nos. 41, 42, 43). For the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motions.

I.

Plaintiffs Chad Thompson, William Schmitt and Don Keeney ("Thompson Plaintiffs"), Plaintiff-Intervenor Ohioans for Safe and Secure Elections and their supporters ("OFSE Plaintiffs"), and Plaintiff-Intervenor Ohioans for Raising the Wage and their supporters ("OFRW Plaintiffs") (together "Plaintiffs"), seek to place proposed local initiatives and constitutional amendments on the November 3, 2020 general election ballot.

The Ohio Constitution provides state electors the right to amend the Ohio Constitution and legislate through initiative and referendum. The Ohio Constitution and various statutes set forth a number of formal requirements for qualifying on the ballot, including a total number of signatures required, a geographic distribution of signers, requirements that petitions must be signed in ink, must be witnessed by the petition circulator, and may not be made by proxy, together with deadlines for submission to the Secretary of State or local officials.

While Plaintiffs were advancing their petitions for the November 3, 2020 general election, the world was stunned by the advent of Coronavirus Disease ("COVID-19"), a highly contagious respiratory virus. The virus has spread throughout the world like wildfire quickly rising to the level of a global pandemic that has posed a significant threat to the safety of all people. In an effort to respond rapidly to this threat, Ohio Governor Mike DeWine, in Executive Order 2020-01D, authorized Ohio Department of Health Director Amy Acton, M.D., to formulate general treatment guidelines to curtail the spread of COVID-19 in Ohio. In accordance with Governor DeWine's Executive Order, Dr. Acton issued several Director's Orders, one of which required all individuals living in Ohio to stay home beginning March 22, 2020 subject to certain exceptions.

According to Plaintiffs, Ohio's enforcement of several signature requirements in light of the ongoing COVID-19 pandemic and Ohio's responding Stay-at-Home orders, make it impossible to qualify their constitutional amendments and initiatives for the November ballot. Plaintiffs Thompson, Schmitt, and Keeley seek an order directing Defendants to either place their marijuana decriminalization initiatives on local ballots, or in the alternative, to enjoin or modify the requirements for qualifying initiatives for the November ballot in light of the public health emergency caused by COVID-19 and Ohio's emergency orders that were issued in response. OFSE and OFRW and their supporters similarly seek orders placing their proposed constitutional

amendments on the November ballot or modification of the requirements for qualifying their proposal amendments for the ballot.

Although Plaintiffs seek place to place different local initiatives and constitutional amendments on the November ballot, the key issue is the same: whether Ohio's strict enforcement of its requirements for placing local initiatives and constitutional amendments on the ballot unconstitutionally burden Plaintiffs' First Amendment rights in light of the ongoing pandemic and Ohio's emergency orders.

II.

A. Ohio's Initiative Procedure

An initiative is a method of direct democracy whereby the people enact laws or adopt constitutional amendments without reliance upon the legislature. *See generally Pfeifer v. Graves*, 88 Ohio St. 473 (1913). The Ohio Constitution reserves to Ohioans the right to engage in direct democracy through the advancement of initiative petitions. Ohio Const., Art. II, § 1a & 1f. The Ohio Constitution empowers Ohioans to advances initiative petitions for local ordinances and measures as well as for constitutional amendments.

1. Initiative Procedure for Constitutional Amendments

Article II, § 1 of the Ohio Constitution empowers Ohioans to "propose amendments to the constitution and to adopt or reject the same at the polls" independent of the Ohio legislature. Ohio Const., Art. II, § 1. Ohio Revised Code § 3519.01 requires anyone who seeks to propose an Ohio constitutional amendment via initiative petition to submit a summary of the amendment along with the signatures of one thousand qualified electors to the attorney general for certification. If the attorney general determines that the summary is fair and truthful within ten days of receiving the initiative petition, then the attorney general must send the initiative petition to the Ohio Ballot

Board. Ohio Rev. Code § 3519.01(A). Within ten days of receiving the proposed amendment, the Board must determine whether the it contains only one proposed law or amendment. Ohio Rev. Code § 3505.062(A).

If both the attorney general and the Board certify the petition, then the attorney general is directed to file with the secretary of state "a verified copy of the proposed law or constitutional amendment together with its summary and the attorney general's certification." Ohio Rev. Code § 3505.062(A) & § 3519.01. Once this process is complete, the Ohio law permits the proponents of the constitutional amendment to acquire signatures to support its placement on the ballot. *Id.*

The Ohio Constitution requires an initiative petition for a proposed constitutional amendment to be signed by ten percent of the electors of the state who voted in the last gubernatorial election. Ohio Const. Art. II, § 1a; Ohio Rev Code § 3519.14 (Secretary of State shall not accept any petition which does not purport to contain the minimum number of signatures). The petitions must contain valid signatures from at least 44 of Ohio's 88 counties, in an amount equal to at least five percent of the total votes cast in the last gubernatorial election in those 44 counties. Ohio Const. Art. II, § 1a; Ohio Rev. Code § 3519.14.

In addition, the "[t]he names of all signers to such petitions shall be written in ink" and the petition initiative must include a "statement of the circulator, as may be required by law, that he witnessed the affixing of every signature" Ohio Const. Art. II, § 1g; *see* Ohio Rev. Code § 3501.38(B). "No person shall write any name other than the person's own . . . [and] no person may authorize another to sign for the petition," Ohio Rev. Code § 3501.38; Ohio Const. Art. II § 1g.

The proponents of the amendment must file their petitions with the Secretary of State no later than 125 days before the general election to qualify for the ballot. Ohio Const. Art. II, § 1a.

"This year, in order to qualify for the November general-election ballot, the petitioners must submit their petitions on or before July 1, 2020." *State ex rel. Ohioans for Secure & Fair Elections*, 2020-Ohio-1459, *P5 (Ohio 2020). The proponents must file the completed petitions and signatures in searchable electronic form with a summary of the number of part petitions per county and the number of signatures, along with an index of the electronic copy of the petition. Ohio Rev. Code § 3519.16(B). After a petition is filed with the Secretary of State, various deadlines are triggered for the Secretary of State to determine the sufficiency of the signatures, for supplemental signatures to be collected, and for challenges to petitions and signatures to be filed in the Ohio Supreme Court.

2. Initiative Procedure for Local Ordinances and Measures

Article II, §1f of the Ohio Constitution reserves the use of referendum and initiative powers to the citizens of a municipality for questions on which a municipality is "authorized by law to control by legislative action." Ohio Const., Art. II, § 1f.

Ohio Revised Code § 731.28 outlines generally the procedure by which municipal initiative petitions are to be submitted, verified, and certified to the board of elections for placement on the ballot. The statute states that, "[o]rdinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation by the general assembly may be proposed by initiative petition." *Id*. Such petitions must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation." *Id*.

Ohio law requires the proponents of local initiative petitions to file "a certified copy of the proposed ordinance or measure with the city auditor or the village clerk" prior to its circulation. Ohio Rev. Code § 731.32. After the initial filing of the proposed ordinance with the city auditor

or village clerk, circulators of initiative petitions may begin to collect signatures by circulating ""a full and correct copy of the title and text of the proposed ordinance or other measure." Ohio Rev. Code § 731.31.

Ohio Revised Code § 731.31, which contains requirements for the presentation of municipal initiative and referendum petitions, provides that these petitions "shall be governed in all other respects by the rules set forth in section 3501.38 of the Revised Code." A signer "must be an elector of the municipal corporation in which the election, upon the ordinance or measure proposed by such initiative petition, or the ordinance or measure referred to by such referendum petition, is to be held." Ohio Rev. Code § 3501.38(B). Moreover, the signatures must be "affixed in ink" and accompanied by information that can be used to identify the signer. *Id.*

The circulator of an initiative petition must "sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code." Ohio Rev. Code § 3501.38(E)(1).

Pursuant to Ohio Revised Code § 731.28, 10 days after a petition containing the required number of signatures is filed, the auditor or clerk transmits the petition and a certified copy of the proposed issues to the board of elections to determine the number of valid signatures. *Id*. The board of elections then certifies the number of signatures and returns the petition to the auditor or clerk within 10 days after receiving it. *Id*. The auditor or clerk "then certifies to the board the validity and sufficiency of the petition and the board submits the petition to the electors at the next election occurring 90 days after the auditor's certification." *Id*.

B. The Parties

Thompson Plaintiffs are proponents of initiative petitions that would enact local legislation. Plaintiffs-Intervenors are proponents of two separate constitutional amendments. Although they have achieved differing levels of progress in this regard, Plaintiffs all began their attempts to comply with Ohio's initiative procedures before the pandemic.

1. Thompson Plaintiffs

Plaintiffs Chad Thompson, William Schmitt and Don Keeney are registered voters in the State of Ohio who regularly circulate initiative petitions they seek to be placed on local election ballots throughout Ohio. (Stip. Facts ¶ 1.) Thompson Plaintiffs routinely and regularly circulate in Ohio proposed initiatives in cities and villages that seek to amend local ordinances and laws that criminalize and/or penalize marijuana possession. For example, a local ballot initiative was filed in Windham, Ohio in August of 2018, that was put to that Villages voters on November 6, 2018, and passed. (Stip. Facts ¶ 2.)

Plaintiffs' proposed marijuana initiatives they intend to be filed, but have not yet been, for inclusion on the November 3, 2020 general election ballot with the appropriate officials in McArthur, Ohio, Rutland, Ohio, Zanesville, Ohio, New Lexington, Ohio, Baltimore, Ohio, Syracuse, Ohio, Adena, Ohio, Cadiz, Ohio and Chagrin Falls, Ohio. (Stip. Facts ¶ 3.) On or before February 27, 2020, Plaintiffs filed proposed marijuana initiatives with local officials in Jacksonville, Ohio, Trimble, Ohio, Glouster, Ohio, Maumee, Ohio, and Akron, Ohio, in order to begin collecting the signatures needed to have those proposed measures placed on the November 3, 2020 general election ballot. (Stip. Facts ¶ 4, Exhs. 2-6.) Plaintiffs, in the present case, must gather signatures from a number of voters equal to percent of the total gubernatorial vote in the city or village where they seek to include an initiative and submit these signatures to the city

auditor or village clerk no later than approximately July 16, 2020 in order to have that initiative included on the cities' and villages' November 3, 2020 election ballots. (Stip. Facts ¶ 13.)

2. Ohioans for Safe and Secure Election Plaintiffs

Plaintiff-Intervenor Ohioans for Safe and Secure Elections ("OSFE") is a political action committee seeking through Ohio's initiative process to place a constitutional amendment on the November 3, 2020 ballot concerning the voting rights of Ohioans and Ohio election procedure. (*See* OFSE Compl., ¶¶ 1, 19, ECF No. 14.) Plaintiffs-Intervenors Darlene L. English, Laura A. Gold, Hasan Kwame Jeffries, Isabel C. Robertson, and Ebony-Speaks Hall are residents and electors of the State of Ohio and are members of the OFSE, and Plaintiffs-Intervenors Susan Zeigler, Scott Campbell, Paul Moke, and Andrew Washington seek to sign and/or circulate petitions to place OFSE's proposed amendment on the ballot. (Compl. at ¶¶ 9-13, ECF No. 14.) Beginning in January 2020, OFSE collected more than 2,000 signatures from eligible Ohio signers in support of its proposed amendment, which was certified by the Ohio Attorney General on February 20, 2020. (Compl. at ¶¶ 21-25, ECF No. 14.) On April 23, 2020, the Ohio Ballot Board certified the OSFE's proposed amendment. (*Id.* at ¶ 27.) OFSE has contracted with a petition circulation firm, Advanced Microtargeting ("AMT") to assist in circulating its proposed amendment and has spent over $500,000 on its campaign. (*Id.* at ¶¶ 19-20.)

3. Ohioans for Raising the Wage Plaintiffs

Likewise, Plaintiff-Intervenor Ohioans for Raising the Wage ("OFRW") is a ballot issue committee operating in the State of Ohio, and Plaintiffs-Intervenors Anthony A. Caldwell, James E. Hayes, David G. Latanick, and Pierrette M. Talley are the members of the committee. (Compl. at ¶¶ 6-7, ECF No. 17-1.) ORFW Intervenors seek to amend the Ohio constitution through the proposal of an initiative petition that would raise Ohio's minimum wage incrementally from its

current rate to $13.00 over the span of several years beginning on January 1, 2021 and ending on January 1, 2025. (Compl. at ¶ 12, ECF No. 17-1.) On October 12, 2019, OFRW Intervenors started circulating an initiative petition containing a summary and text of the proposed amendment. (*Id.* at ¶ 13.) OFRW filed the summary petition along with 1,898 signatures with the attorney general on January 17, 2020, and the attorney general certified that the summary of the proposed amendment was fair and truthful on January 27, 2020. (*Id.* at ¶ 15.) Thereafter, the Ohio Ballot Board certified the proposed amendment on February 5, 2020. (*Id.* at ¶ 16.) Two weeks later, on February 17, 2020, OFRW contracted with a petition circulation firm, FieldWorks, to acquire signatures in support of the amendment's placement on the November 3, 2020 election. (*Id.* at ¶ 17.) With the assistance of FieldWorks and volunteer supporters, OFRW began to circulate the final version of its amendment on February 28, 2020. (*Id.* at ¶ 18-20.)

4. Defendants

Defendants are Ohio Governor DeWine, Director of the Ohio Department of Health Dr. Acton and Ohio Secretary of State LaRose. (Stip. Facts ¶¶ 9-11.) Following the outbreak of COVID-19, Governor DeWine issued various orders directed towards protecting Ohio's citizens from its spread. (Stip. Facts ¶ 9.) Likewise, Ohio Department of Health Director Dr. Amy Acton issued various health orders to protect Ohio citizens from the COVID-19 pandemic. (Stip. Facts ¶ 10.) Ohio Secretary of State Frank LaRose is vested by Ohio law with the authority to enforce Ohio's election laws and to direct that local elections boards comply with Ohio law, the Constitution of the United States, and his own directives and advisories. (Stip. Facts ¶ 11.) At all relevant times Defendants in this action were and are engaged in state action and were and are acting under color of Ohio law. (Stip. Facts ¶ 12.)

C. COVID-19 and Ohio's Response

On January 30, 2020, the World Health Organization ("WHO") declared the outbreak of COVID-19 a public health emergency of international concern. (Stip. Facts ¶ 14.) On January 31, 2020, the President of the United States suspended entry into the United States of foreign nationals who had traveled to China. (Stip. Facts ¶ 15.).

On January 30, 2020, the Director of the National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention ("CDC") announced that COVID-19 had spread to the United States. (Stip. Facts ¶ 16.) On March 3, 2020, Governor DeWine announced that the Arnold Sports Festival, a large gathering of athletes and spectators in downtown Columbus, Ohio, was closed to spectators. (Stip. Facts ¶ 17.)

On March 9, 2020, Governor DeWine declared a state of emergency in Ohio. (Stip. Facts ¶ 18.) On March 13, 2020, the Columbus Metropolitan Library closed its branches. (Stip. Facts ¶ 19.) Parades and events were canceled throughout Central Ohio at this same time, including the Columbus International Auto Show in Columbus, Ohio, and St. Patrick's Day parades in Columbus and Dublin. (Stip. Facts ¶ 20.)

On March 13, 2020, the President of the United States declared a national emergency retroactive to March 1, 2020. (Stip. Facts ¶ 21.) On March 9, 2020, the Ohio State University suspended classes. (Stip. Facts ¶ 22.)

On March 12, 2020, Governor DeWine and the Dr. Acton ordered mandatory emergency closings throughout Ohio. (Stip. Facts ¶ 23.)[1] On March 12, 2020, Governor DeWine ordered all

[1] Governor DeWine has issued several executive orders in response to the outbreak of COVID-19. The orders focus mainly on granting Ohio's various government agencies the ability to adopt emergency rules and amendments to Ohio's administrative code. Yet, others such as Executive Order 2020-01D (Mar. 9, 2020) require the Ohio Department of Health to formulate general treatment guidelines to curtail the spread of COVID-19.

private and public schools, grades K through 12, closed beginning at the conclusion of the school day on Monday, March 16, 2020. (Stip. Facts ¶ 24.)

On March 12, 2020, the Ohio Department of Health issued "Director's Order: In re: Order to Limit and/or Prohibit Mass Gatherings in Ohio." (Stip. Facts ¶ 25.) On March 17, 2020, the Ohio Department of Health issued "Director's Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings and the Closure of Venues in the State of Ohio." (Stip. Facts ¶ 26.)

On March 15, 2020, the Ohio Department of Health issued "Director's Order: In re: Order Limiting the Sale of Food and Beverages, Liquor, Beer and Wine, to Carry-out and Delivery Only." (Stip. Facts ¶ 27.) On March 16, 2020, the Ohio Department of Health issued "Director's Order: In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020." (Stip. Facts ¶ 28.)

On March 19, 2020, the Ohio Department of Health issued "Director's Order to Cease Business Operations at Hair Salons, Day Spas, Nail Salons, Barber Shops, Tattoo Parlors, Body Piercing Locations, Tanning Facilities and Massage Therapy Locations." (Stip. Facts ¶ 29.)

On March 22, 2020, the Ohio Department of Health issued "Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity." (Stip. Facts ¶ 30.). And on April 30, 2020, Defendant Governor DeWine announced a plan to begin to re-open Ohio, and the Ohio Department of Health issued the "Director's Stay Safe Ohio Order." (Stip. Facts ¶ 31.)

D. Plaintiffs' Claims

Plaintiffs contend that prior to the onset of the COVID-19 pandemic, they were working diligently to place their proposed issues on the November 3, 2020 general election ballot, but that the pandemic and Ohio's responding Ohio's Stay-at-Home orders have made it impossible to circulate petitions and obtain the signatures required by Ohio law to qualify their issues for the

November general election. Several of the Plaintiffs wrote to Defendant LaRose in March, asking him to modify or decline to enforce Ohio's signature requirements "in order to make it possible, in light of the current pandemic" for their proposed amendments to be placed on the ballot this fall." (Correspondence between Secretary of State's office and OSFE Campaign Director, Mar. 26, 2020, ECF No. 15-1.) Defendant LaRose responded that he "is not free to modify or to refuse to enforce the explicit constitutional and statutory requirements of initiative petition gathering, even in the current crisis." (*Id*.) OFSE and ORFW Plaintiffs sought a state court order enjoining the signature gathering requirements in the Ohio Constitution and Revised Code in light of the pandemic. *Ohioans for Raising the Wage v. LaRose*, No. 20-CV-2381, at 7 (Ohio Com. Pl., Apr. 28, 2020). The Franklin County Common Pleas denied the Plaintiffs' request for a preliminary injunction, finding Ohio's "constitutional language does not include an exception for extraordinary circumstances or public health emergencies" and that the court "does not have the power to order an exception or remedy that was not contemplated or intended by the plain language of the Ohio Constitution." *Id*. at 8.

In this action, Plaintiffs seek declarations that in the extraordinary circumstances presented by the COVID-19 pandemic, Ohio's signature requirements violate Plaintiffs' First and Fourteenth Amendment rights as applied for the November 3, 2020 election.

Plaintiffs originally requested emergency injunctive relief enjoining enforcement of Ohio's signature requirements and placing their initiatives on the ballot, or in the alternative, modifying those requirements by permitting electronic signatures, reducing the numerical signature requirement, and extending the submission deadline. In light of the Sixth Circuit's recent decision in *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553 (6th Cir. May 5, 2020) to be discussed more fully below, however, Plaintiffs now request that the parties be ordered to confer to develop,

with assistance from the Court, adjustments to the signature requirements as applied to Plaintiffs for the November 2020 general election.

III.

Rule 65 of the Federal Rules of Civil Procedure provides for injunctive relief when a party believes it will suffer immediate and irreparable injury, loss, or damage. Still, an "injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). While Plaintiffs requested either temporary restraining orders or preliminary injunctions, the Court finds it appropriate to address only the requests for preliminary injunctions.

In determining whether to issue a preliminary injunction, the Court must examine four factors: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Id*. (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000); *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir.1997) (*en banc*). These considerations are factors a court must balance, not prerequisites that must be met. *Id*. (citing *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998). "'When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.'" *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

IV.

This case reflects the tension between the state's interest in protecting the integrity and reliability of its constitutional amendment and local initiative process, and the Plaintiffs' First Amendment rights during a global pandemic that has disrupted the lives and livelihoods of millions of Ohioans. Plaintiffs contend that they are substantially likely to succeed on their claims that Ohio's enforcement of the signature requirements for placing local initiatives and constitutional amendments on the ballot, combined with the COVID-19 pandemic and Ohio's Stay-at-Home Orders, violates the First Amendment as applied to them.

A. Likelihood of Success

The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. The First Amendment, however, does not provide a right to place initiatives or referendum on the ballot. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("[W]e must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution."); *see also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[T]he right to an initiative is not guaranteed by the federal Constitution"). "It is instead up to the people of each State, acting in their sovereign capacity to decide whether and how to permit legislation by popular action." *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999).

However, "a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United*, 994 F.2d 291, 295 (6th Cir. 1993) (citing *Meyer v. Grant*, 486 U.S. 414 (1988)). Accordingly, "although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." *Id.*

The Ohio Constitution and statutes at issue in the instant action set forth several formal requirements for petition signature gathering for local initiatives and constitutional amendments that are challenged here, including: the total number of signatures required, the geographic distribution of signers, requirements that signatures be made in ink, not be made by proxy, and must be personally witnessed by the petition circulators, and deadlines for submission of petitions to the Ohio Secretary of State and local authorities.

Plaintiffs claim that enforcement of these requirements "severely burden" their First Amendment ballot access and freedom of association rights and cannot survive strict scrutiny under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), as later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Anderson-Burdick*"), which they contend governs this analysis. OFSE Plaintiffs have also argued that certain requirements that are premised on gathering signatures in person, namely, the requirements that petitions be signed in ink and witnessed by the circulator, severely burden their core political speech, and cannot survive the exacting scrutiny inquiry under *Meyer v. Grant*, 486 U.S. 414 (1988).

Defendants contend, however, that the First Amendment is not even implicated here because Ohio's petition restrictions regulate the mechanics of the initiative process, and do not regulate political speech or expressive conduct or a candidate's right to access the ballot. (Opp. at

9, 14, ECF No. 40.) Defendants further argues if the federal constitution is implicated, "no state actor has infringed on Plaintiffs' First Amendment rights" and, the provisions at issue survive the applicable review, which they maintain is closer to rational basis. Under that analysis, any burden on Plaintiffs' First Amendment rights is slight and outweighed by the Defendants' substantial regulatory interests. (*Id*. at 9, 17.)

The Court will address all of these arguments made by the parties, starting with determining the appropriate framework to utilize when reviewing the constitutional and statutory provisions at issue here.

1. Framework

Plaintiffs urge this Court to adopt the reasoning of the Sixth Circuit's recent opinion in *Esshaki v. Whitmer*, 2020 WL 2185553 (6th Cir. May 5, 2020), where the court upheld the core of the district court's preliminary injunction enjoining Michigan from enforcing the statutory ballot-access provisions for political candidates in advance of Michigan's upcoming primary election under the framework established in *Anderson-Burdick.*

In *Esshaki*, the plaintiffs asserted that Michigan's March 23, 2020 Stay-At Home Orders issued in response to the COVID-19 pandemic prevented them collecting the required signatures by the April 21, 2020 deadline, and that Michigan's enforcement of the statutory requirements "under the present circumstances, is an unconstitutional infringement on their (and voters') rights to association and political expression." *Id*. at 1. Michigan, like Ohio, "insist[ed] on enforcing the signature-gathering requirements as if its Stay-at-Home Order . . . had no impact on the rights of candidates and the people who may wish to vote for them." 2020 WL 1910154 at *1 (E.D. Mich. Apr. 20, 2020). *Id*. Michigan also argued that circulators should have braved the crisis and gathered signatures. The district court rejected the state's argument as "both def[ying] good sense

and fl[ying] in the face of all other guidance that the State was offering to citizens at the time." *Id*. at *5. "[P]rudence at that time counseled in favor of doing just the opposite." *Id*.

Applying *Anderson-Burdick*, the district court found a severe burden on the Plaintiffs' First Amendment rights and applied strict scrutiny to invalidate the combined effects of the emergency orders, Michigan's in-person signature collection requirements, and the pandemic. The district court concluded that "[u]nder these unique historical circumstances," the state's enforcement of its Stay-at-Home Order and the statutory ballot-access requirements operated "in tandem to impose a severe burden on Plaintiff's ability to seek elected office, in violation of his First and Fourteenth Amendment rights to freedom of speech, freedom of association, equal protection, and due process of the law." 2020 WL 1910154 at *1 (E.D. Mich. Apr. 20, 2020). The court noted that the plaintiff "was "challenging neither the constitutionality of the State's ballot access laws nor the Governor's Stay-at-Home Order in isolation. Rather, Plaintiff seeks relief because the two regulations, taken together, have prevented him from collecting enough signatures before the deadline." *Id*. at *4.

The Sixth Circuit, whose decisions bind this Court, agreed with the district court that under *Anderson-Burdick*, "the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (*i.e*., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored *to the present circumstances*." *Id*. (emphasis in original). The court concluded that Michigan's strict application of its ballot-access provisions was thus unconstitutional as applied to the plaintiffs. *Id*.

Defendants contend *Esshaki* does not apply here for two reasons: 1) Michigan's Stay-at-Home Order did not contain an exemption for First Amendment activity; and 2) *Esshaki* involved a candidate seeking access to the ballot, not an initiative.

First, in concluding that the plaintiffs' First Amendment rights were severely burdened, the district court found that Michigan's Stay-at-Home Order did not contain "any exception for campaign workers." 2020 WL 1910154 at *2. Here, the Defendants argue that no state action has infringed on the Plaintiffs' rights because Ohio's Stay-at-Home Orders "have always specifically exempted First Amendment Protected Speech" and the April 30, 2020 Stay Safe Ohio Order specifically exempts "petition or referendum circulators." (Opp. at 6, 19, ECF No. 40.) Plaintiffs vigorously dispute whether this language actually exempted their signature collection efforts from Ohio's Stay-at-Home Orders. (*See e.g.*, Reply at 6–11, ECF No. 41.)

But this Court need not determine whether Ohio's Stay-at-Home Orders exempt petition circulation because, as Plaintiffs clarify, the state action challenged here is "Ohio's strict enforcement of its ballot access provisions – in the face of this pandemic" and not the State's Orders. (*See* OFSE Reply at 2, ECF No. 43.) Therefore, it is irrelevant to this Court's analysis whether there is or was an exemption in Ohio's Stay-at-Home Orders. This conclusion is consistent with the holding in *Esshaki*, where the Sixth Circuit held that Michigan's "strict application of the ballot-access provisions is unconstitutional as applied here" due to the "combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders[.]" 2020 WL 2185553 at *1 (6th Cir. May 5, 2020). It is not uncommon for courts to grant relief in the aftermath of natural disasters based on states' continued enforcement of election regulations. *See e.g.*, *Florida Democratic Party v. Scott*, 215 F.Supp.3d 1250 (N.D. Fla. 2016) (requiring state to extend voter registration deadline in the face of Hurricane Matthew); *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F.Supp.3d 1344 (S.D. Ga. 2016) (same).

The issue before this Court is thus similar to the issue in *Esshaki*—whether strict enforcement of Ohio's signature requirements, combined with the COVID-19 pandemic and effect

of the Stay-at-Home Orders, unconstitutionally burden Plaintiffs' First Amendment rights *as applied here*.

Second, Defendants argue *Esshaki* is inapplicable because that case involved a candidate seeking access to the ballot, not an initiative. Defendants further argue that *Anderson-Burdick* does not apply here because Ohio's signature requirements "regulate the mechanics of the initiative process, not protected speech or a candidate's access to the ballot, and as a result, the First Amendment does not apply." (Opp. at 14, ECF No. 40). "In short," Defendants contend, "Plaintiffs have no First Amendment right to speak or associate by placing initiatives on the State's or a county's ballot." (*Id*. at 17.)

This Court agrees that the right to an initiative is not guaranteed by the First Amendment, but that does not mean that initiatives are without First Amendment protection. Like initiatives, there is "no fundamental right to run for elective office," and yet the Supreme Court has recognized laws restricting candidates' access to the ballot implicate the First Amendment because they "'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.'" *Esshaki*, 2020 WL 1910154, at *4 (E.D. Mich. Apr. 20, 2020) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). Similarly, "[a] state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United*, 994 F.3d at 295; *see also Buckley*, 525 U.S. at 190-91 ("Initiative petition circulators also resemble candidate-petition signature gathers, however, for both seek ballot access.") (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351(1997)).

Importantly, this Court is bound by the Sixth Circuit, which has twice in the last two years applied the *Anderson-Burdick* framework to First Amendment challenges to Ohio's statutory requirements for initiative petitions. *See Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), *reh'g en banc denied* (6th Cir. Sept. 4, 2019), *cert. pending*, No. 19-974 (filed Feb. 3, 2020); *see also Committee to Impose Term Limits v. Ohio Ballot Board*, 885 F.3d 443 (6th Cir. 2018). This Court, and the Sixth Circuit, therefore disagree with Defendants that the First Amendment does not apply because Ohio's signature requirements "regulate the mechanics of the initiative process[.]" *See Daunt v. Benson*, 956 F.3d 396, 422(6th Cir. Apr. 15, 2020) (Readler, J., concurring) ("*Anderson-Burdick* is tailored to the regulation of election mechanics."); *see also Schmitt*, 933 F. 3d at 639 ("Instead, we generally evaluate First Amendment challenge to state election regulations under the three-step *Anderson-Burdick framework*"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (explaining *Anderson's* "ordinary litigation" test did not apply because unlike the statutory provisions in *Anderson*, the challenged statute did not control the mechanics of the electoral process. It is a pure regulation of speech."). Accordingly, this Court too will apply *Anderson-Burdick* to Plaintiffs' challenges here.

a. *Anderson-Burdick*

Anderson-Burdick provides a 'flexible standard'" to evaluate "'[c]onstitutional challenges to specific provisions of a State's election laws'" under the First Amendment. *See Daunt v. Benson*, 956 F.3d at 406(citing *Anderson*, 460 U.S. 780 and *Burdick*, 504 U.S. 428 (1992)). Under *Anderson-Burdick*, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to

which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The severity of the burden on those rights determines the level of scrutiny to be applied. *See Daunt*, 956 F.3d at 407 (citing *Burdick*, 504 U.S. at 434).

"When a state promulgates a regulation which imposes a 'severe' burden on individuals' rights, that regulation will only be upheld if it is 'narrowly drawn to advance a state interest of compelling importance.'" *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (quoting *Burdick*, 504 U.S. at 434). "The analysis requiring that a state law be narrowly tailored to accomplish a compelling state interest is known as the 'strict scrutiny' test." *Esshaki*, 2020 WL 1910154, at *4 (E.D. Mich. Apr. 20, 2020).

But "minimally burdensome" regulations are subject to "a less-searching examination closer to rational basis," *Committee To Impose Term Limits*, 885 F.3d at 448, and "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Schmitt*, 933 F.3d at 639 (citing *Timmons*, 520 U.S. at 358). "Regulations falling somewhere in between—*i.e.*, regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'" *Daunt*, 956 F.3d at 408(quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016)). "This level of review is called 'intermediate scrutiny.[2]'" *Esshaki*, 2020 WL 1910154, at *4 (E.D. Mich. Apr. 20, 2020).

The Court will first consider the "character and magnitude" of the burden on Plaintiffs' First Amendment rights under *Anderson-Burdick*. Plaintiffs contend that this burden is "severe."

[2] The Court notes that based on its analysis herein of the severity of the burden and the tailoring of the application of the laws applicable here during this pandemic, the provisions at issue would not survive this intermediate level of scrutiny.

According to Plaintiffs, their ballot access, freedom of speech, and freedom of association rights are severely burdened because Defendants' strict enforcement of the signature requirements in light of the ongoing COVID-19 pandemic and Stay-at-Home Orders has made it impossible to qualify their measures for the ballot. "'The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.'" *Schmitt*, 933 F.3d at 639 (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). "In some circumstances, the 'combined effect' of ballot-access restrictions can pose a severe burden." *Grimes*, 835 F.3d at 575. "A very early filing deadline, for example, combined with an otherwise reasonable petitioning requirement, can impose a severe burden, especially on independent candidates or minority parties that must gather signatures well before the dominant political parties have declared their nominees." *Id*. at 575. In contrast, "[a] burden is minimal when it 'in no way limit[s] a political party's access to the ballot.'" *Id.* at 577 (quoting *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 537).

In *Schmitt*, the Sixth Circuit assessed the plaintiffs' claims that "the Ohio ballot-initiative process unduly hampers their right to political expression." *See* 933 F.3d at 639 ("We first examine whether the burden imposed by the Ohio ballot-initiative statutes is "severe." *Timmons*, 520 U.S. at 358."). The Sixth Circuit analyzed the burden on Plaintiffs' access to the ballot imposed by the statutes regulating the ballot-initiative process, finding that the cost of seeking mandamus relief to challenge a board of election's certification decision "disincentivizes some ballot proponents from seeking to overturn the board's decision, thereby limiting ballot access." *Id*. at 641 (citing *Grimes*, 835 F.3d at 577).

Similarly, in *Esshaki*, the Sixth Circuit agreed with the district court that "the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders

imposed a severe burden on the plaintiffs' ballot access[.]" 2020 WL 2185553 at *1 (6th Cir. May 5, 2020). In concluding the burden was severe, the court held:

> The reality on the ground for Plaintiff and other candidates is that state action has pulled the rug out from under their ability to collect signatures. Since March 23, 2020, traditional door-to-door signature collecting has become a misdemeanor offense; malls, churches and schools and other public venues where signatures might be gathered have been shuttered, and even the ability to rely on the mail to gather signatures is uncertain—if not prohibitively expensive. Absent relief, Plaintiff's lack of a viable, alternative means to procure the signatures he needs means that he faces virtual exclusion from the ballot.
>
> After considering Defendants' arguments, this Court has little trouble concluding that the unprecedented—though understandably necessary—restrictions imposed on daily life by the Stay-at-Home Order, when combined with the ballot access requirements of Sections 168.133 and 168.544f, have created a severe burden on Plaintiff's exercise of his free speech and free association rights under the First Amendment . . .—as expressed in his effort to place his name on the ballot for elective office. *See Libertarian Party of Ky*., 835 F.3d at 574 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.").

2020 WL 1910154, at *6 (E.D. Mich. Apr. 20, 2020).

Contrarily, Defendants contend that any burden on Plaintiffs' First Amendment rights is "slight" (*See* Opp. at 18, ECF No. 40.) Defendants further contend that Plaintiffs have offered no reason why their issues must be placed on the November 2020 ballot and failed to show that they have attempted to obtain signatures through an alternative process, such as by mail or by phone. (*Id*. at 18-20.) Additionally, Defendants argue that "Ohio is in the process of reopening its doors" and the Plaintiffs' "ability to obtain signatures is improving daily." (*Id*. at 20-21.)

According to Defendants, "both the constitutional framework for proposed constitutional amendments and the statutory framework for proposing local ordinances are content-neutral and nondiscriminatory regulations." (*Id*. at 18. (citing *Taxpayers United*, 994 F.2d at 297).) In *Taxpayers United*, the Sixth Circuit held that Michigan's statute procedure for validating initiative petition signatures, by performing "technical checks" for compliance with certain statutory

requirements, did not violate the plaintiffs' rights to free speech and political association of the plaintiffs. The court explained that its result may have been different if "the plaintiffs were challenging a restriction on their ability to communicate with other voters about proposed legislation, or if they alleged they were being treated differently than other groups seeking to initiate legislation." 994 F.3d at 297. But "because the right to initiate legislation is a wholly state-created right," the Sixth Circuit held it was "constitutionally permissible for Michigan to condition the use of its initiative procedure on compliance with content-neutral, nondiscriminatory regulations that are, as here, reasonably related to the purpose of administering an honest and fair initiative procedure." *Id*.

In ordinary times, the Court may agree with Defendants that Ohio's signature requirements would likely be considered "reasonable, nondiscriminatory restrictions" that could be justified by the "State's important regulatory interests." *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Committee to Impose Term Limits*, 885 F.3d at 448 ("Ohio's single-subject rule is such a minimally burdensome and nondiscriminatory regulation because it requires only that Plaintiffs submit their two proposed constitutional amendments in separate initiative petitions."). "States enjoy 'considerable leeway' to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access (*e.g.*, the number of signatures required, the time for submission, and the method of verification)." *See John Doe No. 1 v. Reed*, 561 U.S. 186, 212, (2010) (Sotomayor, J., concurring) (citing *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999)).

These times, however, are not ordinary. Plaintiffs do not argue that Ohio's signature requirements are facially unconstitutional. Plaintiffs instead contend that they are unconstitutional as applied to them during this extraordinary time. That is, the COVID-19 pandemic has made it

impossible to circulate petitions in person, the only method permitted under Ohio law because of the ink signature and witness requirements. Plaintiffs maintain that because they are unable to circulate in person, and they have no other means of collecting signatures, they are unable to meet the other numerical and geographical requirements by the deadline. Specifically, they state:

> It is axiomatic that face-to-face encounters between people are essential for any physical in "ink" signature-gathering. Given the temporary changes in our society—specifically the severe reduction of the ability to physically encounter other people—there is no means of complying with Ohio's formal signature requirements. In the throes of today's extraordinary circumstances, Ohio's requirements operate to completely eradicate Intervenors' indelible First Amendment, Fourteenth Amendment and Ohio constitutional rights to ballot access, freedom of speech, and freedom of association.

(OFSE Compl., ¶ 5; *see also* OFRW Compl. ¶ 4.)

> Here, OFRW Intervenors are faced not with a mere regulation of how they may access the ballot, but what amounts to a ban on ballot access, and on their related speech and association rights. Petition circulators cannot obtain in-person, pen-to-paper signatures outside of their immediate households, and signers cannot sign petitions outside of their immediate households. Nor can supporters mobilize like-minded people to do these things. Public gatherings and in-person contact are suspended. OFRW has no hope of meeting Ohio's requirements.

(OFRW Mot. at 10; see also OFSE Mot. at 10; *see also* Thompson Mot. at 12-13 ("Under Ohio law as it now exists, Plaintiffs have no lawful procedure by which they may qualify their initiatives for Ohio's November 3, 2020 general . . . Ohio's signature collection requirement under current circumstances makes it impossible to qualify initiatives for the ballot.").)

As did the *Esshaki* court, this Court finds that in these unique historical circumstances of a global pandemic and the impact of Ohio's Stay-at-Home Orders, the State's strict enforcement of the signature requirements for local initiatives and constitutional amendments severely burden Plaintiffs' First Amendment rights *as applied here*. *See* 2020 WL 2185553, at (1 (6th Cir. May 5, 2020).

Life as Ohioans knew it has drastically changed. Since March 22, 2020, all residents of Ohio have been mandated to stay home, with some limited exceptions that are all but clear. All non-essential business operations were ordered to cease activities. Sporting events and concerts have been cancelled. All polling locations were closed for the March 17, 2020 primary election. Public and private schools and universities moved to online learning and shut down campuses. Until very recently restaurants, bars, salons, and malls were closed to the public. Gatherings of 10 or more people have been prohibited. While some businesses are now re-opened, Ohioans have been directed to maintain social distancing, staying at least six feet apart from each other, and to wear masks or facial coverings.

The wet signature and witness requirements require circulators to go into the public and collect signatures in person. But the close, person-to-person contacts required for in person signature gathering have been strongly discouraged—if not prohibited—for several months because of the ongoing public health crisis, and likely pose a danger to the health of the circulators and the signers. Moreover, the public places where Plaintiffs may have solicited these signatures have been closed, and the public events drawing large crowds for Plaintiffs to share their message have cancelled and mass gatherings cancelled. And even if Plaintiffs had attempted to garner support for their measures by phone or mail, such efforts do not obviate the ink signature and witness requirements.

Plaintiffs cannot safely and effectively circulate their petitions in person. Ohio does not permit any other forms of signature gathering, including electronic signing. And because Plaintiffs cannot collect signatures in person or electronically, they have no hope of collecting the required number of signatures from the required geographic distribution by the July deadlines. As the district court in *Esshaki* concluded, without relief here, Plaintiffs "lack of a viable, alternative

means to procure the signatures" they need means that they face "virtual exclusion from the ballot." 2020 WL 1910154, at *3 (E.D. Mich. Apr. 20, 2020).

To be clear, this Court's decision is not a criticism of the Stay-at-Home Orders or Ohio's response to the COVID-19 crisis. Defendants Governor DeWine and Dr. Acton were some of the first in the nation to issue such orders to slow the spread of the coronavirus and are well-deserving of the national—and even global—praise they have received for their responses. See *The Leader We Wish We All Had*, N.Y. Times (May 5, 2020), https://www.nytimes.com/2020/05/05/opinion/coronavirus-ohio-amy-acton.html; *Coronavirus*: *The US governor who saw it coming early*, BBC (Apr. 1, 2020), https://www.bbc.com/news/world-us-canada-52113186. Undoubtedly their actions have flattened the curve and saved the lives of countless Ohioans.

Yet the impact of the Stay-at-Home Orders on Ohioans and the continued risk of close interactions cannot be ignored. The reality is that the Orders and the COVID-19 pandemic have made it impossible for Plaintiffs to satisfy Ohio's signature requirements. Because the burden imposed by the enforcement of the requirements in these circumstances is severe, strict scrutiny is warranted.

b. *Meyer v. Grant*

As explained in detail *supra*, this Court concludes that Sixth Circuit precedent requires application of the *Anderson-Burdick* framework to the issues presented in this action. The Court here, however, briefly addresses the OFSE Plaintiffs arguments that the more appropriate framework is that established under *Meyer v. Grant*, 486 U.S. 414, (1988); *see also Morgan v. White*, Case No. 20-C-2189, slip op. (N.D. Ill. May 18, 220) (Pallmeyer, C.J.) (applying *Meyer* in considering similar signature requirement and finding no severe burden there because, unlike the instant action, the plaintiffs' had slept on their rights to circulate petitions waiting until after the

pandemic hit to attempt to circulate petitions). Under *Meyer*, courts "apply 'exacting scrutiny,' and uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (striking down Ohio statute prohibiting distribution of anonymous campaign literature).

On their face, the witness and ink signature requirements do not "regulate pure speech." *See McIntyre*, 514 U.S. at 357. OFSE argues that Ohio's ink signature and witness requirements that require all circulation to be done in person, during the extraordinary circumstances of this moment, have effectively banned circulation because "[c]irculators cannot safely gather signatures in person in the midst of a pandemic without endangering their own and others' health." (OFSE Mot. at 8, ECF No. 15.) Because Ohio law does not provide for other forms of signature collection, such as electronic signatures, their "core political speech" through circulating "is altogether suppressed." (*Id*.)

Even so, whether this Court were to apply *Meyer's* exacting scrutiny or *Anderson-Burdick's* strict scrutiny, the result is the same—these two provisions cannot withstand constitutional scrutiny.

c. Strict Scrutiny under *Anderson-Burdick*

In order to survive the strict scrutiny analysis, Defendants must show these requirements are "narrowly drawn to advance a state interest of compelling importance." *See Burdick*, 504 U.S. at 434. The Court considers Plaintiffs' challenges to: 1) ink signature requirements set forth in Article II § 1g and Ohio Revised Code § 3501.38(B), and the witness requirements in Article II § 1g and Ohio Revised Code § 3501.38(E); and 2) the numerical and geographical requirements in Article II § 1a, Article II § 1g, and Ohio Revised Code § 731.28, and the deadlines for submission of signatures in Article II § 1a and Ohio Revised Code § 731.28.

i. Ink Signature and Witness Requirements

The Court first addresses the ink signature and witness requirements and concludes Defendants have not established they are "narrowly tailored *to the present circumstances*." *Esshaki*, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020).

In defense of the ink signature and witness requirements, Defendants contend that "states have a substantial interest in ensuring that submitted signatures are authentic," (*Id*. at 22 (citing *Buckley*, 525 U.S. at 205)), and that the Ohio Constitution confirms that "ensuring the validity of the signatures on petitions is an interest of the highest order of both the State and its people." (*Id*. at 23.) Defendants also assert that these requirements combat petition fraud by ensuring each elector signs for themselves and protecting against signatures being added later. (*Id*. at 23-24; *see also id*. at 30 ("un-witnessed, anonymous signature gathering invites fraud.").)

Defendants do not argue that these interests are "compelling" as required under strict scrutiny, because they contend that such an analysis is not warranted. But even assuming that ensuring they are compelling interests, the ink signature and witness requirements are narrowly tailored to achieve that interest in these particular circumstances. *See Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008) ("While eliminating election fraud is certainly a compelling state interest, [the statute] is not narrowly drawn.").

First, Defendants provide examples of how other signature requirements not challenged here (such as the requirement that every signer "be an elector of the state" and include "after his name the date of signing and his place of residence") achieve their interests, and that ink signatures are because "'boards of elections are required to compare petition signatures with voter registration cards to determine if the signatures are genuine[.]'" (Opp. at 23, ECF No. 40 (citing *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St.3d 205, 209, 602 N.E.2d 644 (1992)). But that requirement is

by directive of the Secretary of State, no by the Ohio Constitution or Revised Code. *See* Secretary of State Directive 2019-17.

Furthermore, there is no evidence that certain personally identifiable information, such as the last four digits of a signer's social security number as used for electronic voter registration and as proposed by Plaintiffs as methods to verify signatures, are any less reliable than boards of election employees comparing handwritten signatures, who likely have no training or expertise in handwriting analysis. Likewise, there is no evidence to support, nor reason to believe that enjoining enforcement of the ink signature and witness requirements and allowing electronic signatures would "likely inject fraud into Ohio's petition process." (Opp. at 2, ECF No. 40.); *see also See Citizens for Tax Reform*, 518 F.3d at 387 (finding statute was not narrowly tailored to eliminate election fraud because "there is no evidence in the record that most, many, or even more than a *de minimis* number of circulators who were paid by signature engaged in fraud in the past.").

Moreover, there are other provisions of Ohio law that "expressly deal with the potential danger that circulators might be tempted to pad their petitions with false signatures." *See Meyer*, 486 U.S. at 426-27. For example, false signatures are a fifth-degree felony under Ohio Revised Code § 3599.28. It is also a crime for a signer to sign a petition more than once, to sign someone else's name, sign if they know they are not a qualified voter, accept anything of value for signing a petition, or make a false affidavit or statement concerning signatures on a petition. *See* Ohio Rev. § 3599.13. Violation of those provisions results in up to a $500 fine or up to six months imprisonment. *Id*. "These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Meyer*, 486 U.S. at 427-28; cf. *First National Bank of Boston v. Bellotti*, 435 U.S. 765,

790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue").

OFSE and OFRW Plaintiffs have proposed a detailed system for collecting and submitting electronic signatures that contains many of the same safeguards as paper petitions in order to ensure signatures are authentic and prevent petition fraud, including the last four numbers of the signer's social security number to confirm identity, a method for circulators to monitor the online petitions, and various warnings about the criminal consequences of forging signatures and for election falsification. (*See* Leonard Decl., ECF No. 30-1; *see also* OFSE Reply at 18.) The interests in enforcing the ink signature and witness requirements—ensuring authenticity and combating fraud—can be achieved by the electronic system proposed by Intervenor Plaintiffs in conjunction with the other provisions in Ohio law not challenged here when considering the public health risks accompanying the close, person-to-person contact required to satisfy those requirements. Finally, the Court notes that large parts of the economy are conducted via electronic signatures, which can be linked to personal, secure identifiers and re-checked for errors or fraud.

In the context of the pandemic and the impact of the Stay-at-Home Orders on Plaintiffs' ability to safely come into close contact with potential signers, the enforcement of the ink signature and witness requirements is not narrowly tailored to a compelling state interest as applied to Plaintiffs *in these particular circumstances*. Accordingly, the Court finds that Plaintiffs have established they are likely to succeed on the merits of their challenges to the ink signature requirements set forth in Article II § 1g and Ohio Revised Code § 3501.38(B) for constitutional amendments and Ohio Revised Code § 3501.38(B) for local initiatives, as well as the witness requirements in Article II § 1g for constitutional amendments and Ohio Revised Code § 3501.38(E) for local initiatives.

ii. Numerical and Geographical Requirements and Deadlines

The Court next turns to the numerical and geographical requirements in Article II § 1a and II § 1g and Ohio Revised Code § 731.28, and the deadlines for submission of signatures in Article II § 1a and Ohio Revised Code § 731.28. For the following reasons, the Court finds the numerical and geographical requirements survive strict scrutiny, but the deadlines cannot.

Petitions for proposed local initiatives "must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election of the office of governor in the municipal corporation." Ohio Rev. Code § 731.28. In order to qualify local initiatives for the November 3, 2020 election, petitions must be filed with the city auditor or village clerk no later than approximately July 16, 2020. (Stip. Facts ¶ 13.)

Defendants argue "Ohio and its citizens have important interests in keep unauthorized initiatives off the ballot itself that outweigh the burden to Plaintiffs." (Opp. at 21, ECF No. 40.) They posit that the State's "substantial interests" in simplifying the ballot, preventing voter confusion, and maintaining voter confidence in the government and electoral process justify the requirements challenged here. (*Id*. at 21-22.)

Defendants contend that the numerical and geographic requirements are "supported by the regulatory interest of 'making sure that an initiative has sufficient grass roots support to be placed on the ballot.'" (*Id*. at 22 (quoting *Meyer*, 486 U.S. at 425-26.).) The State contends that this interest is "substantial." (*Id*.)

This Court agrees that the State "has a strong interest in ensuring that proposals are not submitted for enactment into law unless they have sufficient support." *See Taxpayers United*, 994 F.2d at 297 (6th Cir. 1993); *Buckley*, 525 U.S. at 205 (holding Colorado could "meet the State's substantial interests in regulating the ballot-initiative process" and "ensure grass roots support" by

"condition[ing] placement of an initiative proposal on the ballot on the proponent's submission of valid signatures representing five percent of the total votes cast for Secretary of State at the previous general election.").

The Supreme Court has held that "the State's interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot [is] compelling" and that "a state may require a preliminary showing of significant support before placing a candidate on the general election ballot." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (citing *American Party of Texas v. White*, 415 U.S. 767, 782 n. 14 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971)).

In the instant action, the State's interest in requiring sufficient grassroots support for proposed local initiatives and constitutional amendments to be placed on the ballot is perhaps even more compelling than for candidates because of the nature of those measures. Ohioans have reserved for themselves this right to initiate legislation and propose constitutional amendments. The numerical signature requirements for those initiatives ensures that only those measures supported by a significant number of voters make it on the ballot for enactment, and prevents voter confusion, ballot overcrowding, or frivolous initiatives from earning spots on the ballot. The geographical requirement also ensures that the support is statewide, and not just from Ohio's most populous counties.

Defendants assert that the deadlines for petitions to be submitted "advances the state's interest in providing sufficient time for the Secretary of State to verify signatures, and for that verification to occur in an orderly and fair fashion." (*Id*. at 24 (citing *American Party of Texas v. White*, 415 U.S. 767, 787, fn. 18 (1974).) While this Court agrees that ensuring the Secretary of State—and municipalities for local initiatives—have enough time to verify signatures without

disrupting preparations for the upcoming election is important, the July 1 and July 16 deadlines here, respectively, are not narrowly tailored in light of Plaintiffs' inability to safely circulate petitions in person beginning in mid-March and continuing to present day. *See Esshaki*, 2020 WL 1910154, at *7 (E.D. Mich. Apr. 20, 2020) ("The March 23, 2020 Stay-at-Home Order, for reasons already discussed, effectively halted signature-gathering by traditional means, reducing the available time prescribed by the Michigan Legislature to gather one thousand signatures by twenty-nine days."). Plaintiffs had made significant efforts to qualify their initiatives for the November 3, 2020 general election ballot months before much of Ohio was shutdown due to the virus, prohibiting Plaintiffs from safely collecting signatures in person. Cf. *Morgan v. White*, Case No. 20-C-2189, slip op. (N.D. Ill. May 18, 2020) (Pallmeyer, C.J.) (concluding plaintiffs could not show Illinois' Stay-at-Home Order caused the alleged burden on their ability to collect signatures in support of constitutional amendment rather than their own delay when the only party to begin circulation efforts started after the pandemic the week before filing suit and a month before deadline).

The Court comes to a different conclusion with respect to the numerical and geographical requirements, however. The most significant obstacle to Plaintiffs' alleged ability to meet the numerical and geographic requirements in light of the COVID-19 pandemic and Stay-at-Home Orders is their inability to collect signatures in person and the prohibition on electronic signatures. Based on the above holdings with respect to the submission deadlines, signature requirements, and the witness requirements, the resulting burden imposed by the numerical and geographical requirements is not as severe.

This is consistent with the *Esshaki* court's holding that Michigan did not show it had a compelling interest in enforcing "*the specific numerical requirements* . . . in the context of the

pandemic conditions and the upcoming August primary.") (emphasis in original). *See* 2020 WL 1910154, at *7 (E.D. Mich. Apr. 20, 2020). First, the Court emphasizes the compelling importance of the State's interest in ensuring that initiatives to enact legislation or to amend Ohio's constitution are submitted to Ohio's voters only if they have sufficient grassroots support, not just a "modicum of support" as is true for the candidates. Second, the *Esshaki* court emphasized that the specific signature requirement was not narrowly tailored because it did not account for the plaintiffs' inability to collect signatures in the twenty-nine days in between when Michigan's Stay-at-Home Order went into effect and the statutory deadline. *Id*. at. *7. The court explained that "a state action narrowly tailored to accomplish the same compelling state interest would correspondingly reduce the signature requirement to account for the lost twenty-nine days." *Id*.

In the case *sub judice*, the Court finds that reduction of the numerical and geographical requirements is not warranted given the compelling importance of ensuring the grassroots support for proposed initiatives (and that the support be statewide for constitutional amendments). Further, the Court's decision with respect to other requirements impeding Plaintiffs' ability to meet those requirements—the deadlines, the ink signature requirements, and the witness requirements—will have the effect of tailoring those requirements to the present circumstances. The Court therefore finds that Plaintiffs have established they are likely to succeed on the merits of their challenges to the deadlines for the submission of signatures in Article II § 1a and Ohio Revised Code § 731.28, but not with respect to the numerical and geographical requirements in Article II § 1a and II § 1g and Ohio Revised Code § 731.28.

B. Irreparable Injury

Defendants contend that Plaintiffs suffer no injury because they can go into the public and gather signatures. Plaintiffs disagree, maintaining that their loss of constitutional rights satisfies

the prong of the Rule 65 analysis. And, the OFRW Intervenors also argue that the "more than $1.5 million spent to qualify their proposal specifically for placement on the November 3, 2020 general election ballot—funds that would have all been expended 'for naught' if OFRW Intervenors cannot submit their proposal in 2020—does" constitute irreparable injury. Plaintiffs arguments are well taken.

While OFRW Intervenors are correct that "ordinarily, the payment of money is not considered irreparable," when "expenditures cannot be recouped, the resulting loss may be irreparable." (OFRW Reply at 17, ECF No. 42 (citing *Philip Morris USA, Inc. v. Scott*, 561 U.S. 1301, 1304 (2010)). The Court, however, need not make that determination here because "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citing *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir.2003)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

C. Substantial Harm to Others and Public Interest

The remaining factors, "harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The State contends enjoining enforcement of Ohio's signature requirements "will allow unfettered and automatic access to the general election ballot for innumerable petitions" and that as a result "Ohio's ballot will be cluttered with proposed initiated statutes, ordinances and constitutional amendments that do not have so much as the minimum level of support otherwise required by law." (Opp. at 27, ECF No. 40.) According Defendants, the "Plaintiffs urge this Court do what the *Esshaki* Court swiftly struck down just last week." (*Id*. at 29.) Defendants further argue

that Plaintiffs' requested relief is not in the public interest because the requirements Plaintiffs seek to enjoin ensure ballot integrity and that "[i]mplementing a system that utilizes unwitnessed, anonymous signature gathering invites fraud." (Opp. at 30, ECF No. 40.)

Plaintiffs respond that an injunction would be in the public's interest, and that any harm to the State is outweighed by the burden on Plaintiffs and the public. This Court agrees. Plaintiffs have established a likelihood of success on the merits of their First Amendment claims with respect to some of Ohio's signature requirements, and "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quotation omitted). Conversely, it is not in the public's interest to require Plaintiffs to go out into the public and risk their health and the public's health to collect signatures in person from voters. *See* 2020 WL 1910154, at *9 (E.D. Mich. Apr. 20, 2020).

There is no evidence that electronic signatures would "likely inject fraud into Ohio's petition process[.]" (Opp. at 2, ECF No. 40.) Moreover, Plaintiffs-Intervenors OFSE and OFRW have proposed a detailed system, developed and implemented at their own cost, for gathering, verifying, and submitting electronic signatures. OFRW states it has contracted with DocuSign, "the country's leading company for execution of electronic signatures on legal documents." (Leonard Decl. at ¶ 7, ECF No. 30-1.) They will establish a dedicated website that directs signers to a PDF of the petitions that closely mirrors paper versions and require the signer to provide the last 4 digits of their social security number to verify their identity. (*Id*. at ¶ 8.) The circulator will be the administrator of the on-line petition and will monitor the activity on the website, including for duplicate names and multiple uses of an IP address. (*Id*.) The Secretary of State will be provided the last 4 digits of the social security numbers to authenticate the identity of the signer. (*Id*.) According to OFSE Plaintiffs, "[t]he State would not itself need to implement the system; it would

merely have to accept electronically-signed petitions instead of insisting on wet-ink, physically-witnessed ones. The State already uses this method of verification when it registers voters electronically." (OFSE Reply at 19, ECF No. 43.)

The Court also finds that any burden to Defendants will be outweighed by the burden on Plaintiffs and the public of attempting to comply with the signature requirements as enforced against them in these current circumstances. *Libertarian Party of Illinois v. Pritzker*, No. 20-CV-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020). There is no risk that "Ohio's ballot will be cluttered" with unsupported initiatives because the numerical and geographical requirement will not be affected by the Court's ruling. Additionally, this Court's decision is limited to these Plaintiffs, in these particular circumstances, for the November 3, 2020 general election only. This order does not apply to other individuals or ballot issues not before this Court.

The balance of these factors therefore weighs in favor of an injunction.

V.

Having found Plaintiffs are entitled to emergency injunctive relief, this Court is left to decide how to remedy these constitutional violations. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). "In formulating the appropriate remedy, 'a court need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.'" *Garbett v. Herbert*, 2020 WL 2064101, *17 (D. Utah. Apr. 29, 2020) (quoting *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087) (enjoining enforcement of some but not all requirements for candidate to qualify for ballot in light of COVID-19 pandemic).

This Court is without power to modify the requirements set forth in the Ohio Revised Code for local initiatives as sought by the Thompson Plaintiffs in light of the Sixth Circuit's decision in *Esshaki*, staying the district court's "plenary re-writing of the State's ballot-access provisions[.]" 2020 WL 2185553, at *2 (6th Cir. May 5, 2020). The Court will "instruct[] 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." *Id.*[3] Defendants shall report their proposed adjustments to the enjoined requirements to the Court by 12:00 pm on Tuesday, May 26, 2020.

While the legislature may remedy the constitutional violations in the Ohio Revised Code, it is without power to amend the Ohio Constitution—all constitutional amendments must be approved by the people of Ohio. *See* Ohio Const. Art. II, § 1a. Neither Defendant LaRose nor the Ohio General Assembly can modify the requirements in the Ohio Constitution that this Court has found unconstitutionally burdens Plaintiffs' First Amendment rights. Defendant LaRose affirmed his understanding of this in correspondence with OFSE Plaintiffs, where he stated he "is not free to modify or to refuse to enforce the explicit constitutional and statutory requirements for initiative petition signature gathering, even in the current crisis" and that "some of the requirements to which [OFSE Plaintiffs] are referring are in Ohio's Constitution which the legislature cannot change on its own. (*See* ECF No. 15-1.)

[3] The Court notes that after the Sixth Circuit's decision in *Esshaki*, Michigan agreed to reduce its signature collection requirement by 50%, which is what the district court had previously ordered, extended the filing deadline, and allowed candidates to collect signature images and submit petition sheets electronically. *See* Elections, The Office of Secretary of State Jocelyn Benson (Updated May 8, 2020), https://www.michigan.gov/sos/0,4670,7-127-1633---,00.html.

This Court, however, has the power to remedy those violations. *See Goldman-Frankie v. Austin*, 727 F.2d 603, 608 (6th Cir. 1984) (holding Michigan ballot access requirements, including provision of Michigan constitution, unconstitutional and affirming district court's order placing independent candidate for state office on the ballot after Michigan failed to remedy violations).

The Court therefore orders Defendants to accept electronically-signed and witnessed petitions collected through the on-line signature collection plans proposed by OFRW Plaintiffs and OFSE Plaintiffs as set forth in their briefing and supporting documents and discussed above. (*See* Leonard Decl., ECF No. 30-1; OFSE Reply at 18-19, ECF No. 43.) The Court further orders the parties to meet and confer regarding any technical or security issues to OFSE and OFRW Plaintiffs' on-line signature collection plan. The parties shall submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020.

VI.

For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motions for a Preliminary Injunction. (ECF Nos. 4, 15, 17-2.). The Court hereby:

- Enjoins enforcement of the ink signature requirement in Ohio Revised Code § 3501.38(B) and witness requirement in Ohio Revised Code § 3501.38(E) as applied to the Thompson Plaintiffs for the November 3, 2020 general election.

- Enjoins enforcement of the deadline in Ohio Revised Code § 731.28 as to Thompson Plaintiffs for the November 3, 2020 general election.

- Directs Defendants to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements "so as to reduce the burden on ballot access." *Esshaki*, 2020 WL 2185553, at *2.

- Enjoins enforcement of the ink signature and witness requirements in Article II § 1g and Ohio Revised Code § 3501.38(B) as applied to OFSE and OFRW Plaintiffs for the November 3, 2020 general election.

- Enjoins enforcement of the deadlines in Article II § 1a of the Ohio Constitution as to OFSE and OFRW Plaintiffs for the November 3, 2020 general election.

- Orders Defendants to accept electronically-signed and witnessed petitions from OFSE and OFRW Plaintiffs collected through the on-line signature collection plans set forth in their briefing and submitting documents.

- Orders Defendants to accept petitions from OFSE and OFRW Plaintiffs that are submitted to the Secretary of State by July 31, 2020.[4]

- Orders OFRW and OFSE Plaintiffs and Defendants to meet and confer regarding any technical or security issues to the on-line signature collection plans. The parties shall submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020.

IT IS SO ORDERED.

5/19/2020
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

[4] The Court selected this date for OFSE and OFRW Plaintiffs' submission of petitions in part to remedy the loss of time already incurred by Plaintiffs and because the Secretary of State is required to accept signatures until this date. Ohio Const. Art. II § 1g.

Attachment 3

Applicants' Petition for Rehearing En Banc, May 26, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 20-3526

CHAD THOMPSON; et al.,
Plaintiffs - Appellees

v.

RICHARD MICHAEL DEWINE,
in his capacity as the Governor of Ohio, **et al.**;
Defendants - Appellants

OHIOANS FOR SECURE AND FAIR ELECTIONS; et al.,
Proposed Intervenors - Appellees

OHIOANS FOR RAISING THE WAGE; et al.,
Proposed Intervenors - Appellees

On Appeal from the United States District Court for the Southern District of Ohio

APPELLEES' PETITION FOR REHEAING EN BANC AND MOTION TO VACATE PANEL'S STAY PENDING APPEAL

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Petition for Rehearing En Banc

Pursuant to Federal Rules of Appellate Procedure 27(a) and 35, Plaintiffs-Appellees petition the full En Banc Court to rehear the Panel's Order and grant their accompanying motion to vacate the stay pending appeal rendered by the Panel in the above-styled case on May 26, 2020. *See Cooey v. Bradshaw*, 338 F.3d 615 (6th Cir. 2003). The United States Court of Appeals for the Sixth Circuit's stay (hereinafter "Sixth Circuit's Order") (Attachment 1) was entered on May 26, 2020. The United States District Court for the Southern District of Ohio's preliminary injunction (hereinafter "District Court Order") (Attachment 2) was entered on May 19, 2020. The Panel's stay was contrary to law and should be vacated on rehearing by the full En Banc Court.

The Panel's Order stayed a preliminary injunction entered by the District Court enjoining Ohio authorities from enforcing their in-person, "wet," witnessed signature collection requirements as applied to the November 3, 2020 general election. The District Court, like numerous Courts, Governors, and elections officials across the country, had concluded that in-person signature

collection was rendered factually impossible and legally questionable by the COVID-19 pandemic and Ohio's mandatory shelter orders implemented beginning on March 22, 2020. The Sixth Circuit's Order staying the District Court's injunction pending appeal necessarily spells the death knell of Plaintiffs-Appellees' efforts to collect enough signatures by July 16, 2020 in order to have their initiatives timely placed on Ohio's November 3, 2020 general election ballot. The relief being sought here is not available from any other court.

Pursuant to Federal Rule of Appellate Procedure 35(b)(1), Plaintiffs-Appellees state:

> the panel decision conflicts with decisions of the United States Supreme Court and this Court, *see Esshaki v. Whitmer*, ---F. App'x ----, 2020 WL 218553 at *3 (6th Cir. 2020); *Ramsek v. Beshear*, No. 20-5542, slip op., at 5 (6th Cir., May 23, 2020); *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569, (1987); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Reynolds v. Sims*, 377 U.S. 533 (1964); and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

Introduction

Petitioners are residents of Ohio who regularly circulate initiative petitions for placement on local election ballots. They seek to place these initiatives on local November 3, 2020 election ballots in cities and villages across Ohio. Before the onset of COVID-19 crisis in Ohio, Petitioners on or about February 27, 2020 timely filed their proposed initiatives with several cities in Ohio. Under Ohio law, this authorized them to begin collecting the needed signatures from voters to support placement of these initiatives on local ballots. The deadline for doing so in Ohio is July 16, 2020.

Then COVID-19 erupted. On March 16, 2020, Defendants canceled Ohio's primary elections that were scheduled for the following morning. *See* Director's Order: In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020.[1] In the

[1] https://coronavirus.ohio.gov/wps/wcm/connect/gov/7c8309f8-9f28-4793-9198-05968d01a640/Order+to+Close+Polling+locations+3-16-2020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-7c8309f8-9f28-4793-9198-05968d01a640-n5829UP.

weeks before Ohio's primary was canceled, world, national and local leaders began taking emergency steps to close public gatherings, shutter public accommodations, force people to physically distance themselves from one another, and require that they stay home. The World Health Organization (WHO) on January 30, 2020, for example, declared a Public Health Emergency of International Concern.

Governor DeWine on March 9, 2020 declared a state of emergency in Ohio. *See* Executive Order 2020-01D.[2] One week before that, on March 3, 2020, Respondent DeWine announced that the Arnold Sports Festival, a large gathering of athletes and spectators in downtown Columbus, was to be closed to spectators. *See* Shawn Lanier, *Arnold Sports Festival cancels convention due to coronavirus, will allow athletes to compete*, NBCI.COM, March 3, 2020.[3]

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[2] https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d.

[3] https://www.nbc4i.com/news/local-news/dewine-ginther-set-press-conference-on-arnold-classic/.

Parades and public events were canceled throughout Ohio at this same time, including the Mid-American Conference Men's and Women's Basketball tournament in Cleveland, Ohio, the Columbus International Auto Show in Columbus, Ohio, and St. Patrick's Day parades throughout the State. *See generally* Mark Ferenchik, *Coronavirus: What's closed, canceled in Columbus area*, COLUMBUS DISPATCH, March 12, 2020.[4]

On March 12, 2020, Defendants began ordering mandatory closings throughout Ohio, including all private and public schools. These orders also banned, with limited exceptions, all gatherings of 100 or more persons. *See* Director's Order: In re: Order to Limit and/or Prohibit Mass Gatherings in Ohio.[5] On March 17, 2020, Defendants extended their ban on mass gatherings to include gatherings of 50 or more persons, and also banned most

[4] https://www.dispatch.com/news/20200312/coronavirus-whats-closed-canceled-in-columbus-area.

[5] https://coronavirus.ohio.gov/wps/wcm/connect/gov/b815ab52-a571-4e65-9077-32468779671a/ODH+Order+to+Limit+and+Prohibit+Mass+Gatherings%2C+3.12.20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-b815ab52-a571-4e65-9077-32468779671a-n6IAHNT.

recreational activities in Ohio. *See* Director's Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings in Ohio.[6]

On March 22, 2020, Defendants ordered that everyone in Ohio "stay at home or at their place of residence" unless subject to a specific exception for providing or receiving "essential" services, maintain at least a six foot social distance between themselves and others outside "a single household or living unit," and avoid altogether gatherings of ten or more people. *See* Director's Stay at Home Order: Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity.[7]

These orders were not advisory. Governor DeWine repeatedly emphasized this to the public: "'We would not have issued this if it was not a matter of life and death,'" Ian Cross,

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[6] https://coronavirus.ohio.gov/wps/wcm/connect/gov/dd504af3-ae2c-4d2e-b2bd-02c1a3beed89/Director%27s+Order-+Amended+Mass+Gathering+3.17.20+%281%29.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-dd504af3-ae2c-4d2e-b2bd-02c1a3beed89-n5829IL.

[7] https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf.

Gov. DeWine clarifies enforcement, reporting of stay-at-home order violations, News5Cleveland.com, March 23, 2020 (quoting DeWine and emphasis added).[8] Emphasizing how serious these closures and prohibitions were, Governor DeWine stated that he and local authorities were prepared to prosecute: "DeWine noted this is an order, not a suggestion, and he expects all people to comply and that all health departments and local law enforcement can enforce this order." Laura Mazade, *What does the stay-at-home order mean for Ohio*, Cincinnati Enquirer, March 22, 2020 (emphasis added).[9]

Plaintiffs-Appellees filed this action on April 27, 2020. They claimed that by forcing them to stay at home, maintaining a six-foot separation from others, and prohibiting their attending gatherings, Ohio law had made it impossible for them to gather the signatures needed to place their initiatives on Ohio's

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[8] https://www.news5cleveland.com/news/continuing-coverage/coronavirus/gov-dewine-clarifies-enforcement-reporting-of-stay-at-home-order-violations.

[9] https://www.cincinnati.com/story/news/2020/03/22/coronavirus-ohio-stay-home-order/2895154001/.

November 3, 2020 ballot. Ohio, after all, required and strictly enforced its in-person signature collection requirement. Collection had been rendered factually and legally impossible.

On April 30, 2020, three days after Plaintiffs' case was filed, Ohio issued its emergency order extending its shelter restrictions for many businesses, most public places and virtually all gatherings until at least May 29, 2020. *See* Ohio Department of Health, Director's Stay Safe Ohio Order, April 30, 2020.[10]

Ohio's April 30, 2020 order extended much of what was found in prior orders; many public and private places, such as primary/secondary schools and businesses, remained closed. Ohio Department of Health, Coronavirus (COVID-19): Continued Business Closures, May 2, 2020.[11] "Parades, fairs, festivals, and carnivals" remained on the list of prohibited activities, *id.*, as did gatherings at "Country clubs and social clubs." *Id. See* Randy Ludlow, *Coronavirus in Ohio: Gov. Mike DeWine warns virus*

[10] https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-Safe-Ohio-Order.pdf.

[11] https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio/Continued-Business-Closures/.

remains 'a dangerous risk' even as state reopens, Columbus Dispatch, May 12, 2020.[12]

Meanwhile, the April 30, 2020 order for the first time stated an exception to its ban on public gatherings for "petition or referendum circulators." Thus, for the first time since March 12, 2020 when the orders began, circulators were purportedly allowed to venture into public and "gather" without necessarily violating Ohio's emergency shelter orders. What they can do in public remains unclear under Ohio law, since the April 30, 2020 order continued to impose physical separation requirements on all unrelated individuals. Further, the circulator exception said nothing about potential signers. Thus, those who sign petitions may still be subject to criminal prosecution if they are either not lawfully in public or if they do not remain at least six feet apart from the circulators who approach them.

Even assuming that the April 30, 2020 order created a meaningful exception for petition circulation – and it did not – it is

[12] https://www.dispatch.com/news/20200512/coronavirus-in-ohio-gov-mike-dewine-warns-virus-remains-rsquoa-dangerous-riskrsquo-even-as-state-reopens.

undisputed that no such exception existed before then. Ohio's circulator exception was a litigation tactic, pure and simple.

What Ohio had done before April 30, 2020 was attempt to build into its emergency shelter orders an undefined "First Amendment protected speech" exception, one that said nothing about petitions, circulators, or anything else. *See* Director's Stay at Home Order, March 22, 2020 (identifying without elaboration and no description "g. First Amendment protected speech" as an exception).[13] Unlike all of the other exceptions in various orders for things like "essential businesses," Ohio's purported First Amendment exception listed nothing; it was absolutely blank. It said nothing about circulators of any sort, nothing about political activities, and nothing about anything else.

Indeed, Ohio's many express prohibitions on activities and places fully protected by the First Amendment, such as "parades, fairs, and festivals," *see*, *e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995),

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13 https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf.

"movie theatres," *see*, *e.g.*, *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976), "social clubs," *see*, *e.g.*, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987), etcetera, made it clear that this purported "First Amendment protected speech" exception meant nothing more than being an empty heading.

To the Sixth Circuit Panel, however, this vapid language became "vitally important." Sixth Circuit's Order at 7. It was not the combination of the pandemic and Ohio's strict in-person signature collection requirement that caused Plaintiffs-Appellees' First Amendment injury, it was their own fault: "we cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe." *Id.* at 8.

"Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders," the Sixth Circuit explained. *Id.* at 6 (citation omitted). "And in its April 30 order, the State declared that its stay-at-home restrictions did not apply

to 'petition or referendum circulators[.]'" *Id.* (citation omitted). "So none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions." *Id.*

The Panel further concluded, in violation of a wealth of precedent from this Court and the Supreme Court, that the District Court exceeded its authority by attempting to fashion relief: "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Id.* at 10. Relying on a prior unpublished decision in *Esshaki v. Whitmer*, --- F. App'x ----, 2020 WL 218553 at *2 (6th Cir. 2020), it ruled that a federal court cannot award affirmative electoral relief in the face of a First Amendment violation: "By unilaterally modifying the Ohio Constitution's ballot initiative regulations, the district court usurped this authority from Ohio electors." *Id.* at 10.

Argument

I. *Esshaki* Cannot Be Distinguished Because Petitioners Were Precluded By Ohio Law Under Threat of Criminal Punishment from Gathering Signatures.

It is undisputed that Ohio imposed justified, highly restrictive orders beginning no later than March 22, 2020 and extending until at least May 29, 2020. People have been and remain limited in where they can go and what they can do. Ohio's physical separation requirement remains in place, and gatherings remain strictly limited. Criminal penalties remain in place. Only on April 30, 2020, three days following Petitioners' filing of this action, did they decide that their "First Amendment exception" included "circulators." Before then, no such exception existed. Plaintiffs, like fellow Ohioans, complied. Plaintiffs-Appellees accordingly lost several weeks' worth of possible in-person signature collection. Ohio recognizes no other kind.

Ignoring these undisputed facts, the Sixth Circuit Panel concluded that Defendants' vapid exception for "First Amendment protected speech" was plainly understandable by all. Plaintiffs-Appellees were foolish not to understand that. They should have

known that they could ignore Defendants' orders and threats of criminal punishment and wander the streets, go door-to-door, closely approach others, all with pen and paper in hand. It is, after all, protected by the First Amendment, isn't it?

Ironically, just three days before on May 23, 2020 the Sixth Circuit in *Ramsek v. Beshear*, No. 20-5542, slip op., at 5 (6th Cir., May 23, 2020) (attached to Appellees' Rule 28(j) letter to Sixth Circuit, Doc. No. 30-1), itself could not answer this question in terms of in-person protests. It ruled that it could not "on this exceptionally short notice … conclude that [Kentucky's] prohibition on in-person protests would likely fail strict scrutiny." Whether in-person speech was "protected" by the First Amendment during the COVID-19 crisis, it said, was not clear and could not be easily resolved by the Sixth Circuit. But circulators, they should know better!

Making the Sixth Circuit's conclusion doubly ironic is the fact that Defendants repeatedly argued in the District Court and in the Sixth Circuit that the First Amendment does not apply at all to Petitioners' activity, so much so that not only was a stay

needed but initial en banc review should be granted. *See*, *e.g.*, Appellants' Reply to Response to Motion to Stay, Sixth Cir. Doc. No. 26, at 12. Respondents brazenly demanded it both ways; the First Amendment applied so circulators were always free to collect signatures, but it did not apply so Ohio could restrict their circulation efforts without constitutional inquiry.

The Sixth Circuit's conclusion is not only callous, it is indefensible. No Court, including this Court, has ever given effect to these vague and standard-less First Amendment exceptions -- until now. If they did, after all, States could insulate all of their laws from First Amendment scrutiny by just stating that they do not apply to "protected" First Amendment activities. Not only would free speech suffer, so would freedom of religion. Imagine a law that banned drive-in church services, but had an exception for "protected First Amendment religion." According to the Panel, this ban would be immune from Free Exercise challenge because Catholics should have known the ban did not apply to them.

This Court has repeatedly warned against the traps that vague laws and exceptions like these create. *See Grayned v. City*

of Rockford, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning"). Recognizing this fact, no Court has ever concluded that such a "First Amendment exception" is meaningful or enforceable. In *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Cal. 1993), for example, the Court rejected the very thought that such an exception had any meaning: it "does not define the concept of 'First Amendment Activities,' nor, indeed, could it define this concept." (Emphasis added).

Rubin, 823 F. Supp. at 712 n.6, referred to the Supreme Court's decision in *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569, (1987), which had rejected a similar argument in the context of restrictions placed on speech in airport terminals. *Jews for Jesus*, the District Court stated,

> suggests the peril in drafting an ordinance which uses the term 'First Amendment Activities' as if the meaning of such a term were self-evident or easily discernible. More precisely, *Jews for Jesus* suggests that such provisions are inherently vague and unenforceable, and hence unconstitutional.

823 F. Supp. at 712 n.6. Here, too, Ohio's purported exception is unconstitutional.

Deciding what is and what is not "First Amendment protected speech" is complicated even for skilled lawyers and judges, as illustrated by this case. Defendants' lawyers here, after all, insist (incorrectly) that signature collection is not protected by the First Amendment. The lay public can hardly be expected to have a better understanding than the government's "top lawyers."

The Supreme Court made this point and used this precise language in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), where Minnesota had prohibited any person from wearing a "political badge, political button, or other political insignia … at or about the polling place." *Id.* at 1883. The prohibition was unconstitutional, the Supreme Court explained, because it gave Minnesota election judges authority "to decide whether a particular item falls within the ban." *Id.* The Supreme Court ruled that Minnesota violated the First Amendment by leaving undefined what is and what is not allowed, and leaving its election judges to address "riddles that even the State's top lawyers struggle to solve." *Id.* at 1891.

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), further illustrates the point. There, a lawyer who had made statements about a criminal case to the press was charged in a disciplinary proceeding with making prejudicial extrajudicial statements about a pending case. *Id.* at 1033. The Nevada Code of Professional Conduct, meanwhile, provided a "safe harbor" provision that allowed lawyers to publicly "state without elaboration ... the general nature of the ... defense." Even assuming that the restrictions on speech proved consistent with the First Amendment, the majority in an opinion authored by Justice Kennedy ruled, this safe harbor provision itself unconstitutionally "misled [the lawyer] into thinking that he could give his press conference without fear of discipline." *Id.* at 1048.

The majority explained:

> Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "fair notice to those to whom [it] is directed. " A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. … The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Id. at 1048-49 (quoting *Grayned,* 408 U.S. 104, and emphasis added).

Plaintiffs-Appellees here want to remain safe. They want their families to remain safe. They want their friends to remain safe. They want Ohioans to remain safe. They also do not want to be arrested. What Plaintiffs-Appellees want is to fully exercise their First Amendment rights without having to guess about what might happen. Defendants' argument that Plaintiffs-Appellees always could have done so because of their "First Amendment" exception makes that impossible. Plaintiffs-Appellees are forced to guess at what they can and cannot do. They are forced to take their chances.

Because Ohio's First Amendment exception was unconstitutionally vague and meaningless, the present case is indistinguishable from *Esshaki v. Whitmer*, ---F. App'x ----, 2020 WL 218553 (6th Cir. 2020). There, this Court affirmed a District Court's holding that the pandemic and Michigan's strict enforcement rule for in-person signature collection placed a severe burden on First Amendment rights:

> The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored to the present circumstances.

2020 WL 2185553, at *1. The present case is no different. The Panel's contrary conclusion here that Ohio's law did not severely burden Plaintiffs-Appellees' First Amendment rights requires Rehearing En Banc to maintain uniformity in this Court's decisions.

II. The Panel Contradicted Established Law When it Held that the District Court Exceeded its Authority to Order Relief.

The Sixth Circuit incorrectly concluded that the District Court exceeded its authority by awarding ballot access relief. The panel's conclusion strays from a long line of precedents that make clear federal courts have precisely this kind of authority. This is as true of unconstitutional State constitutional provisions, see *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."),

as it is for state statutes, which is all Petitioners' challenge involves here.[14]

Judge Stranch in her partial dissent to the Sixth Circuit's decision in *Esshaki v. Whitmer*, ---F. App'x ----, 2020 WL 218553 at *3 (6th Cir. 2020), which the Sixth Circuit panel in this case relied upon, thoroughly explained why this view is incorrect:

> The long history of federal injunctive relief, including affirmative relief, in comparable situations is uncontestable. Since at least 1908, the Supreme Court has held that Plaintiffs may bring suits against state officials seeking prospective relief to end continuing violations of federal law. A federal court's ability to redress a plaintiff's claim is built into the court's Article III jurisdiction and the requirement that a plaintiff have standing to sue. Specific and practical federal injunctions against state actors have thus been deemed appropriate under circumstances ranging from ballot access and reapportionment cases to school integration and prison reform. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (concluding that absent an injunction ordering a candidate's name be placed on the ballot, the candidate and his supporters would suffer a constitutional injury from Ohio's ballot access requirements); *Reynolds v. Sims*, 377 U.S. 533 (1964) (affirming an injunction requiring Alabama legislators to conduct an election under an apportionment scheme specified in the district court's order); *Milliken v. Bradley*, 433 U.S. 267 (1977) (concluding that the district court did not abuse its discretion in ordering a remedial

[14] Local initiatives in Ohio, unlike statewide initiatives, are governed only by state statutes. Ohio's Constitution does not restrict them in any way.

> education plan, which adopted specific programs proposed by local school authorities, to redress de jure school segregation); *Hutto v. Finney*, 437 U.S. 678 (1978) (finding that a district court did not abuse its discretion in compelling a 30-day limit on solitary confinement to remedy a state prison's ongoing Eighth Amendment violations).

(Stranch, J., concurring and dissenting in part) (some citations omitted).

Judge Stranch further correctly explained that the "view that lower courts may issue only 'prohibitive' rather than 'compulsory' injunctions against state officials" was "inaccurate." *Id.* "To the contrary," she explaind, "Supreme Court jurisprudence has consistently approved of both negative injunctions that instruct a defendant not to act and mandatory injunctions that instruct states to take particular action." Id. (citations omitted). "[T]he Supreme Court has identified circumstances in which federal courts must intervene to remedy ongoing constitutional violations. For example, where the one-person, one-vote doctrine is implicated or a plaintiff alleges racial gerrymandering, district courts are tasked with drawing up reapportionment plans." *Id.* (citation omitted).

Further, Judge Stranch stated, "[i]f the Supreme Court believed that a district court could not compel a state to take specific steps to remedy a constitutional voting-rights violation, it would have said so in its recent order addressing Wisconsin's approach to the primary election during the COVID-19 pandemic. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, — – U.S. ——, 140 S. Ct. 1205, 1206, —— L.Ed.2d —— (2020)." *Id.* at *4. "In that case, the Court left in place an extension of the absentee ballot deadline from Tuesday, April 7, 2020 to Monday, April 13, 2020."

Plaintiffs-Appellees lost two months of circulation time to the emergency shutdown in Ohio. Many of Defendants' emergency orders remain presently in effect throughout Ohio. Physical distancing is still being required. Notwithstanding that Ohio is beginning the long process of reopening, it has not reopened completely. Gatherings continue to be restricted. In-person circulation, like it or not, will never be the same. The panel's contrary conclusion not only wholly ignores the weeks lost to circulation already, it is oblivious to the reality that encircled

Ohioans and will continue to hamper their movements and activities to this day.

Conclusion

For the foregoing reasons, Plaintiffs-Appellees respectfully request that the full En Banc Court rehear the Panel's Order and vacate its stay pending appeal.

CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Appellees certify that they have prepared this document in 14-point Century font and that excluding the Caption, Signature Blocks and Certificates, the document includes 3885 words.

s/*Mark R. Brown*
Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Petition was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding.

s/*Mark R. Brown*
Mark R. Brown

Attachment 4

Applicants' Motion to Vacate Stay Directed to En Banc Court,

May 26, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 20-3526

CHAD THOMPSON; et al.,
Plaintiffs - Appellees

v.

RICHARD MICHAEL DEWINE,
in his capacity as the Governor of Ohio, **et al.**;
Defendants - Appellants

OHIOANS FOR SECURE AND FAIR ELECTIONS; et al.,
Proposed Intervenors - Appellees

OHIOANS FOR RAISING THE WAGE; et al.,
Proposed Intervenors - Appellees

On Appeal from the United States District Court for the Southern District of Ohio

APPELLEES' MOTION TO VACATE THE SIXTH CIRCUIT'S STAY PENDING APPEAL DIRECTED TO THE FULL EN BANC COURT

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Motion to Vacate Stay

Pursuant to Federal Rules of Appellate Procedure 27(a) and 35, Plaintiffs-Appellees petition the full En Banc Court to rehear the Panel's Order and grant this Motion to vacate the stay pending appeal rendered by the Panel in the above-styled case on May 26, 2020. *See Cooey v. Bradshaw*, 338 F.3d 615 (6th Cir. 2003). The United States Court of Appeals for the Sixth Circuit's stay (hereinafter "Sixth Circuit's Order") (Attachment 1) was entered on May 26, 2020. The United States District Court for the Southern District of Ohio's preliminary injunction (hereinafter "District Court Order") (Attachment 2) was entered on May 19, 2020. The Panel's stay was contrary to law and should be vacated on rehearing by the full En Banc Court.

Plaintiffs-Appellees are filing contemporaneously with this Motion a separate Petition for Rehearing of the Panel's Order En Banc under Rule 35.

The Sixth Circuit's Order stayed a preliminary injunction entered by the District Court enjoining Ohio authorities from enforcing their in-person, "wet," witnessed signature collection

requirements as applied to the November 3, 2020 general election. The District Court, like numerous Courts, Governors, and elections officials across the country, had concluded that in-person signature collection was rendered factually impossible and legally questionable by the COVID-19 pandemic and Ohio's mandatory shelter orders implemented beginning on March 22, 2020. The Sixth Circuit's Order staying the District Court's injunction pending appeal necessarily spells the death knell of Plaintiffs-Appellees' efforts to collect enough signatures by July 16, 2020 in order to have their initiatives timely placed on Ohio's November 3, 2020 general election ballot. The relief being sought here is not available from any other court.

Introduction

Petitioners are residents of Ohio who regularly circulate initiative petitions for placement on local election ballots. They seek to place these initiatives on local November 3, 2020 election ballots in cities and villages across Ohio. Before the onset of COVID-19 crisis in Ohio, Petitioners on or about February 27, 2020 timely filed their proposed initiatives with several cities in

Ohio. Under Ohio law, this authorized them to begin collecting the needed signatures from voters to support placement of these initiatives on local ballots. The deadline for doing so in Ohio is July 16, 2020.

Then COVID-19 erupted. On March 16, 2020, Defendants canceled Ohio's primary elections that were scheduled for the following morning. *See* Director's Order: In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020.[1] In the weeks before Ohio's primary was canceled, world, national and local leaders began taking emergency steps to close public gatherings, shutter public accommodations, force people to physically distance themselves from one another, and require that they stay home. The World Health Organization (WHO) on January 30, 2020, for example, declared a Public Health Emergency of International Concern. On January 31, 2020, the

[1] https://coronavirus.ohio.gov/wps/wcm/connect/gov/7c8309f8-9f28-4793-9198-05968d01a640/Order+to+Close+Polling+locations+3-16-2020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-7c8309f8-9f28-4793-9198-05968d01a640-n5829UP.

President of the United States suspended entry into the United States of foreign nationals who had traveled to China. *See* Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus.[2]

On January 31, 2020, the Director of the National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention (CDC) announced that COVID-19 had spread to the United States. *See* Press Release: CDC Confirms Person-to-Person Spread of New Coronavirus in the United States.[3]

Respondent DeWine on March 9, 2020 declared a state of emergency in Ohio. *See* Executive Order 2020-01D.[4] One week

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[2] https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/.

[3] https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html.

[4] https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d.

before that, on March 3, 2020, Respondent DeWine announced that the Arnold Sports Festival, a large gathering of athletes and spectators in downtown Columbus, was to be closed to spectators. *See* Shawn Lanier, *Arnold Sports Festival cancels convention due to coronavirus, will allow athletes to compete*, NBCI.COM, March 3, 2020.[5]

Parades and public events were canceled throughout Ohio at this same time, including the Mid-American Conference Men's and Women's Basketball tournament in Cleveland, Ohio, the Columbus International Auto Show in Columbus, Ohio, and St. Patrick's Day parades throughout the State. *See generally* Mark Ferenchik, *Coronavirus: What's closed, canceled in Columbus area*, COLUMBUS DISPATCH, March 12, 2020.[6]

On March 13, 2020, the President of the United States declared a national emergency retroactive to March 1, 2020. *See* Proclamation on Declaring a National Emergency Concerning the

[5] https://www.nbc4i.com/news/local-news/dewine-ginther-set-press-conference-on-arnold-classic/.

[6] https://www.dispatch.com/news/20200312/coronavirus-whats-closed-canceled-in-columbus-area.

Novel Coronavirus Disease (COVID-19) Outbreak.[7] Beginning with the Ohio State University on or about March 9, 2020, *see* OHIO STATE SUSPENDS CLASSES UNTIL MARCH 30 DUE TO CORONAVIRUS OUTBREAK, THE LANTERN, March 9, 2020,[8] colleges and universities throughout Ohio began closing their physical facilities and remaining closed until unknown future dates.

On March 12, 2020, Defendants began ordering mandatory closings throughout Ohio, including all private and public schools (grades K through 12). *See* News Release: Governor DeWine Announces School Closures.[9] These orders also banned, with limited exceptions, all gatherings of 100 or more persons. *See* Director's Order: In re: Order to Limit and/or Prohibit Mass

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[7] https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

[8] https://www.thelantern.com/2020/03/ohio-state-suspends-classes-until-march-30-due-to-coronavirus-outbreak/.

[9] https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/announces-school-closures.

Gatherings in Ohio.[10] On March 17, 2020, Defendants extended their ban on mass gatherings to include gatherings of 50 or more persons, and also banned most recreational activities in Ohio. *See* Director's Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings in Ohio.[11]

On March 15, 2020, Defendants closed all restaurants, liquor stores and eating establishments and limited them to carry-out service only. *See* Director's Order: In re: Order Limiting the Sale of Food and Beverages, Liquor, Beer and Wine, to Carry-out and Delivery Only.[12] On March 19, 2020, they closed all barber shops,

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[10] https://coronavirus.ohio.gov/wps/wcm/connect/gov/b815ab52-a571-4e65-9077-32468779671a/ODH+Order+to+Limit+and+Prohibit+Mass+Gatherings%2C+3.12.20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-b815ab52-a571-4e65-9077-32468779671a-n6IAHNT.

[11] https://coronavirus.ohio.gov/wps/wcm/connect/gov/dd504af3-ae2c-4d2e-b2bd-02c1a3beed89/Director%27s+Order-+Amended+Mass+Gathering+3.17.20+%281%29.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-dd504af3-ae2c-4d2e-b2bd-02c1a3beed89-n5829IL.

[12] https://coronavirus.ohio.gov/wps/wcm/connect/gov/aa5aa123-c6c9-4e95-8a0d-bc77409c7296/Health+Director+Order+Limit+Food%2C+Alcohol+

hair salons, day spas, tattoo parlors, and similar places of business. *See* Director's Order.[13] On March 22, 2020, they ordered that everyone in Ohio "stay at home or at their place of residence" unless subject to a specific exception for providing or receiving "essential" services, maintain at least a six foot social distance between themselves and others outside "a single household or living unit," and avoid altogether gatherings of ten or more people. *See* Director's Stay at Home Order: Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity.[14]

Sales+to+Carry+Out+Delivery+Only.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-aa5aa123-c6c9-4e95-8a0d-bc77409c7296-n58291W.

[13] https://coronavirus.ohio.gov/wps/wcm/connect/gov/273f5e4f-823b-4ed1-a119-7e7c6851f45a/Director%27s+Order+closing+hair+salons+nail+salons+barber+shops+3-19-2020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-273f5e4f-823b-4ed1-a119-7e7c6851f45a-n582aXd.

[14] https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf.

These orders were not advisory. Governor DeWine repeatedly emphasized this to the public: "'We would not have issued this if it was not a matter of life and death,'" Ian Cross, *Gov. DeWine clarifies enforcement, reporting of stay-at-home order violations*, News5Cleveland.com, March 23, 2020 (quoting DeWine and emphasis added).[15] The Governor encouraged Ohioans to report violations: "residents should contact the business' human resources department or their local health department to report violations of the stay-at-home order." *Id.* Emphasizing how serious these closures and prohibitions were, Governor DeWine stated that he and local authorities were prepared to prosecute: "DeWine noted this is an order, not a suggestion, and he expects all people to comply and that all health departments and local law enforcement can enforce this order. " Laura Mazade, *What does the stay-at-home order mean for Ohio*,

[15] https://www.news5cleveland.com/news/continuing-coverage/coronavirus/gov-dewine-clarifies-enforcement-reporting-of-stay-at-home-order-violations.

Cincinnati Enquirer, March 22, 2020 (emphasis added).[16] Governor DeWine emphasized that violating the orders constituted a "second-degree misdemeanor and can be enforced by the state's 113 public health departments and local police." *Id.* None of Ohio's orders said anything about circulators being able to conduct in-person collection. Circulators like everyone else were required to stay home.

Plaintiffs-Appellees filed this action on April 27, 2020. They claimed that by forcing them to stay at home, maintaining a six-foot separation from others, and prohibiting their attending gatherings, Ohio law had made it impossible for them to gather the signatures needed to place their initiatives on Ohio's November 3, 2020 ballot. Ohio, after all, required and strictly enforced its in-person signature collection requirement. Collection had been rendered factually and legally impossible.

On April 30, 2020, three days after Plaintiffs' case was filed, Ohio issued its emergency order extending its shelter restrictions

[16] https://www.cincinnati.com/story/news/2020/03/22/coronavirus-ohio-stay-home-order/2895154001/.

for many businesses, most public places and virtually all gatherings until at least May 29, 2020. *See* Ohio Department of Health, Director's Stay Safe Ohio Order, April 30, 2020.[17] In his announcement on May 8, 2020, Governor DeWine stated "the obvious and [did] not shy away from it: The risk is up. The more contacts we have, the more that we do, the more risk there is." *DeWine warns 'risk is up' as Ohio continues reopening process: 'This is a high-risk operation'*, 10tv.com, May 8, 2020 (emphasis added).[18] "He urged all Ohioans to continue following physical distancing guidelines of staying at least six feet apart and wearing a mask whenever possible." *Id.* (emphasis added).

Ohio's April 30, 2020 order extended much of what was found in prior orders; many public and private places, such as primary/secondary schools and businesses, remained closed. Ohio Department of Health, Coronavirus (COVID-19): Continued

[17] https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-Safe-Ohio-Order.pdf.

[18] https://www.10tv.com/article/dewine-warns-risk-ohio-continues-reopening-process-high-risk-operation-2020-may.

Business Closures, May 2, 2020.[19] "Parades, fairs, festivals, and carnivals" remained on the list of prohibited activities, *id.*, as did gatherings at "Country clubs and social clubs." *Id. See* Randy Ludlow, *Coronavirus in Ohio: Gov. Mike DeWine warns virus remains 'a dangerous risk' even as state reopens*, Columbus Dispatch, May 12, 2020.[20]

Meanwhile, the April 30, 2020 order for the first time stated an exception to its ban on public gatherings for "petition or referendum circulators." Thus, for the first time since March 12, 2020 when the orders began, circulators were purportedly allowed to venture into public and "gather" without necessarily violating Ohio's emergency shelter orders. What they can do in public remains unclear under Ohio law, since the April 30, 2020 order continued to impose physical separation requirements on all unrelated individuals. Further, the circulator exception said nothing about potential signers. Thus, those who sign petitions

[19] https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio/Continued-Business-Closures/.

[20] https://www.dispatch.com/news/20200512/coronavirus-in-ohio-gov-mike-dewine-warns-virus-remains-rsquoa-dangerous-riskrsquo-even-as-state-reopens.

may still be subject to criminal prosecution if they are either not lawfully in public or if they do not remain at least six feet apart from the circulators who approach them.

Even assuming that the April 30, 2020 order created a meaningful exception for petition circulation – and it did not – it is undisputed that no such exception existed before then. Ohio's circulator exception was a litigation tactic, pure and simple.

What Ohio had done before April 30, 2020 was attempt to build into its emergency shelter orders an undefined "First Amendment protected speech" exception, one that said nothing about petitions, circulators, or anything else. *See* Director's Stay at Home Order, March 22, 2020 (identifying without elaboration and no description "g. First Amendment protected speech" as an exception).[21] Unlike all of the other exceptions in various orders for things like "essential businesses," Ohio's purported First Amendment exception listed nothing as allowed; it was absolutely blank. It said nothing about circulators of any sort, nothing about

[21] https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf.

political activities, and nothing about anything else. Indeed, Ohio's many express prohibitions on activities and places fully protected by the First Amendment, such as "parades, fairs, and festivals," *see*, *e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), "movie theatres," *see*, *e.g.*, *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976), "social clubs," *see*, *e.g.*, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987), etcetera, made it clear that this purported "First Amendment protected speech" exception meant nothing more than being a vague exception.

To the Sixth Circuit Panel, however, this vapid exception became "vitally important." Sixth Circuit's Order at 7. It was not the combination of the pandemic and Ohio's strict in-person signature collection requirement that caused Plaintiffs-Appellees' First Amendment injury, it was their own fault: "we cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs

from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe." *Id.* at 8.

"Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders," the Sixth Circuit explained. *Id.* at 6 (citation omitted). "And in its April 30 order, the State declared that its stay-at-home restrictions did not apply to 'petition or referendum circulators[.]'" *Id.* (citation omitted). "So none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions." *Id.*

The Panel further concluded, in violation of a wealth of precedent from this Court and the Supreme Court, that the District Court exceeded its authority by attempting to fashion relief: "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Id.* at 10. Relying on a prior unpublished decision in *Esshaki v. Whitmer*, --- F. App'x ----, 2020 WL 218553 at *2 (6th Cir. 2020), it ruled that a federal court cannot award affirmative electoral relief in the face of a First Amendment violation: "By unilaterally modifying the

Ohio Constitution's ballot initiative regulations, the district court usurped this authority from Ohio electors." *Id.* at 10.

Argument

When deciding whether to issue the stay in the first instance, the Sixth Circuit was required to balance

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). *See also Michigan State A. Phillip Randolph Inst. v. Johnson*, 883 F.3d 656, 662 (6th Cir. 2016).

Here, the Panel demonstrably erred as a matter of law in concluding (1) that Petitioners were fully free to circulate their petitions during Ohio's mandatory, forced closure, (2) Ohio's restrictions did not place a severe burden on Petitioners' First Amendment rights, and (3) federal courts cannot affirmatively redress First Amendment violations in the context of elections. Further, it ignored the wealth of pandemic precedent recognizing

the impact the last several weeks of COVID-19 have had on First Amendment political rights.

I. Petitioners Were Precluded By Ohio Law Under Threat of Criminal Punishment from Gathering Signatures.

It is undisputed that Ohio imposed justified, highly restrictive orders beginning no later than March 22, 2020 and extending until at least May 29, 2020. People have been and remain limited in where they can go and what they can do. Ohio's physical separation requirement remains in place, and gatherings remain strictly limited. Criminal penalties remain in place. Plaintiffs-Appellees remained model citizens and duly complied with these orders. No official ever informed them that an exception for "First Amendment protected speech" allowed them to go door-to-door, gather in public, approach others, and collect signatures. No one in Ohio ever imagined this was allowed.

Neither did Defendants. Only on April 30, 2020, three days following Petitioners' filing of this action, did they decide that their "First Amendment exception" included "circulators." Before then, no such exception existed. Plaintiffs, like fellow Ohioans,

complied. Plaintiffs-Appellees accordingly lost several weeks' worth of possible in-person signature collection. Ohio recognizes no other kind.

Ignoring these undisputed facts, the Sixth Circuit Panel concluded that Defendants' vapid exception for "First Amendment protected speech" was plainly understandable by all. Plaintiffs-Appellees were foolish not to understand that. They should have known that they could ignore Defendants' orders and threats of criminal punishment and wander the streets, go door-to-door, closely approach others, all with pen and paper in hand. It is, after all, protected by the First Amendment, isn't it?

Ironically, just three days before on May 23, 2020 the Sixth Circuit in *Ramsek v. Beshear*, No. 20-5542, slip op., at 5 (6th Cir., May 23, 2020) (attached to Appellees' Rule 28(j) letter to Sixth Circuit, Doc. No. 30-1), itself could not answer this question in terms of in-person protests. It ruled that it could not "on this exceptionally short notice … conclude that [Kentucky's] prohibition on in-person protests would likely fail strict scrutiny." Whether in-person speech was "protected" by the First

Amendment during the COVID-19 crisis, it said, was not clear and could not be easily resolved by the Sixth Circuit. But circulators, they should know better!

Making the Sixth Circuit's conclusion doubly ironic is the fact that Defendants repeatedly argued in the District Court and in the Sixth Circuit that the First Amendment does not apply at all to Petitioners' activity, so much so that not only was a stay needed but initial en banc review should be granted. *See*, *e.g.*, Appellants' Reply to Response to Motion to Stay, Sixth Cir. Doc. No. 26, at 12. Respondents brazenly demanded it both ways; the First Amendment applied so circulators were always free to collect signatures, but it did not apply so Ohio could restrict their circulation efforts without constitutional inquiry.

The Sixth Circuit's conclusion is not only callous, it is indefensible. No Court, including this Court, has ever given effect to these vague and standard-less First Amendment exceptions -- until now. If they did, after all, States could insulate all of their laws from First Amendment scrutiny by just stating that they do not apply to "protected" First Amendment activities. Not only

would free speech suffer, so would freedom of religion. Imagine a law that banned drive-in church services, but had an exception for "protected First Amendment religion." According to the Panel, this ban would be immune from Free Exercise challenge because Catholics should have known the ban did not apply to them.

This Court has repeatedly warned against the traps that vague laws and exceptions like these create. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning"). Recognizing this fact, no Court has ever concluded that such a "First Amendment exception" is meaningful or enforceable. In *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Cal. 1993), for example, the Court rejected the very thought that such an exception had any meaning: it "does not define the concept of 'First Amendment Activities,' nor, indeed, could it define this concept." (Emphasis added).

Rubin, 823 F. Supp. at 712 n.6, referred to the Supreme Court's decision in *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569, (1987), which had rejected a similar

argument in the context of restrictions placed on speech in airport terminals. *Jews for Jesus*, the District Court stated,

> suggests the peril in drafting an ordinance which uses the term 'First Amendment Activities' as if the meaning of such a term were self-evident or easily discernible. More precisely, *Jews for Jesus* suggests that such provisions are inherently vague and unenforceable, and hence unconstitutional.

823 F. Supp. at 712 n.6. Here, too, Ohio's purported exception is unconstitutional.

Deciding what is and what is not "First Amendment protected speech" is complicated even for skilled lawyers and judges, as illustrated by this case. Defendants' lawyers here, after all, insist (incorrectly) that signature collection is not protected by the First Amendment. The lay public can hardly be expected to have a better understanding than the government's "top lawyers."

The Supreme Court made this point and used this precise language in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), where Minnesota had prohibited any person from wearing a "political badge, political button, or other political insignia … at or about the polling place." *Id.* at 1883. The prohibition was unconstitutional, the Supreme Court explained, because it gave

Minnesota election judges authority "to decide whether a particular item falls within the ban." *Id.* The Supreme Court ruled that Minnesota violated the First Amendment by leaving undefined what is and what is not allowed, and leaving its election judges to address "riddles that even the State's top lawyers struggle to solve." *Id.* at 1891.

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), further illustrates the point. There, a lawyer who had made statements about a criminal case to the press was charged in a disciplinary proceeding with making prejudicial extrajudicial statements about a pending case. *Id.* at 1033. The Nevada Code of Professional Conduct, meanwhile, provided a "safe harbor" provision that allowed lawyers to publicly "state without elaboration ... the general nature of the ... defense." Even assuming that the restrictions on speech proved consistent with the First Amendment, the majority in an opinion authored by Justice Kennedy ruled, this safe harbor provision itself unconstitutionally "misled [the lawyer] into thinking that he could give his press conference without fear of discipline." *Id.* at 1048.

The majority explained:

> Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "fair notice to those to whom [it] is directed. " A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. … The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Id. at 1048-49 (quoting *Grayned,* 408 U.S. 104, and emphasis added).

Plaintiffs-Appellees here want to remain safe. They want their families to remain safe. They want their friends to remain safe. They want Ohioans to remain safe. They also do not want to be arrested. What Plaintiffs-Appellees want is to fully exercise their First Amendment rights without having to guess about what might happen. The Panel's conclusion that Plaintiffs-Appellees always could have done so because of their "First Amendment" exception makes that impossible. Plaintiffs-Appellees are forced to guess at what they can and cannot do and take their chances.

Because Ohio's First Amendment exception was unconstitutionally vague and meaningless, the present case is indistinguishable from *Esshaki v. Whitmer*, ---F. App'x ----, 2020

WL 218553 (6th Cir. 2020). There, this Court affirmed a District Court's holding that the pandemic and Michigan's strict enforcement rule for in-person signature collection placed a severe burden on First Amendment rights:

> The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored to the present circumstances.

2020 WL 2185553, at *1. The present case is no different. The Panel's contrary conclusion here that Ohio's law did not severely burden Plaintiffs-Appellees' First Amendment rights requires Rehearing En Banc and its stay order vacated in order to maintain uniformity in this Court's decisions.

II. The Sixth Circuit Erred in Ruling that the District Court Exceeded its Authority to Order Relief.

The Sixth Circuit incorrectly concluded that the District Court exceeded its authority by awarding ballot access relief. The panel's conclusion strays from a long line of precedents that make clear federal courts have precisely this kind of authority. This is

as true of unconstitutional State constitutional provisions, see *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."), as it is for state statutes, which is all Petitioners' challenge involves here.[22]

Judge Stranch in her partial dissent to the Sixth Circuit's decision in *Esshaki v. Whitmer*, ---F. App'x ----, 2020 WL 218553 at *3 (6th Cir. 2020), which the Sixth Circuit panel in this case relied upon, thoroughly explained why this view is incorrect:

> The long history of federal injunctive relief, including affirmative relief, in comparable situations is uncontestable. Since at least 1908, the Supreme Court has held that Plaintiffs may bring suits against state officials seeking prospective relief to end continuing violations of federal law. A federal court's ability to redress a plaintiff's claim is built into the court's Article III jurisdiction and the requirement that a plaintiff have standing to sue. Specific and practical federal injunctions against state actors have thus been deemed appropriate under circumstances ranging from ballot access and reapportionment cases to school integration and prison reform. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (concluding that absent an injunction ordering a candidate's name be placed on the

[22] Local initiatives in Ohio, unlike statewide initiatives, are governed only by state statutes. Ohio's Constitution does not restrict them in any way.

> ballot, the candidate and his supporters would suffer a constitutional injury from Ohio's ballot access requirements); *Reynolds v. Sims*, 377 U.S. 533 (1964) (affirming an injunction requiring Alabama legislators to conduct an election under an apportionment scheme specified in the district court's order); *Milliken v. Bradley*, 433 U.S. 267 (1977) (concluding that the district court did not abuse its discretion in ordering a remedial education plan, which adopted specific programs proposed by local school authorities, to redress de jure school segregation); *Hutto v. Finney*, 437 U.S. 678 (1978) (finding that a district court did not abuse its discretion in compelling a 30-day limit on solitary confinement to remedy a state prison's ongoing Eighth Amendment violations).

(Stranch, J., concurring and dissenting in part) (some citations omitted).

Judge Stranch further correctly explained that the "view that lower courts may issue only 'prohibitive' rather than 'compulsory' injunctions against state officials" was "inaccurate." *Id.* "To the contrary," she explaind, "Supreme Court jurisprudence has consistently approved of both negative injunctions that instruct a defendant not to act and mandatory injunctions that instruct states to take particular action." Id. (citations omitted). "[T]he Supreme Court has identified circumstances in which federal courts must intervene to remedy ongoing constitutional violations. For example, where the one-person, one-vote doctrine is

implicated or a plaintiff alleges racial gerrymandering, district courts are tasked with drawing up reapportionment plans." *Id.* (citation omitted).

Further, Judge Stranch stated, "[i]f the Supreme Court believed that a district court could not compel a state to take specific steps to remedy a constitutional voting-rights violation, it would have said so in its recent order addressing Wisconsin's approach to the primary election during the COVID-19 pandemic. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, ––– U.S. ––––, 140 S. Ct. 1205, 1206, ––– L.Ed.2d –––– (2020)." *Id.* at *4. "In that case, the Court left in place an extension of the absentee ballot deadline from Tuesday, April 7, 2020 to Monday, April 13, 2020."

Plaintiffs-Appellees lost two months of circulation time to the emergency shutdown in Ohio. Many of Defendants' emergency orders remain presently in effect throughout Ohio. Physical distancing is still being required. Notwithstanding that Ohio is beginning the long process of reopening, it has not reopened completely. Gatherings continue to be restricted. In-person

circulation, like it or not, will never be the same. The panel's contrary conclusion not only wholly ignores the weeks lost to circulation already, it is oblivious to the reality that encircled Ohioans and will continue to hamper their movements and activities to this day.

III. Courts and Officials Across the Country Recognize that Petitioning Cannot Safely Proceed During the COVID-19 Pandemic.

Courts across the country have recognized that it is not only that people risk legal penalties if they try to circulate petitions, they simply cannot do so as a factual matter. Just to cite a few examples, in *Garbett v. Herbert*, 2020 WL 2064101 (D. Utah, April 29, 2020), in ruling that a pro-rata reduction was required under the First Amendment to Utah's signature collection requirement, the Court rejected the State's claim that candidates technically could have collected signatures given the advisory nature of the State's orders: "it is difficult to imagine a confluence of events that would make it more difficult for a candidate to collect signatures." *Id.* at *12. "[U]nder these specific

circumstances, the character and magnitude of the burden on Garbett's First Amendment rights was severe." *Id.* at *13.

Likewise, Chief Judge Pallmeyer in *Libertarian Party of Illinois v. Pritker*, 2020 WL 1951687, *2 (N.D. Ill., Apr. 23, 2020), enjoined Illinois's signature collection requirements because of the "disruption and rapid spread of a contagious and dangerous respiratory illness." The Supreme Judicial Court of Massachusetts, meanwhile, on April 30, 2020 approved an agreement that allows initiative circulators to obtain signatures electronically. *See* Chris Lisinski, *Accord clears way for e-signatures on ballot questions*, 22WWLP.COM, April 30, 2020.[23]

New Jersey's Governor specifically ordered that initiative circulators not go door-to-door to collect signatures; instead that they can and should collect signatures electronically. *See* Jonathan D. Salant, *No knocking on doors. Murphy orders political petition signatures be collected electronically*, NJ.COM,

[23] https://www.wwlp.com/news/state-politics/accord-clears-way-for-e-signatures-on-ballot-questions/.

April 29, 2020.[24] Connecticut's Governor on May 11, 2020 issued an executive order reducing signature collection numbers by 30% and allowing circulators to electronically collect signatures. *See* Connecticut Ex. Order No. 7LL, May 11, 2020.[25] Governor Inslee in Washington State stated that in-person signature collection cannot be required because "[g]athering signatures during the COVID-19 pandemic 'runs contrary to recommended public health practices.'" Jim Camden, *Candidates who are broke will get a break when filing to get names on the ballot*, Spokesman Review, May 6, 2020.[26] Everyone, it seems, recognizes the danger posed by in-person signature collection. In their denial of that manifest truth, Ohio's officials and the original Panel in this case stand alone.

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[24] https://www.nj.com/coronavirus/2020/04/no-knocking-on-doors-murphy-orders-political-petition-signatures-be-collected-electronically.html.

[25] https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7LL.pdf.

[26] https://www.spokesman.com/stories/2020/may/06/candidates-who-are-broke-will-get-a-break-when-fil/.

Conclusion

For the foregoing reasons, Plaintiffs-Appellees respectfully request that the full En Banc Court rehear the Panel's Order, and vacate its stay pending appeal.

CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Appellees certify that they have prepared this document in 14-point Century font and that excluding the Caption, Signature Blocks and Certificates, the document includes 4798 words.

s/*Mark R. Brown*
Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Motion was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding.

s/*Mark R. Brown*
Mark R. Brown

Attachment 5

Applicants' Motion For Reconsideration and to Vacate Stay Directed to Original Panel,

May 30, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 20-3526

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,
Plaintiffs - Appellees

v.

RICHARD MICHAEL DEWINE,
in his capacity as the Governor of Ohio;
AMY ACTON, in her official capacity as Director of Ohio Department of Health; **FRANK LAROSE**, in his official capacity as Ohio Secretary of State,
Defendants - Appellants

OHIOANS FOR SECURE AND FAIR ELECTIONS; DARLENE L. ENGLISH; LAURA A. GOLD; ISABEL C. ROBERTSON; EBONY SPEAKES-HALL; PAUL MOKE; ANDRE WASHINGTON; SCOTT A. CAMPBELL; SUSAN ZEIGLER; HASAN KWAME JEFFRIES,
Proposed Intervenors - Appellees

OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL; JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,
Proposed Intervenors - Appellees

On Appeal from the United States District Court for the Southern District of Ohio

PLAINTIFFS-APPELLEES' EMERGENCY MOTION FOR RECONSIDERATION AND TO VACATE STAY IN LIGHT OF INTERVENING SUPREME COURT DECISION

Plaintiffs-Appellees respectfully file this Emergency Motion pursuant to Sixth Circuit Rule 27(c) & (g) seeking reconsideration of the stay pending appeal ordered by this Court on May 26, 2020, *see* Attachment 1, and vacatur of that stay order. Sixth Circuit Rule 27(g) states that "[a] party may file a motion for reconsideration of any other action [that is, other than a "rehearing of a judgment"] of a panel, of a single judge or of the clerk." Pursuant to Sixth Circuit Rule 27(c)(2), which governs emergency motions, Plaintiffs-Appellees attach to this Motion in addition to this Court's stay, *see* Attachment 1, a copy of the "notice of appeal," *see* Attachment 2, and a copy of "the order appealed from," that is the Order of the District Court. *See* Attachment 3. Plaintiffs-Appellees also attach as Attachment 4 the decision of the Supreme Court in *South Bay United Pentecostal Church v. Gavin*, 590 U.S. __, No. 19A1044, at 2 (May 29, 2020), as a document "necessary to decide the motion." *See* Sixth Circuit Rule 27(c)(2).

The Sixth Circuit's Order stayed a preliminary injunction entered by the District Court enjoining Ohio authorities from enforcing their in-person, "wet," witnessed signature collection requirements and July 16, 2020 deadline as applied to the November 3, 2020 general election. The

District Court, like numerous Courts, Governors, and elections officials across the country, had concluded that in-person signature collection was rendered factually impossible and legally questionable by the COVID-19 pandemic and Ohio's mandatory shelter orders implemented beginning on March 22, 2020.

The Sixth Circuit's Order staying the District Court's injunction pending appeal is to be published and reported at __ F.3d __ (2020). It likely spells the death knell for Plaintiff-Appellees' efforts to collect enough signatures by the July 16, 2020 deadline in Ohio in order to have their initiatives timely placed on Ohio's November 3, 2020 general election ballot. It is imperative that the stay, which as explained below is no longer tenable in light of an intervening decision of the Supreme Court of the United States, be immediately lifted.

Introduction

The District Court on May 19, 2020 after full briefing, the filing of stipulated facts, and Respondents' decision to forego an evidentiary hearing, entered a preliminary injunction in Plaintiffs' favor (1) prohibiting enforcement of Ohio's in-person, "wet," witnessed signature

collection requirements, (2) prohibiting enforcement of Ohio's July 16, 2020 deadline for the submission of signatures, and (3) "[d]irect[ing] Defendants to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements 'so as to reduce the burden on ballot access.'" Opinion and Order, R. 44, at PAGEID # 675 (citation omitted). In support of the preliminary injunction, it first concluded that Ohio's purported exception for "First Amendment protected speech" was irrelevant:

> this Court need not determine whether Ohio's Stay-at-Home Orders exempt petition circulation because … the state action challenged here is "Ohio's strict enforcement of its ballot access provisions – in the face of this pandemic" and not the State's Orders. Therefore, it is irrelevant to this Court's analysis whether there is or was an exemption in Ohio's Stay-at-Home Orders. This conclusion is consistent with the holding in *Esshaki*, where the Sixth Circuit held that Michigan's "strict application of the ballot-access provisions is unconstitutional as applied here" due to the "combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders[.]"It is not uncommon for courts to grant relief in the aftermath of natural disasters based on states' continued enforcement of election regulations.

Id. at 653 (citation omitted).

"The issue before this Court," it explained, "is … whether strict enforcement of Ohio's signature requirements, combined with the COVID-19 pandemic and effect of the Stay-at-Home Orders,

unconstitutionally burden Plaintiffs' First Amendment rights as applied here." *Id.* at 653-54.

Applying *Anderson-Burdick* balancing, the Court concluded, "[a]s did the *Esshaki* court, … that in these unique historical circumstances of a global pandemic and the impact of Ohio's Stay-at-Home Orders, the State's strict enforcement of the signature requirements for local initiatives and constitutional amendments severely burden Plaintiffs' First Amendment rights *as applied here*." Id. at 660 (italics original and citation omitted). "Plaintiffs cannot safely and effectively circulate their petitions in person. Ohio does not permit any other forms of signature gathering, including electronic signing. And because Plaintiffs cannot collect signatures in person or electronically, they have no hope of collecting the required number of signatures from the required geographic distribution by the July deadlines." *Id.* at 661.

Weighing the remaining factors and the equities involved, the District Court ruled that this limited relief was necessary:

> The Court also finds that any burden to Defendants will be outweighed by the burden on Plaintiffs and the public of attempting to comply with the signature requirements as enforced against them in these current circumstances. There is no risk that "Ohio's ballot will be cluttered" with unsupported initiatives because the numerical and geographical requirement will not be

> affected by the Court's ruling. Additionally, this Court's decision is limited to these Plaintiffs, in these particular circumstances, for the November 3, 2020 general election only. This order does not apply to other individuals or ballot issues not before this Court. The balance of these factors therefore weighs in favor of an injunction.

Id. at 673. The District Court on May 22, 2020 denied Respondents' motion to stay the injunction pending appeal, 2020 WL 2614447 (S.D. Ohio, May 22, 2020), after Respondents had filed their appeal.

Sixth Circuit's Stay

This Court on May 26, 2020 vacated the District Court's preliminary injunction in a published per curiam opinion. Key to the panel's decision were Ohio's post-litigation circulator exception created on April 30, 2020 and its pre-litigation exception for "First Amendment protected speech" issued on March 22, 2020. Rejecting Plaintiffs-Appellees' argument that this First Amendment exception was literally meaningless since it required a very advanced knowledge of Constitutional Law and an ability to predict future judicial pronouncements, *see*, *e.g.*, Plaintiffs'-Appellees' Opposition to Stay, Doc. No. 21, at Pages 12-13, the Sixth Circuit found it "vitally important" to its conclusion that Plaintiffs-Appellees were not totally excluded from

placing initiatives on ballots, and thus were not severely burdened by Ohio's orders and laws. Sixth Circuit's Order at 7.

Because of Ohio's "First Amendment protected speech" exception, it was not the combination of the pandemic and Ohio's strict in-person signature collection requirement that caused Plaintiffs-Appellees' injury, the Sixth Circuit ruled, it was Plaintiffs-Appellees' own fault: "we cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe." *Id.* at 8. "Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders." *Id.* at 6 (citation omitted). "So none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions." *Id.*

Reasons to Grant Reconsideration and Vacate Stay

When deciding whether to issue the stay in the first instance, the Sixth Circuit was required to balance

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

> irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). *See also Michigan State A. Phillip Randolph Inst. v. Johnson*, 883 F.3d 656, 662 (6th Cir. 2016).

The Sixth Circuit's stay in the present case granted under these factors cannot now survive in light of the Supreme Court's holding in *South Bay United Pentecostal Church v. Gavin*, 590 U.S. __, No. 19A1044, at 2 (May 29, 2020) (C.J., concurring). As explained in greater detail below, that case denied emergency relief to a church that sought a First Amendment exception to California's content-neutral ban on gatherings "limit[ing] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees."

The majority refused the relief because, as explained by the Chief Justice in his concurring opinion, "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *Id.* at 2. "The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable." *Id.* at 3.

The Supreme Court's decision in *South Bay United Pentecostal Church* that it is "quite improbable" that a First Amendment exception will be carved out of a content-neutral limit on gatherings (like California's and Ohio's) during the COVID-19 crisis necessarily means that it could not have been clear -- nor likely even correct -- that Ohio's First Amendment exception encompassed circulation of initiatives. If such an exemption to a content-neutral law will not be recognized for religious speech and practice, which is recognized as a form of viewpoint discrimination under the Speech Clause, *see Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), it is inconceivable that one will be carved out for initiative circulation. This is an a fortiori case.

At bare minimum, Plaintiffs-Appellees could not have reasonably known what the Justices of the Supreme Court do not even know. Because this Court's contrary conclusion was "vitally important" to its decision to issue a stay, that stay must be vacated and reconsidered.

I. Applicants were precluded by Ohio law under threat of criminal punishment from gathering signatures.

It is undisputed that Ohio imposed justified, highly restrictive orders beginning no later than March 22, 2020 and extending until at

least May 29, 2020. People have been and remain limited in where they can go and what they can do. Ohio's physical separation requirement remains in place to this day, and gatherings remain strictly limited. Criminal penalties remain in place. Plaintiffs-Appellees remained model citizens and duly complied with these orders. No official ever informed them that an exception for "First Amendment protected speech" absolutely allowed them to go door-to-door, gather in public, approach others, and collect signatures. No one in Ohio ever imagined door-to-door solicitation was still allowed.

Neither did Defendants. Only on April 30, 2020, three days following Plaintiffs-Appellees' filing of this action, did they decide that their "First Amendment exception" included "circulators." Before then, no such exception existed. Plaintiffs-Appellees, like fellow Ohioans, complied. Plaintiffs-Appellees accordingly lost several weeks' worth of possible in-person signature collection. Ohio recognizes no other kind.

The Sixth Circuit concluded that Defendants' exception for "First Amendment protected speech" was plainly understandable by all to extend to circulators -- even before that was announced on April 30, 2020. According to the Sixth Circuit it insured that Plaintiffs-Appellees

were free to exercise their First Amendment rights in the face of a content-neutral shelter restriction issued during a time of national emergency. Regardless of COVID-19, the Sixth Circuit ruled, Plaintiffs-Appellees possessed a "First Amendment protected" right to ignore the emergency and Ohio's shelter orders. Moreover, this was a "vitally important" distinction that drove the outcome in the case.

The Sixth Circuit's "vitally important" distinction cannot survive the Supreme Court's ruling in *South Bay United Pentecostal Church v. Gavin*, 590 U.S. __, No. 19A1044 (May 29, 2020). That case makes it clear that the "vitally important" lynchpin in the Sixth Circuit's stay decision is incorrect. The stay must accordingly be vacated.

Even before this Court's holding in *South Bay United Pentecostal Church*, the Sixth Circuit's conclusion was untenable. Whether conduct demands First Amendment protection from a content-neutral emergency law (like Ohio's) has always presented a difficult constitutional question. It was and remains no slam dunk either way. There simply is no ready answer. The best one can do is predict what a court will say at the end of a complicated constitutional analysis. Concluding that Plaintiffs-Appellees always could have gathered

signatures, as the Sixth Circuit did, put the constitutional cart in front of the proverbial horse.

Supreme Court Justices even before *South Bay United Pentecostal Church*, often expressed disagreement over First Amendment protections for conduct, especially in the face of content-neutral restrictions and triply so during times of crisis. Justices have many times indicated that whether conduct is constitutionally protected and what protection it receives present "difficult" First Amendment questions. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), to use another example, the Court explained in terms of a ban on "political badge[s], political button[s], or other political insignia … at or about the polling place," *id.* at 1883, that the law failed because it presented "riddles that even the State's top lawyers struggle to solve." *Id.* at 1891. *See also Smith v. Goguen*, 415 U.S. 566, 591-92 (1974) (Rehnquist, J., dissenting) ("The issue of the application of the First Amendment to expressive conduct, or 'symbolic speech,' is undoubtedly a difficult one"); *Morse v. Republican Party*, 517 U.S. 186, 239 (1996) (Breyer, J., concurring) ("First Amendment questions about the extent to which the Federal Government, through

preclearance procedures, can regulate the workings of a political party convention, are difficult ones").

This reality is further demonstrated by this Court's decision in *Buckley*, which extended First Amendment protections to circulators under the circumstances presented; the Chief Justice dissented, Justice Thomas concurred, and Justices O'Connor and Breyer both concurred and dissented in part.

The Sixth Circuit itself recognized this fact just three days before it stayed the preliminary injunction in the present case. In *Ramsek v. Beshear*, No. 20-5542, slip op., at 5 (6th Cir., May 23, 2020), the Court stated that it could not "on this exceptionally short notice ... conclude that [Kentucky's] prohibition on in-person protests would likely fail strict scrutiny."

South Bay United Pentecostal Church's logic applies three-times-over here, where Defendants, who get to decide when their "First Amendment" exception applies under their emergency orders, not only just recently (after this litigation commenced) discovered it includes circulators, but have consistently claimed throughout this litigation that the First Amendment does not apply *at all*. *See*, *e.g.*, Appellants'

Petition for Initial Hearing En Banc, Doc. No. 9, at Page 14 (6th Cir., May 21, 2020). Given this position, from March 22, 2020 until at least April 30, 2020 it was clear that Defendants were not going to recognize initiative circulation as a "First Amendment protected" activity.

II. Ohio's First Amendment exception is unconstitutionally vague.

Even before *South Bay United Pentecostal Church* no Court had ever given effect to vague and standard-less First Amendment exceptions. If they did, after all, States could insulate all of their laws from First Amendment scrutiny by just stating the obvious -- that the law does not override "protected" First Amendment activities. Such a statement means nothing at all since this First Amendment protection already exists as a constant.

Not only does such a holding threaten free speech, moreover, it places religious speech and practices at dire risk. If the Sixth Circuit is correct, then California by the simple expedient of announcing a "First Amendment" exception could have fully insulated all of its laws from Free Speech and Free Exercise challenges. California's successful defense, like Ohio's here, would be that its law did not prohibit the religious practices after all -- thus no foul no harm. Churches would lose

out of the gate, even if they could show the laws were not content-neutral and targeted religion.

No one can know beforehand in the face of a content-neutral health restriction issued during a world crisis like COVID-19 that they would have an iron-clad First Amendment right to ignore the law. The exception here was hopelessly vague from the beginning. The Supreme Court has repeatedly warned against these kinds of traps in the context of First Amendment rights. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning").

No Court has ever concluded that a statutory "First Amendment exception" means enough to insulate a law from First Amendment scrutiny. *See*, *e.g.*, *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Cal. 1993) (stating that a "First Amendment" exception "does not define the concept of 'First Amendment Activities,' nor, indeed, could it define this concept"). The *Rubin* Court, for example, cited *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569, (1987), to "suggest[] the peril in drafting an ordinance which uses the term 'First Amendment Activities' as if the meaning of such a term were self-

evident or easily discernible. More precisely, *Jews for Jesus* suggests that such provisions are inherently vague and unenforceable, and hence unconstitutional." 823 F. Supp. at 712 n.6.

Plaintiffs-Appellees here want to remain safe. They want their families to remain safe. They want their friends to remain safe. They want Ohioans to remain safe. They also do not want to be arrested. What Plaintiffs-Appellees want is to exercise their First Amendment rights in a way that is consistent with the COVID-19 crisis. The Sixth Circuit's conclusion not only makes that impossible, it encourages people to flout content-neutral emergency restrictions like those in Ohio in the name of the First Amendment. It encourages people to take the law into their own hands, which is the last thing this Country needs during this time of crisis. The stay must be vacated.

Conclusion

The Sixth Circuit's stay is now, in light of the Supreme Court's decision in *South Bay United Pentecostal Church v. Gavin*, 590 U.S. __, No. 19A1044, (May 29, 2020), quite questionable. It is common Supreme Court practice to vacate judgments and orders in light of intervening Supreme Court decisions and remand those matters for further

consideration. *See*, *e.g.*, *Aldridge v. Louisiana*, No. 18-8748, 2020 WL 1978920 (U.S., Apr. 27, 2020). Plaintiffs-Appellees respectfully move this Court to do that now in order to free the case for fuller reconsideration in light of the Supreme Court's holding in *South Bay United Pentecostal Church*.

Respectfully submitted,

/s/ Mark R. Brown

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Plaintiffs-Appellees certify that they have prepared this document in 14-point Century font and that excluding the Caption, Signature Blocks and Certificates, the document includes 2986 words.

s/*Mark R. Brown*
Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Motion was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding.

s/*Mark R. Brown*
Mark R. Brown

Attachment 1

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0162p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellees,

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; AMY ACTON, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE, in his official capacity as Ohio Secretary of State,

Defendants-Appellants,

OHIOANS FOR SECURE AND FAIR ELECTIONS; DARLENE L. ENGLISH; LAURA A. GOLD; ISABEL C. ROBERTSON; EBONY SPEAKES-HALL; PAUL MOKE; ANDRE WASHINGTON; SCOTT A. CAMPBELL; SUSAN ZEIGLER; HASAN KWAME JEFFRIES; OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL; JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,

Intervenors-Appellees.

No. 20-3526

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:20-cv-02129—Edmund A. Sargus, Jr., District Judge.

Decided and Filed: May 26, 2020

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

COUNSEL

ON MOTION: Benjamin M. Flowers, Michael J. Hendershot, Stephen P. Carney, Shams H. Hirji, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants. **ON RESPONSE:** Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus,

Ohio, for Plaintiffs-Appellees. Donald J. McTigue, Derek Clinger, MCTIGUE & COLOMBO LLC, Columbus, Ohio, for Intervenors-Appellees.

ORDER

PER CURIAM. By all accounts, Ohio's public officials have admirably managed the problems presented by the unprecedented COVID-19 pandemic. This includes restricting Ohioans' daily lives to slow the spread of a highly infectious disease. Nearly every other state and the federal government have done the same. And these are the types of actions and judgments that elected officials are supposed to take and make in times of crisis. But these restrictions have not gone unchallenged. *See, e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020). Our Constitution, of course, governs during both good and challenging times. Unlike those cases, however, the Plaintiffs and Intervenors here do not challenge the State's restrictions per se. Rather, they allege that COVID-19 and the State's stay-at-home orders have made it impossibly difficult for them to meet the State's preexisting requirements for initiatives to secure a place on the November ballot—violating their First Amendment rights. So they challenge Ohio's application of its general election and ballot-initiative laws to them.

Ohio's officials have not been unbending in their administration of the State's election laws. Indeed, they postponed the Ohio primary election, originally scheduled during the height of the pandemic. That exercise of judgment is not before us. Rather, Plaintiffs challenge the Ohio officials' decision not to further modify state election law in the context of this case. The district court agreed with Plaintiffs and granted a preliminary injunction, finding that, as applied, certain provisions of the Ohio Constitution and Ohio Code violate the First Amendment. Defendants now ask for a stay of that injunction to preserve the status quo pending appeal.

The people of Ohio vested their sovereign legislative power in the General Assembly. Ohio Const. art. II, § 1. But they also retained the power to amend the State Constitution, enact laws, and enact municipal ordinances by initiative and referendum. *Id.* art. II, §§ 1a, 1b, 1f. The Ohio Constitution and the Ohio Code establish the process for proposing an initiative to the

State's electors and impose many requirements for ballot access. Relevant here, a petition to put an initiative before Ohio's electors for referendum must include signatures from ten percent of the applicable jurisdiction's electors that voted in the last gubernatorial election, each signature must "be written in ink," and the initiative's circulator must witness each signature. *Id.* art. II, § 1g; *see id*. art. II, § 1a; Ohio Rev. Code Ann. § 731.28. And the initiative's proponents must submit these signatures to the Secretary of State 125 days before the election for a constitutional amendment and 110 days before the election for a municipal ordinance. Ohio Const. art. II, § 1a; Ohio Rev. Code Ann. § 731.28.

Given the COVID-19 pandemic, three individuals and two organizations, who are obtaining signatures in support of initiatives to amend the Ohio Constitution and propose municipal ordinances, challenged these requirements, as-applied to them. They claim Ohio's ballot-initiative requirements violate their First and Fourteenth Amendment rights and moved to enjoin the State from enforcing these requirements against them. The district court granted their motion in part, enjoining enforcement of the ink signature requirement, the witness requirement, and the submission deadlines, and denied their motion in part, upholding the number of signatures requirement. The court also directed Defendants to "update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements so as to reduce the burden on ballot access" as well as ordered them to "accept electronically-signed and witnessed petitions from [the organizational plaintiffs] collected through the on-line signature collection plans set forth in their briefing" and to "accept petitions from [the organizational plaintiffs] that are submitted to the Secretary of State by July 31, 2020[.]"[1] (R. 44, Op. & Order at PageID # 675–76.) And the court ordered Defendants and the organizational plaintiffs to "meet and confer regarding any technical or security issues to the on-line signature collection plans" and "submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020." (*Id*.) Defendants now move for an administrative stay and for a stay pending appeal.

[1]The district court chose this date because it is also the deadline for petition proponents to submit additional signatures if the Secretary of State determines that the original submissions were insufficient. (R. 50, Op. & Order at PageID # 718.) The Secretary of State would then have less than a month, until August 30, to determine whether the petitions satisfy the requirements for ballot access, Plaintiffs would need to file any legal challenge to the Secretary of State's determination by September 9, the Secretary of State would have to certify the form of official ballots by September 14, and the Supreme Court would have to rule on any challenge by September 19. (*Id.*)

"[I]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions" are immediately appealable. 28 U.S.C. § 1292(a)(1). And the district court has already denied Defendants' motion for a stay pending appeal in that court. So we have jurisdiction and Defendants' motion is ripe for our review.

A movant must establish four factors to obtain a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When evaluating these factors for an alleged constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) ("In First Amendment cases, however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action." (internal quotation marks and alteration omitted)). So we turn first to that.

I.

"[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution[.]" *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("[I]nitiatives and referenda . . . are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action."). As Defendants concede, our precedent dictates that we evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework.[2] *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019);

[2]Defendants contend that *Anderson-Burdick* shouldn't apply to ballot initiative requirements because restrictions on the people's legislative powers (rather than political speech or voting) don't implicate the First Amendment. At least two other Courts of Appeals have held as much. *See Initiative & Referendum Inst. v. Walker*,

Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members & Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 885 F.3d 443, 448 (6th Cir. 2018). First, we determine the burden the State's regulation imposes on the plaintiffs' First Amendment rights. When States impose "reasonable nondiscriminatory restrictions[,]" courts apply rational basis review and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, (1983)). But when States impose severe restrictions, such as exclusion or virtual exclusion from the ballot, strict scrutiny applies. *Id.* at 434; *Schmitt*, 933 F.3d at 639 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot."). For cases between these extremes, we weigh the burden imposed by the State's regulation against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

We have regularly upheld ballot access regulations like those at issue. *See Schmitt*, 933 F.3d at 641–42 (upholding Ohio's provision of only mandamus review for challenges to a Board of Elections' ruling over compliance with ballot initiative requirements against a First Amendment challenge); *Ohio Ballot Bd.*, 885 F.3d at 448 (upholding Ohio's single-subject requirement for ballot initiatives against a First Amendment challenge); *Taxpayers United*, 994 F.2d at 296–97 (upholding Michigan's number-of-signatures requirement for ballot initiatives against a First Amendment challenge). But these are not normal times. So the question is whether the COVID-19 pandemic and Ohio's stay-at-home orders increased the burden that Ohio's ballot-initiative regulations place on Plaintiffs' First Amendment rights.

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450 F.3d 1082, 1099–100 (10th Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002). And this court has often questioned whether *Anderson-Burdick* applies to anything besides generally applicable restrictions on the right to vote. *Daunt v. Benson*, 956 F.3d 396, 423–24 (6th Cir. 2020) (Readler, J., concurring) (acknowledging that "*Anderson-Burdick* is a poor vehicle" for evaluating First Amendment challenges to public service qualification regulations; *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020) (recognizing that applying *Anderson-Burdick* to Equal Protection claims "takes some legal gymnastics"); *Schmitt*, 933 F.3d at 644 (Bush, J., concurring in part) ("[T]he Court's precedents in *Anderson* and *Burdick*, though concerning election regulation, similarly do not address the key question raised in this case: is the First Amendment impinged upon by statutes regulating the election mechanics concerning initiative petitions?" (citation omitted)). But until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this.

We must answer this question from the perspective of the people and organizations affected by Ohio's ballot initiative restrictions and considering all opportunities these parties had to exercise their rights. *Mays*, 951 F.3d at 785–86.

The district court held that Ohio's strict enforcement of its ballot initiative regulations imposed a severe burden on Plaintiffs' First Amendment rights, given the pandemic. Not so. The district court based its order, in part, on this court's recent order in *Esshaki v. Whitmer*, --- F. App'x ----, 2020 WL 2185553 (6th Cir. May 5, 2020). But there are several key differences between this case and *Esshaki*. At bottom, a severe burden excludes or virtually excludes electors or initiatives from the ballot. *See Mays*, 951 F.3d at 786; *Schmitt*, 933 F.3d at 639. But Ohio law doesn't do that.

In *Esshaki* we held that "the *combination* of [Michigan's] strict enforcement of [its] ballot-access provisions and [its] Stay-at-Home Orders imposed a severe burden on the plaintiff's ballot access[,]" 2020 WL 2185553, at *1 (emphasis added). In other words, Michigan still required candidates seeking ballot access by petition to procure the same number of physical signatures as a non-pandemic year, "without exception for or consideration of the COVID-19 pandemic or the Stay-at-Home Orders." *Id*. What's more, Michigan's stay-at-home orders remained in place through the deadline for petition submission. *Id*. So Michigan abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures that they had gathered to that point.

On the other hand, Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders. From the first Department of Health Order issued on March 12, Ohio made clear that its stay-at-home restrictions did not apply to "gatherings for the purpose of the expression of First Amendment protected speech[.]" Ohio Dep't of Health, Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio ¶ 7 (March 12, 2020). And in its April 30 order, the State declared that its stay-at-home restrictions did not apply to "petition or referendum circulators[.]" Ohio Dep't of Health, Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order ¶ 4 (April 30, 2020). So none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions.

Unlike the Ohio orders, the Michigan executive orders in *Esshaki* did not specifically exempt First Amendment protected activity. To be sure, executive officials in Michigan informally indicated that they would not enforce those orders against those engaged in protected activity. *See* Mich. Dep't of Health & Human Servs., Executive Order 2020-42 FAQs (Apr. 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html. Of course, that promise is not the same as putting the restriction in the order itself. *Cf. Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (We "must presume that [the] legislature says in a statute what it means and means in a statute what is says there."); *Sosna v. Iowa*, 419 U.S. 393, 399–400 (1975) (noting, in the context of the capable of repetition yet evading review exception to mootness, that just because a state official says they won't enforce a statute against a party now doesn't mean they won't exercise their discretion to enforce the statute at a later time). But in any event, we did not address the significance of exemptions in *Esshaki* at all. By contrast, we believe that Ohio's express exemption (especially for "petition or referendum circulators" specifically) is vitally important here.

What's more, Ohio is beginning to lift their stay-at-home restrictions. On May 20, the Ohio Department of Health rescinded its stay-at-home order. Ohio Dep't of Health, Director's Order that Rescinds and Modifies Portions of the Stay Safe Ohio Order (May 20, 2020). We found a severe burden in *Esshaki* because Michigan's stay-at-home order remained in effect through the deadline to submit ballot-access petitions. Considering all opportunities Plaintiffs had, and still have, to exercise their rights in our calculation of the burden imposed by the State's regulations, *see Mays*, 951 F.3d at 785–86, Plaintiffs' burden is less than severe. Even if Ohio's stay-at-home order had applied to Plaintiffs, the five-week period from Ohio's rescinding of its order until the deadline to submit an initiative petition undermines Plaintiffs' argument that the State has excluded them from the ballot.

Plaintiffs' claim effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds) as they would without the pandemic. But that's not necessarily true. There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them and bring the petitions to the

electors' homes to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.

Moreover, just because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot. And we must remember, First Amendment violations require state action. U.S. Const. amend. I ("*Congress* shall make no law . . . ." (emphasis added)); 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, *of any State* . . . ." (emphasis added)). So we cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe. *See Schmitt*, 933 F.3d at 639.

Despite the pandemic, we believe that the more apt comparison is to our burden analysis in *Schmitt*. The plaintiffs there made a First Amendment challenge to Ohio's restriction of judicial review for board of elections ballot decisions to petitions for a writ of mandamus. And we held that the burden was intermediate because there are some costs associated with obtaining legal counsel and seeking mandamus review. *Id*. at 641. So this prevents some proponents from seeking judicial review of the board's exclusion of their initiative and constitutes more than a de minimis limit on access to the ballot. *Id. Schmitt* concluded that a burden is minimal when it "in no way" limits access to the ballot.[3] *Id*. (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 577 (6th Cir. 2016)). Thus, the burden in *Schmitt* had to be intermediate. Same here. Requiring Plaintiffs to secure hundreds of thousands of signatures

[3]To be sure, this statement arguably conflicts with other articulations of what constitutes a minimal burden. *See Burdick*, 504 U.S. at 434–39 (because Hawaii's election laws were reasonable and nondiscriminatory they imposed a minimal burden on the plaintiff's First Amendment rights, even though they prevented the plaintiff from casting a vote for his preferred candidate); *Daunt*, 956 F.3d at 408 (classifying regulations that are "generally applicable [and] nondiscriminatory" as imposing a minimal burden); *Taxpayers United*, 994 F.2d at 297 (finding Michigan's ballot initiative regulations minimally burdensome because they were "content-neutral, nondiscriminatory regulations that [were] reasonably related to the purpose of administering an honest and fair initiative procedure."). Indeed, it's hard not to conclude that the signature requirements in *Taxpayers United* necessarily limited ballot access. And in *Burdick*, the Supreme Court remarked that all "[e]lection laws will invariably impose some burden on individual voters." 504 U.S. at 433. But the State doesn't argue that its ballot initiative regulations impose only a minimal burden. And because those regulations satisfy intermediate scrutiny, they would survive under the framework for regulations that impose a minimal burden. So we proceed under the intermediate burden analysis discussed in *Schmitt*. 933 F.3d at 641.

in support of their initiative is a burden. That said, Ohio requires the same from Plaintiffs now as it does during non-pandemic times. So the burden here is not severe.

Whether this intermediate burden on Plaintiffs' First Amendment rights passes constitutional muster depends on whether the State has legitimate interests to impose the burden that outweigh it. *See Burdick*, 504 U.S. at 434. Here they offer two.[4] Defendants claim the witness and ink requirements help prevent fraud by ensuring that the signatures are authentic. And the deadlines allow them time to verify signatures in an orderly and fair fashion, while also providing initiative proponents time to challenge any adverse decision in court.

These interests are not only legitimate, they are compelling. *John Doe No. 1*, 561 U.S. at 186 ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008) ("[E]liminating election fraud is certainly a compelling state interest[.]"); *Austin*, 994 F.2d at 297 ("[S]tate[s] ha[ve] a strong interest in ensuring that its elections are run fairly and honestly," as well as "in maintaining the integrity of its initiative process." (internal quotation marks omitted)). The district court faulted Defendants for not narrowly tailoring their regulations. But *Anderson-Burdick*'s intermediate scrutiny doesn't require narrow tailoring. Because the State's compelling and well-established interests in administering its ballot initiative regulations outweigh the intermediate burden those regulations place on Plaintiffs, Defendants are likely to prevail on the merits.

II.

Unless the statute is unconstitutional, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Defendants have shown they are likely to prevail on the merits. Serious and irreparable harm will thus result if Ohio cannot conduct its

[4]Defendants also claim a third state interest: ensuring that each initiative on the ballot has a threshold amount of support to justify taking up space on the ballot. This interest is more appropriately related to Ohio's number of signatures requirement. *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012) (A State may legitimately "avoid[ ] overcrowded ballots" and "protect the integrity of its political processes from frivolous or fraudulent candidacies."). But the district court did not enjoin the State's enforcement of that regulation so it's not properly before us in this motion for a stay pending appeal.

election in accordance with its lawfully enacted ballot-access regulations. Comparatively, Plaintiffs have not shown that complying with a law we find is likely constitutional will harm them. So the balance of the equities favors Defendants. Finally, giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006). With all four factors favoring Defendants, we grant their motion for a stay pending appeal.

III.

Last, even though we grant Defendants' motion for a stay pending appeal, we note that the district court exceeded its authority by rewriting Ohio law with its injunction. Despite relying heavily on *Esshaki*, the district court failed to apply its primary holding: "federal courts have no authority to dictate to the States precisely how they should conduct their elections." ---F. App'x ----, 2020 WL 218553 at *2. In *Esshaki* we granted a stay for the affirmative portion of the district court's injunction that (1) reduced the number of signatures required to appear on the ballot, (2) extended the filing deadline, and (3) ordered the State to permit the collection of signatures by electronic mail. While it may not have done the first of these, the court below did the second and third. The district court extended the filing deadline by almost a month, to July 31, and ordered Defendants to accept petitions electronically signed, under the plan Plaintiffs drafted.

Federal courts can enter positive injunctions that require parties to comply with existing law. But they cannot "usurp[] a State's legislative authority by re-writing its statutes" to create new law. *Id*. The district court read this holding too narrowly; recognizing it could not modify the Ohio Code but remained free to amend the Ohio Constitution. Instead of simply invalidating Ohio's initiative deadline and signature requirement, the district court chose a new deadline and prescribed the form of signature the State must accept. The Ohio Constitution requires elector approval for all amendments. Ohio Const. art. II, § 1a; *id.* art. XVI, §§ 1, 2. By unilaterally modifying the Ohio Constitution's ballot initiative regulations, the district court usurped this authority from Ohio electors.

The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections. And because that's where the decision-making authority is, federal courts don't lightly tamper with election regulations. These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into unchartered waters. It may well be that the new methods for gathering signatures and verifying them proposed by Plaintiffs (using electronic signatures gathered online by third parties and identified by social security number) will prove workable. But they may also pose serious security concerns and other, as yet unrealized, problems. So the decision to drastically alter Ohio's election procedures must rest with the Ohio Secretary of State and other elected officials, not the courts.

One final point, rewriting a state's election procedures or moving deadlines rarely ends with one court order. Moving one piece on the game board invariably leads to additional moves. This is exactly why we must heed the Supreme Court's warning that federal courts are not supposed to change state election rules as elections approach. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). Here, the November election itself may be months away but important, interim deadlines that affect Plaintiffs, other ballot initiative proponents, and the State are imminent. And moving or changing a deadline or procedure now will have inevitable, other consequences.

There is no doubt that the COVID-19 pandemic and Ohio's responsive restrictions to halt the spread of that disease have made it difficult for all Ohioans to carry on with their lives. But for the most part we are letting our elected officials, with input from public health experts, decide when and how to apply those restrictions. The election context is no different. And while the Constitution provides a backstop, as it must—we are unwilling to conclude that the State is infringing upon Plaintiffs' First Amendment rights in this particular case.

For these reasons, we **GRANT** Defendants' motion for a stay pending appeal and **DISMISS AS MOOT** their motion for an administrative stay.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Attachment 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

CHAD THOMPSON, et al,	:	
	:	
Plaintiffs,	:	**Case No. 2:20-cv-2129**
	:	
v.	:	**JUDGE SARGUS**
	:	**MAG. JUDGE VASCURA**
GOVERNOR OF OHIO MIKE DEWINE, et al,	:	
	:	
Defendants.	:	

DEFENDANTS' NOTICE OF APPEAL

Defendants Governor Richard "Mike" DeWine, Ohio Department of Health Director Amy Acton, and Ohio Secretary of State Frank LaRose in the above-captioned action hereby give notice of their appeal to the United States Court of Appeals for the Sixth Circuit from the Opinion and Order [Doc. 44] entered by the Court on May 19, 2020.

This appeal is taken under 28 U.S.C. § 1292.

Respectfully submitted this 20th day of May, 2020.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Julie M. Pfeiffer
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2020, the foregoing was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Julie M. Pfeiffer
JULIE M. PFEIFFER (0069762)
Assistant Attorney General

Attachment 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHAD THOMPSON, et al.,

Plaintiffs,

v.

CASE No. 2:20-CV-2129
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsea M. Vascura

GOVERNOR OF OHIO MICHAEL DEWINE, et al.,

Defendants.

OPINION AND ORDER

The instant matter is before the Court for consideration of three Applications for a Temporary Restraining Order and/or three Motions for Preliminary Injunction filed by each of the groups of Plaintiffs in this matter. (ECF Nos. 4, 15, 17-2.) The Court held several telephone conferences with the parties, who unanimously indicated that they did not need an evidentiary hearing, instead requesting that the Court rely on their agreed stipulated facts, their non-contested affidavits, and their briefing. Defendants filed their Memorandum in Opposition (ECF No. 40) and Plaintiffs filed their Replies (ECF Nos. 41, 42, 43). For the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motions.

I.

Plaintiffs Chad Thompson, William Schmitt and Don Keeney ("Thompson Plaintiffs"), Plaintiff-Intervenor Ohioans for Safe and Secure Elections and their supporters ("OFSE Plaintiffs"), and Plaintiff-Intervenor Ohioans for Raising the Wage and their supporters ("OFRW Plaintiffs") (together "Plaintiffs"), seek to place proposed local initiatives and constitutional amendments on the November 3, 2020 general election ballot.

The Ohio Constitution provides state electors the right to amend the Ohio Constitution and legislate through initiative and referendum. The Ohio Constitution and various statutes set forth a number of formal requirements for qualifying on the ballot, including a total number of signatures required, a geographic distribution of signers, requirements that petitions must be signed in ink, must be witnessed by the petition circulator, and may not be made by proxy, together with deadlines for submission to the Secretary of State or local officials.

While Plaintiffs were advancing their petitions for the November 3, 2020 general election, the world was stunned by the advent of Coronavirus Disease ("COVID-19"), a highly contagious respiratory virus. The virus has spread throughout the world like wildfire quickly rising to the level of a global pandemic that has posed a significant threat to the safety of all people. In an effort to respond rapidly to this threat, Ohio Governor Mike DeWine, in Executive Order 2020-01D, authorized Ohio Department of Health Director Amy Acton, M.D., to formulate general treatment guidelines to curtail the spread of COVID-19 in Ohio. In accordance with Governor DeWine's Executive Order, Dr. Acton issued several Director's Orders, one of which required all individuals living in Ohio to stay home beginning March 22, 2020 subject to certain exceptions.

According to Plaintiffs, Ohio's enforcement of several signature requirements in light of the ongoing COVID-19 pandemic and Ohio's responding Stay-at-Home orders, make it impossible to qualify their constitutional amendments and initiatives for the November ballot. Plaintiffs Thompson, Schmitt, and Keeley seek an order directing Defendants to either place their marijuana decriminalization initiatives on local ballots, or in the alternative, to enjoin or modify the requirements for qualifying initiatives for the November ballot in light of the public health emergency caused by COVID-19 and Ohio's emergency orders that were issued in response. OFSE and OFRW and their supporters similarly seek orders placing their proposed constitutional

amendments on the November ballot or modification of the requirements for qualifying their proposal amendments for the ballot.

Although Plaintiffs seek place to place different local initiatives and constitutional amendments on the November ballot, the key issue is the same: whether Ohio's strict enforcement of its requirements for placing local initiatives and constitutional amendments on the ballot unconstitutionally burden Plaintiffs' First Amendment rights in light of the ongoing pandemic and Ohio's emergency orders.

II.

A. Ohio's Initiative Procedure

An initiative is a method of direct democracy whereby the people enact laws or adopt constitutional amendments without reliance upon the legislature. *See generally Pfeifer v. Graves*, 88 Ohio St. 473 (1913). The Ohio Constitution reserves to Ohioans the right to engage in direct democracy through the advancement of initiative petitions. Ohio Const., Art. II, § 1a & 1f. The Ohio Constitution empowers Ohioans to advances initiative petitions for local ordinances and measures as well as for constitutional amendments.

1. Initiative Procedure for Constitutional Amendments

Article II, § 1 of the Ohio Constitution empowers Ohioans to "propose amendments to the constitution and to adopt or reject the same at the polls" independent of the Ohio legislature. Ohio Const., Art. II, § 1. Ohio Revised Code § 3519.01 requires anyone who seeks to propose an Ohio constitutional amendment via initiative petition to submit a summary of the amendment along with the signatures of one thousand qualified electors to the attorney general for certification. If the attorney general determines that the summary is fair and truthful within ten days of receiving the initiative petition, then the attorney general must send the initiative petition to the Ohio Ballot

Board. Ohio Rev. Code § 3519.01(A). Within ten days of receiving the proposed amendment, the Board must determine whether the it contains only one proposed law or amendment. Ohio Rev. Code § 3505.062(A).

If both the attorney general and the Board certify the petition, then the attorney general is directed to file with the secretary of state "a verified copy of the proposed law or constitutional amendment together with its summary and the attorney general's certification." Ohio Rev. Code § 3505.062(A) & § 3519.01. Once this process is complete, the Ohio law permits the proponents of the constitutional amendment to acquire signatures to support its placement on the ballot. *Id.*

The Ohio Constitution requires an initiative petition for a proposed constitutional amendment to be signed by ten percent of the electors of the state who voted in the last gubernatorial election. Ohio Const. Art. II, § 1a; Ohio Rev Code § 3519.14 (Secretary of State shall not accept any petition which does not purport to contain the minimum number of signatures). The petitions must contain valid signatures from at least 44 of Ohio's 88 counties, in an amount equal to at least five percent of the total votes cast in the last gubernatorial election in those 44 counties. Ohio Const. Art. II, § 1a; Ohio Rev. Code § 3519.14.

In addition, the "[t]he names of all signers to such petitions shall be written in ink" and the petition initiative must include a "statement of the circulator, as may be required by law, that he witnessed the affixing of every signature" Ohio Const. Art. II, § 1g; *see* Ohio Rev. Code § 3501.38(B). "No person shall write any name other than the person's own . . . [and] no person may authorize another to sign for the petition," Ohio Rev. Code § 3501.38; Ohio Const. Art. II § 1g.

The proponents of the amendment must file their petitions with the Secretary of State no later than 125 days before the general election to qualify for the ballot. Ohio Const. Art. II, § 1a.

"This year, in order to qualify for the November general-election ballot, the petitioners must submit their petitions on or before July 1, 2020." *State ex rel. Ohioans for Secure & Fair Elections*, 2020-Ohio-1459, *P5 (Ohio 2020). The proponents must file the completed petitions and signatures in searchable electronic form with a summary of the number of part petitions per county and the number of signatures, along with an index of the electronic copy of the petition. Ohio Rev. Code § 3519.16(B). After a petition is filed with the Secretary of State, various deadlines are triggered for the Secretary of State to determine the sufficiency of the signatures, for supplemental signatures to be collected, and for challenges to petitions and signatures to be filed in the Ohio Supreme Court.

2. Initiative Procedure for Local Ordinances and Measures

Article II, §1f of the Ohio Constitution reserves the use of referendum and initiative powers to the citizens of a municipality for questions on which a municipality is "authorized by law to control by legislative action." Ohio Const., Art. II, § 1f.

Ohio Revised Code § 731.28 outlines generally the procedure by which municipal initiative petitions are to be submitted, verified, and certified to the board of elections for placement on the ballot. The statute states that, "[o]rdinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation by the general assembly may be proposed by initiative petition." *Id*. Such petitions must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation." *Id*.

Ohio law requires the proponents of local initiative petitions to file "a certified copy of the proposed ordinance or measure with the city auditor or the village clerk" prior to its circulation. Ohio Rev. Code § 731.32. After the initial filing of the proposed ordinance with the city auditor

or village clerk, circulators of initiative petitions may begin to collect signatures by circulating "'a full and correct copy of the title and text of the proposed ordinance or other measure." Ohio Rev. Code § 731.31.

Ohio Revised Code § 731.31, which contains requirements for the presentation of municipal initiative and referendum petitions, provides that these petitions "shall be governed in all other respects by the rules set forth in section 3501.38 of the Revised Code." A signer "must be an elector of the municipal corporation in which the election, upon the ordinance or measure proposed by such initiative petition, or the ordinance or measure referred to by such referendum petition, is to be held." Ohio Rev. Code § 3501.38(B). Moreover, the signatures must be "affixed in ink" and accompanied by information that can be used to identify the signer. *Id.*

The circulator of an initiative petition must "sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code." Ohio Rev. Code § 3501.38(E)(1).

Pursuant to Ohio Revised Code § 731.28, 10 days after a petition containing the required number of signatures is filed, the auditor or clerk transmits the petition and a certified copy of the proposed issues to the board of elections to determine the number of valid signatures. *Id*. The board of elections then certifies the number of signatures and returns the petition to the auditor or clerk within 10 days after receiving it. *Id*. The auditor or clerk "then certifies to the board the validity and sufficiency of the petition and the board submits the petition to the electors at the next election occurring 90 days after the auditor's certification." *Id*.

B. The Parties

Thompson Plaintiffs are proponents of initiative petitions that would enact local legislation. Plaintiffs-Intervenors are proponents of two separate constitutional amendments. Although they have achieved differing levels of progress in this regard, Plaintiffs all began their attempts to comply with Ohio's initiative procedures before the pandemic.

1. Thompson Plaintiffs

Plaintiffs Chad Thompson, William Schmitt and Don Keeney are registered voters in the State of Ohio who regularly circulate initiative petitions they seek to be placed on local election ballots throughout Ohio. (Stip. Facts ¶ 1.) Thompson Plaintiffs routinely and regularly circulate in Ohio proposed initiatives in cities and villages that seek to amend local ordinances and laws that criminalize and/or penalize marijuana possession. For example, a local ballot initiative was filed in Windham, Ohio in August of 2018, that was put to that Villages voters on November 6, 2018, and passed. (Stip. Facts ¶ 2.)

Plaintiffs' proposed marijuana initiatives they intend to be filed, but have not yet been, for inclusion on the November 3, 2020 general election ballot with the appropriate officials in McArthur, Ohio, Rutland, Ohio, Zanesville, Ohio, New Lexington, Ohio, Baltimore, Ohio, Syracuse, Ohio, Adena, Ohio, Cadiz, Ohio and Chagrin Falls, Ohio. (Stip. Facts ¶ 3.) On or before February 27, 2020, Plaintiffs filed proposed marijuana initiatives with local officials in Jacksonville, Ohio, Trimble, Ohio, Glouster, Ohio, Maumee, Ohio, and Akron, Ohio, in order to begin collecting the signatures needed to have those proposed measures placed on the November 3, 2020 general election ballot. (Stip. Facts ¶ 4, Exhs. 2-6.) Plaintiffs, in the present case, must gather signatures from a number of voters equal to percent of the total gubernatorial vote in the city or village where they seek to include an initiative and submit these signatures to the city

auditor or village clerk no later than approximately July 16, 2020 in order to have that initiative included on the cities' and villages' November 3, 2020 election ballots. (Stip. Facts ¶ 13.)

2. Ohioans for Safe and Secure Election Plaintiffs

Plaintiff-Intervenor Ohioans for Safe and Secure Elections ("OSFE") is a political action committee seeking through Ohio's initiative process to place a constitutional amendment on the November 3, 2020 ballot concerning the voting rights of Ohioans and Ohio election procedure. (*See* OFSE Compl., ¶¶ 1, 19, ECF No. 14.) Plaintiffs-Intervenors Darlene L. English, Laura A. Gold, Hasan Kwame Jeffries, Isabel C. Robertson, and Ebony-Speaks Hall are residents and electors of the State of Ohio and are members of the OFSE, and Plaintiffs-Intervenors Susan Zeigler, Scott Campbell, Paul Moke, and Andrew Washington seek to sign and/or circulate petitions to place OFSE's proposed amendment on the ballot. (Compl. at ¶¶ 9-13, ECF No. 14.) Beginning in January 2020, OFSE collected more than 2,000 signatures from eligible Ohio signers in support of its proposed amendment, which was certified by the Ohio Attorney General on February 20, 2020. (Compl. at ¶¶ 21-25, ECF No. 14.) On April 23, 2020, the Ohio Ballot Board certified the OSFE's proposed amendment. (*Id.* at ¶ 27.) OFSE has contracted with a petition circulation firm, Advanced Microtargeting ("AMT") to assist in circulating its proposed amendment and has spent over $500,000 on its campaign. (*Id.* at ¶¶ 19-20.)

3. Ohioans for Raising the Wage Plaintiffs

Likewise, Plaintiff-Intervenor Ohioans for Raising the Wage ("OFRW") is a ballot issue committee operating in the State of Ohio, and Plaintiffs-Intervenors Anthony A. Caldwell, James E. Hayes, David G. Latanick, and Pierrette M. Talley are the members of the committee. (Compl. at ¶¶ 6-7, ECF No. 17-1.) ORFW Intervenors seek to amend the Ohio constitution through the proposal of an initiative petition that would raise Ohio's minimum wage incrementally from its

current rate to $13.00 over the span of several years beginning on January 1, 2021 and ending on January 1, 2025. (Compl. at ¶ 12, ECF No. 17-1.) On October 12, 2019, OFRW Intervenors started circulating an initiative petition containing a summary and text of the proposed amendment. (*Id.* at ¶ 13.) OFRW filed the summary petition along with 1,898 signatures with the attorney general on January 17, 2020, and the attorney general certified that the summary of the proposed amendment was fair and truthful on January 27, 2020. (*Id.* at ¶ 15.) Thereafter, the Ohio Ballot Board certified the proposed amendment on February 5, 2020. (*Id.* at ¶ 16.) Two weeks later, on February 17, 2020, OFRW contracted with a petition circulation firm, FieldWorks, to acquire signatures in support of the amendment's placement on the November 3, 2020 election. (*Id.* at ¶ 17.) With the assistance of FieldWorks and volunteer supporters, OFRW began to circulate the final version of its amendment on February 28, 2020. (*Id.* at ¶ 18-20.)

4. Defendants

Defendants are Ohio Governor DeWine, Director of the Ohio Department of Health Dr. Acton and Ohio Secretary of State LaRose. (Stip. Facts ¶¶ 9-11.) Following the outbreak of COVID-19, Governor DeWine issued various orders directed towards protecting Ohio's citizens from its spread. (Stip. Facts ¶ 9.) Likewise, Ohio Department of Health Director Dr. Amy Acton issued various health orders to protect Ohio citizens from the COVID-19 pandemic. (Stip. Facts ¶ 10.) Ohio Secretary of State Frank LaRose is vested by Ohio law with the authority to enforce Ohio's election laws and to direct that local elections boards comply with Ohio law, the Constitution of the United States, and his own directives and advisories. (Stip. Facts ¶ 11.) At all relevant times Defendants in this action were and are engaged in state action and were and are acting under color of Ohio law. (Stip. Facts ¶ 12.)

C. COVID-19 and Ohio's Response

On January 30, 2020, the World Health Organization ("WHO") declared the outbreak of COVID-19 a public health emergency of international concern. (Stip. Facts ¶ 14.) On January 31, 2020, the President of the United States suspended entry into the United States of foreign nationals who had traveled to China. (Stip. Facts ¶ 15.).

On January 30, 2020, the Director of the National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention ("CDC") announced that COVID-19 had spread to the United States. (Stip. Facts ¶ 16.) On March 3, 2020, Governor DeWine announced that the Arnold Sports Festival, a large gathering of athletes and spectators in downtown Columbus, Ohio, was closed to spectators. (Stip. Facts ¶ 17.)

On March 9, 2020, Governor DeWine declared a state of emergency in Ohio. (Stip. Facts ¶ 18.) On March 13, 2020, the Columbus Metropolitan Library closed its branches. (Stip. Facts ¶ 19.) Parades and events were canceled throughout Central Ohio at this same time, including the Columbus International Auto Show in Columbus, Ohio, and St. Patrick's Day parades in Columbus and Dublin. (Stip. Facts ¶ 20.)

On March 13, 2020, the President of the United States declared a national emergency retroactive to March 1, 2020. (Stip. Facts ¶ 21.) On March 9, 2020, the Ohio State University suspended classes. (Stip. Facts ¶ 22.)

On March 12, 2020, Governor DeWine and the Dr. Acton ordered mandatory emergency closings throughout Ohio. (Stip. Facts ¶ 23.)[1] On March 12, 2020, Governor DeWine ordered all

[1] Governor DeWine has issued several executive orders in response to the outbreak of COVID-19. The orders focus mainly on granting Ohio's various government agencies the ability to adopt emergency rules and amendments to Ohio's administrative code. Yet, others such as Executive Order 2020-01D (Mar. 9, 2020) require the Ohio Department of Health to formulate general treatment guidelines to curtail the spread of COVID-19.

private and public schools, grades K through 12, closed beginning at the conclusion of the school day on Monday, March 16, 2020. (Stip. Facts ¶ 24.)

On March 12, 2020, the Ohio Department of Health issued "Director's Order: In re: Order to Limit and/or Prohibit Mass Gatherings in Ohio." (Stip. Facts ¶ 25.) On March 17, 2020, the Ohio Department of Health issued "Director's Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings and the Closure of Venues in the State of Ohio." (Stip. Facts ¶ 26.)

On March 15, 2020, the Ohio Department of Health issued "Director's Order: In re: Order Limiting the Sale of Food and Beverages, Liquor, Beer and Wine, to Carry-out and Delivery Only." (Stip. Facts ¶ 27.) On March 16, 2020, the Ohio Department of Health issued "Director's Order: In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020." (Stip. Facts ¶ 28.)

On March 19, 2020, the Ohio Department of Health issued "Director's Order to Cease Business Operations at Hair Salons, Day Spas, Nail Salons, Barber Shops, Tattoo Parlors, Body Piercing Locations, Tanning Facilities and Massage Therapy Locations." (Stip. Facts ¶ 29.)

On March 22, 2020, the Ohio Department of Health issued "Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity." (Stip. Facts ¶ 30.). And on April 30, 2020, Defendant Governor DeWine announced a plan to begin to re-open Ohio, and the Ohio Department of Health issued the "Director's Stay Safe Ohio Order." (Stip. Facts ¶ 31.)

D. Plaintiffs' Claims

Plaintiffs contend that prior to the onset of the COVID-19 pandemic, they were working diligently to place their proposed issues on the November 3, 2020 general election ballot, but that the pandemic and Ohio's responding Ohio's Stay-at-Home orders have made it impossible to circulate petitions and obtain the signatures required by Ohio law to qualify their issues for the

November general election. Several of the Plaintiffs wrote to Defendant LaRose in March, asking him to modify or decline to enforce Ohio's signature requirements "in order to make it possible, in light of the current pandemic" for their proposed amendments to be placed on the ballot this fall." (Correspondence between Secretary of State's office and OSFE Campaign Director, Mar. 26, 2020, ECF No. 15-1.) Defendant LaRose responded that he "is not free to modify or to refuse to enforce the explicit constitutional and statutory requirements of initiative petition gathering, even in the current crisis." (*Id*.) OFSE and ORFW Plaintiffs sought a state court order enjoining the signature gathering requirements in the Ohio Constitution and Revised Code in light of the pandemic. *Ohioans for Raising the Wage v. LaRose*, No. 20-CV-2381, at 7 (Ohio Com. Pl., Apr. 28, 2020). The Franklin County Common Pleas denied the Plaintiffs' request for a preliminary injunction, finding Ohio's "constitutional language does not include an exception for extraordinary circumstances or public health emergencies" and that the court "does not have the power to order an exception or remedy that was not contemplated or intended by the plain language of the Ohio Constitution." *Id*. at 8.

In this action, Plaintiffs seek declarations that in the extraordinary circumstances presented by the COVID-19 pandemic, Ohio's signature requirements violate Plaintiffs' First and Fourteenth Amendment rights as applied for the November 3, 2020 election.

Plaintiffs originally requested emergency injunctive relief enjoining enforcement of Ohio's signature requirements and placing their initiatives on the ballot, or in the alternative, modifying those requirements by permitting electronic signatures, reducing the numerical signature requirement, and extending the submission deadline. In light of the Sixth Circuit's recent decision in *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553 (6th Cir. May 5, 2020) to be discussed more fully below, however, Plaintiffs now request that the parties be ordered to confer to develop,

with assistance from the Court, adjustments to the signature requirements as applied to Plaintiffs for the November 2020 general election.

III.

Rule 65 of the Federal Rules of Civil Procedure provides for injunctive relief when a party believes it will suffer immediate and irreparable injury, loss, or damage. Still, an "injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). While Plaintiffs requested either temporary restraining orders or preliminary injunctions, the Court finds it appropriate to address only the requests for preliminary injunctions.

In determining whether to issue a preliminary injunction, the Court must examine four factors: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Id*. (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000); *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir.1997) (*en banc*). These considerations are factors a court must balance, not prerequisites that must be met. *Id*. (citing *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998). "'When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.'" *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

IV.

This case reflects the tension between the state's interest in protecting the integrity and reliability of its constitutional amendment and local initiative process, and the Plaintiffs' First Amendment rights during a global pandemic that has disrupted the lives and livelihoods of millions of Ohioans. Plaintiffs contend that they are substantially likely to succeed on their claims that Ohio's enforcement of the signature requirements for placing local initiatives and constitutional amendments on the ballot, combined with the COVID-19 pandemic and Ohio's Stay-at-Home Orders, violates the First Amendment as applied to them.

A. Likelihood of Success

The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. The First Amendment, however, does not provide a right to place initiatives or referendum on the ballot. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("[W]e must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution."); *see also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[T]he right to an initiative is not guaranteed by the federal Constitution"). "It is instead up to the people of each State, acting in their sovereign capacity to decide whether and how to permit legislation by popular action." *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999).

However, "a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United*, 994 F.2d 291, 295 (6th Cir. 1993) (citing *Meyer v. Grant*, 486 U.S. 414 (1988)). Accordingly, "although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." *Id.*

The Ohio Constitution and statutes at issue in the instant action set forth several formal requirements for petition signature gathering for local initiatives and constitutional amendments that are challenged here, including: the total number of signatures required, the geographic distribution of signers, requirements that signatures be made in ink, not be made by proxy, and must be personally witnessed by the petition circulators, and deadlines for submission of petitions to the Ohio Secretary of State and local authorities.

Plaintiffs claim that enforcement of these requirements "severely burden" their First Amendment ballot access and freedom of association rights and cannot survive strict scrutiny under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), as later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Anderson-Burdick*"), which they contend governs this analysis. OFSE Plaintiffs have also argued that certain requirements that are premised on gathering signatures in person, namely, the requirements that petitions be signed in ink and witnessed by the circulator, severely burden their core political speech, and cannot survive the exacting scrutiny inquiry under *Meyer v. Grant*, 486 U.S. 414 (1988).

Defendants contend, however, that the First Amendment is not even implicated here because Ohio's petition restrictions regulate the mechanics of the initiative process, and do not regulate political speech or expressive conduct or a candidate's right to access the ballot. (Opp. at

9, 14, ECF No. 40.) Defendants further argues if the federal constitution is implicated, "no state actor has infringed on Plaintiffs' First Amendment rights" and, the provisions at issue survive the applicable review, which they maintain is closer to rational basis. Under that analysis, any burden on Plaintiffs' First Amendment rights is slight and outweighed by the Defendants' substantial regulatory interests. (*Id*. at 9, 17.)

The Court will address all of these arguments made by the parties, starting with determining the appropriate framework to utilize when reviewing the constitutional and statutory provisions at issue here.

1. Framework

Plaintiffs urge this Court to adopt the reasoning of the Sixth Circuit's recent opinion in *Esshaki v. Whitmer*, 2020 WL 2185553 (6th Cir. May 5, 2020), where the court upheld the core of the district court's preliminary injunction enjoining Michigan from enforcing the statutory ballot-access provisions for political candidates in advance of Michigan's upcoming primary election under the framework established in *Anderson-Burdick.*

In *Esshaki*, the plaintiffs asserted that Michigan's March 23, 2020 Stay-At Home Orders issued in response to the COVID-19 pandemic prevented them collecting the required signatures by the April 21, 2020 deadline, and that Michigan's enforcement of the statutory requirements "under the present circumstances, is an unconstitutional infringement on their (and voters') rights to association and political expression." *Id*. at 1. Michigan, like Ohio, "insist[ed] on enforcing the signature-gathering requirements as if its Stay-at-Home Order . . . had no impact on the rights of candidates and the people who may wish to vote for them." 2020 WL 1910154 at *1 (E.D. Mich. Apr. 20, 2020). *Id*. Michigan also argued that circulators should have braved the crisis and gathered signatures. The district court rejected the state's argument as "both def[ying] good sense

and fl[ying] in the face of all other guidance that the State was offering to citizens at the time." *Id*. at *5. "[P]rudence at that time counseled in favor of doing just the opposite." *Id*.

Applying *Anderson-Burdick*, the district court found a severe burden on the Plaintiffs' First Amendment rights and applied strict scrutiny to invalidate the combined effects of the emergency orders, Michigan's in-person signature collection requirements, and the pandemic. The district court concluded that "[u]nder these unique historical circumstances," the state's enforcement of its Stay-at-Home Order and the statutory ballot-access requirements operated "in tandem to impose a severe burden on Plaintiff's ability to seek elected office, in violation of his First and Fourteenth Amendment rights to freedom of speech, freedom of association, equal protection, and due process of the law." 2020 WL 1910154 at *1 (E.D. Mich. Apr. 20, 2020). The court noted that the plaintiff "was "challenging neither the constitutionality of the State's ballot access laws nor the Governor's Stay-at-Home Order in isolation. Rather, Plaintiff seeks relief because the two regulations, taken together, have prevented him from collecting enough signatures before the deadline." *Id*. at *4.

The Sixth Circuit, whose decisions bind this Court, agreed with the district court that under *Anderson-Burdick*, "the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (*i.e*., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored *to the present circumstances*." *Id*. (emphasis in original). The court concluded that Michigan's strict application of its ballot-access provisions was thus unconstitutional as applied to the plaintiffs. *Id*.

Defendants contend *Esshaki* does not apply here for two reasons: 1) Michigan's Stay-at-Home Order did not contain an exemption for First Amendment activity; and 2) *Esshaki* involved a candidate seeking access to the ballot, not an initiative.

First, in concluding that the plaintiffs' First Amendment rights were severely burdened, the district court found that Michigan's Stay-at-Home Order did not contain "any exception for campaign workers." 2020 WL 1910154 at *2. Here, the Defendants argue that no state action has infringed on the Plaintiffs' rights because Ohio's Stay-at-Home Orders "have always specifically exempted First Amendment Protected Speech" and the April 30, 2020 Stay Safe Ohio Order specifically exempts "petition or referendum circulators." (Opp. at 6, 19, ECF No. 40.) Plaintiffs vigorously dispute whether this language actually exempted their signature collection efforts from Ohio's Stay-at-Home Orders. (*See e.g.*, Reply at 6–11, ECF No. 41.)

But this Court need not determine whether Ohio's Stay-at-Home Orders exempt petition circulation because, as Plaintiffs clarify, the state action challenged here is "Ohio's strict enforcement of its ballot access provisions – in the face of this pandemic" and not the State's Orders. (*See* OFSE Reply at 2, ECF No. 43.) Therefore, it is irrelevant to this Court's analysis whether there is or was an exemption in Ohio's Stay-at-Home Orders. This conclusion is consistent with the holding in *Esshaki*, where the Sixth Circuit held that Michigan's "strict application of the ballot-access provisions is unconstitutional as applied here" due to the "combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders[.]" 2020 WL 2185553 at *1 (6th Cir. May 5, 2020). It is not uncommon for courts to grant relief in the aftermath of natural disasters based on states' continued enforcement of election regulations. *See e.g., Florida Democratic Party v. Scott*, 215 F.Supp.3d 1250 (N.D. Fla. 2016) (requiring state to extend voter registration deadline in the face of Hurricane Matthew); *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F.Supp.3d 1344 (S.D. Ga. 2016) (same).

The issue before this Court is thus similar to the issue in *Esshaki*—whether strict enforcement of Ohio's signature requirements, combined with the COVID-19 pandemic and effect

of the Stay-at-Home Orders, unconstitutionally burden Plaintiffs' First Amendment rights *as applied here*.

Second, Defendants argue *Esshaki* is inapplicable because that case involved a candidate seeking access to the ballot, not an initiative. Defendants further argue that *Anderson-Burdick* does not apply here because Ohio's signature requirements "regulate the mechanics of the initiative process, not protected speech or a candidate's access to the ballot, and as a result, the First Amendment does not apply." (Opp. at 14, ECF No. 40). "In short," Defendants contend, "Plaintiffs have no First Amendment right to speak or associate by placing initiatives on the State's or a county's ballot." (*Id*. at 17.)

This Court agrees that the right to an initiative is not guaranteed by the First Amendment, but that does not mean that initiatives are without First Amendment protection. Like initiatives, there is "no fundamental right to run for elective office," and yet the Supreme Court has recognized laws restricting candidates' access to the ballot implicate the First Amendment because they "'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.'" *Esshaki*, 2020 WL 1910154, at *4 (E.D. Mich. Apr. 20, 2020) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). Similarly, "[a] state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United*, 994 F.3d at 295; *see also Buckley*, 525 U.S. at 190-91 ("Initiative petition circulators also resemble candidate-petition signature gathers, however, for both seek ballot access.") (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351(1997)).

Importantly, this Court is bound by the Sixth Circuit, which has twice in the last two years applied the *Anderson-Burdick* framework to First Amendment challenges to Ohio's statutory requirements for initiative petitions. *See Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), *reh'g en banc denied* (6th Cir. Sept. 4, 2019), *cert. pending*, No. 19-974 (filed Feb. 3, 2020); *see also Committee to Impose Term Limits v. Ohio Ballot Board*, 885 F.3d 443 (6th Cir. 2018). This Court, and the Sixth Circuit, therefore disagree with Defendants that the First Amendment does not apply because Ohio's signature requirements "regulate the mechanics of the initiative process[.]" *See Daunt v. Benson*, 956 F.3d 396, 422(6th Cir. Apr. 15, 2020) (Readler, J., concurring) ("*Anderson-Burdick* is tailored to the regulation of election mechanics."); *see also Schmitt*, 933 F. 3d at 639 ("Instead, we generally evaluate First Amendment challenge to state election regulations under the three-step *Anderson-Burdick framework*"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (explaining *Anderson's* "ordinary litigation" test did not apply because unlike the statutory provisions in *Anderson*, the challenged statute did not control the mechanics of the electoral process. It is a pure regulation of speech."). Accordingly, this Court too will apply *Anderson-Burdick* to Plaintiffs' challenges here.

a. *Anderson-Burdick*

Anderson-Burdick provides a 'flexible standard'" to evaluate "'[c]onstitutional challenges to specific provisions of a State's election laws'" under the First Amendment. *See Daunt v. Benson*, 956 F.3d at 406(citing *Anderson*, 460 U.S. 780 and *Burdick*, 504 U.S. 428 (1992)). Under *Anderson-Burdick*, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to

which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The severity of the burden on those rights determines the level of scrutiny to be applied. *See Daunt*, 956 F.3d at 407 (citing *Burdick*, 504 U.S. at 434).

"When a state promulgates a regulation which imposes a 'severe' burden on individuals' rights, that regulation will only be upheld if it is 'narrowly drawn to advance a state interest of compelling importance.'" *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (quoting *Burdick*, 504 U.S. at 434). "The analysis requiring that a state law be narrowly tailored to accomplish a compelling state interest is known as the 'strict scrutiny' test." *Esshaki*, 2020 WL 1910154, at *4 (E.D. Mich. Apr. 20, 2020).

But "minimally burdensome" regulations are subject to "a less-searching examination closer to rational basis," *Committee To Impose Term Limits*, 885 F.3d at 448, and "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Schmitt*, 933 F.3d at 639 (citing *Timmons*, 520 U.S. at 358). "Regulations falling somewhere in between—*i.e.*, regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'" *Daunt*, 956 F.3d at 408(quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016)). "This level of review is called 'intermediate scrutiny.[2]'" *Esshaki*, 2020 WL 1910154, at *4 (E.D. Mich. Apr. 20, 2020).

The Court will first consider the "character and magnitude" of the burden on Plaintiffs' First Amendment rights under *Anderson-Burdick*. Plaintiffs contend that this burden is "severe."

[2] The Court notes that based on its analysis herein of the severity of the burden and the tailoring of the application of the laws applicable here during this pandemic, the provisions at issue would not survive this intermediate level of scrutiny.

According to Plaintiffs, their ballot access, freedom of speech, and freedom of association rights are severely burdened because Defendants' strict enforcement of the signature requirements in light of the ongoing COVID-19 pandemic and Stay-at-Home Orders has made it impossible to qualify their measures for the ballot. "'The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.'" *Schmitt*, 933 F.3d at 639 (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). "In some circumstances, the 'combined effect' of ballot-access restrictions can pose a severe burden." *Grimes*, 835 F.3d at 575. "A very early filing deadline, for example, combined with an otherwise reasonable petitioning requirement, can impose a severe burden, especially on independent candidates or minority parties that must gather signatures well before the dominant political parties have declared their nominees." *Id*. at 575. In contrast, "[a] burden is minimal when it 'in no way limit[s] a political party's access to the ballot.'" *Id.* at 577 (quoting *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 537).

In *Schmitt*, the Sixth Circuit assessed the plaintiffs' claims that "the Ohio ballot-initiative process unduly hampers their right to political expression." *See* 933 F.3d at 639 ("We first examine whether the burden imposed by the Ohio ballot-initiative statutes is "severe." *Timmons*, 520 U.S. at 358."). The Sixth Circuit analyzed the burden on Plaintiffs' access to the ballot imposed by the statutes regulating the ballot-initiative process, finding that the cost of seeking mandamus relief to challenge a board of election's certification decision "disincentivizes some ballot proponents from seeking to overturn the board's decision, thereby limiting ballot access." *Id*. at 641 (citing *Grimes*, 835 F.3d at 577).

Similarly, in *Esshaki*, the Sixth Circuit agreed with the district court that "the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders

imposed a severe burden on the plaintiffs' ballot access[.]" 2020 WL 2185553 at *1 (6th Cir. May 5, 2020). In concluding the burden was severe, the court held:

> The reality on the ground for Plaintiff and other candidates is that state action has pulled the rug out from under their ability to collect signatures. Since March 23, 2020, traditional door-to-door signature collecting has become a misdemeanor offense; malls, churches and schools and other public venues where signatures might be gathered have been shuttered, and even the ability to rely on the mail to gather signatures is uncertain—if not prohibitively expensive. Absent relief, Plaintiff's lack of a viable, alternative means to procure the signatures he needs means that he faces virtual exclusion from the ballot.
>
> After considering Defendants' arguments, this Court has little trouble concluding that the unprecedented—though understandably necessary—restrictions imposed on daily life by the Stay-at-Home Order, when combined with the ballot access requirements of Sections 168.133 and 168.544f, have created a severe burden on Plaintiff's exercise of his free speech and free association rights under the First Amendment . . .—as expressed in his effort to place his name on the ballot for elective office. *See Libertarian Party of Ky.*, 835 F.3d at 574 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.").

2020 WL 1910154, at *6 (E.D. Mich. Apr. 20, 2020).

Contrarily, Defendants contend that any burden on Plaintiffs' First Amendment rights is "slight" (*See* Opp. at 18, ECF No. 40.) Defendants further contend that Plaintiffs have offered no reason why their issues must be placed on the November 2020 ballot and failed to show that they have attempted to obtain signatures through an alternative process, such as by mail or by phone. (*Id*. at 18-20.) Additionally, Defendants argue that "Ohio is in the process of reopening its doors" and the Plaintiffs' "ability to obtain signatures is improving daily." (*Id*. at 20-21.)

According to Defendants, "both the constitutional framework for proposed constitutional amendments and the statutory framework for proposing local ordinances are content-neutral and nondiscriminatory regulations." (*Id*. at 18. (citing *Taxpayers United*, 994 F.2d at 297).) In *Taxpayers United*, the Sixth Circuit held that Michigan's statute procedure for validating initiative petition signatures, by performing "technical checks" for compliance with certain statutory

requirements, did not violate the plaintiffs' rights to free speech and political association of the plaintiffs. The court explained that its result may have been different if "the plaintiffs were challenging a restriction on their ability to communicate with other voters about proposed legislation, or if they alleged they were being treated differently than other groups seeking to initiate legislation." 994 F.3d at 297. But "because the right to initiate legislation is a wholly state-created right," the Sixth Circuit held it was "constitutionally permissible for Michigan to condition the use of its initiative procedure on compliance with content-neutral, nondiscriminatory regulations that are, as here, reasonably related to the purpose of administering an honest and fair initiative procedure." *Id*.

In ordinary times, the Court may agree with Defendants that Ohio's signature requirements would likely be considered "reasonable, nondiscriminatory restrictions" that could be justified by the "State's important regulatory interests." *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Committee to Impose Term Limits*, 885 F.3d at 448 ("Ohio's single-subject rule is such a minimally burdensome and nondiscriminatory regulation because it requires only that Plaintiffs submit their two proposed constitutional amendments in separate initiative petitions."). "States enjoy 'considerable leeway' to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access (*e.g.*, the number of signatures required, the time for submission, and the method of verification)." *See John Doe No. 1 v. Reed*, 561 U.S. 186, 212, (2010) (Sotomayor, J., concurring) (citing *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191 (1999)).

These times, however, are not ordinary. Plaintiffs do not argue that Ohio's signature requirements are facially unconstitutional. Plaintiffs instead contend that they are unconstitutional as applied to them during this extraordinary time. That is, the COVID-19 pandemic has made it

impossible to circulate petitions in person, the only method permitted under Ohio law because of the ink signature and witness requirements. Plaintiffs maintain that because they are unable to circulate in person, and they have no other means of collecting signatures, they are unable to meet the other numerical and geographical requirements by the deadline. Specifically, they state:

> It is axiomatic that face-to-face encounters between people are essential for any physical in "ink" signature-gathering. Given the temporary changes in our society—specifically the severe reduction of the ability to physically encounter other people—there is no means of complying with Ohio's formal signature requirements. In the throes of today's extraordinary circumstances, Ohio's requirements operate to completely eradicate Intervenors' indelible First Amendment, Fourteenth Amendment and Ohio constitutional rights to ballot access, freedom of speech, and freedom of association.

(OFSE Compl., ¶ 5; *see also* OFRW Compl. ¶ 4.)

> Here, OFRW Intervenors are faced not with a mere regulation of how they may access the ballot, but what amounts to a ban on ballot access, and on their related speech and association rights. Petition circulators cannot obtain in-person, pen-to-paper signatures outside of their immediate households, and signers cannot sign petitions outside of their immediate households. Nor can supporters mobilize like-minded people to do these things. Public gatherings and in-person contact are suspended. OFRW has no hope of meeting Ohio's requirements.

(OFRW Mot. at 10; see also OFSE Mot. at 10; *see also* Thompson Mot. at 12-13 ("Under Ohio law as it now exists, Plaintiffs have no lawful procedure by which they may qualify their initiatives for Ohio's November 3, 2020 general . . . Ohio's signature collection requirement under current circumstances makes it impossible to qualify initiatives for the ballot.").)

As did the *Esshaki* court, this Court finds that in these unique historical circumstances of a global pandemic and the impact of Ohio's Stay-at-Home Orders, the State's strict enforcement of the signature requirements for local initiatives and constitutional amendments severely burden Plaintiffs' First Amendment rights *as applied here*. *See* 2020 WL 2185553, at (1 (6th Cir. May 5, 2020).

Life as Ohioans knew it has drastically changed. Since March 22, 2020, all residents of Ohio have been mandated to stay home, with some limited exceptions that are all but clear. All non-essential business operations were ordered to cease activities. Sporting events and concerts have been cancelled. All polling locations were closed for the March 17, 2020 primary election. Public and private schools and universities moved to online learning and shut down campuses. Until very recently restaurants, bars, salons, and malls were closed to the public. Gatherings of 10 or more people have been prohibited. While some businesses are now re-opened, Ohioans have been directed to maintain social distancing, staying at least six feet apart from each other, and to wear masks or facial coverings.

The wet signature and witness requirements require circulators to go into the public and collect signatures in person. But the close, person-to-person contacts required for in person signature gathering have been strongly discouraged—if not prohibited—for several months because of the ongoing public health crisis, and likely pose a danger to the health of the circulators and the signers. Moreover, the public places where Plaintiffs may have solicited these signatures have been closed, and the public events drawing large crowds for Plaintiffs to share their message have cancelled and mass gatherings cancelled. And even if Plaintiffs had attempted to garner support for their measures by phone or mail, such efforts do not obviate the ink signature and witness requirements.

Plaintiffs cannot safely and effectively circulate their petitions in person. Ohio does not permit any other forms of signature gathering, including electronic signing. And because Plaintiffs cannot collect signatures in person or electronically, they have no hope of collecting the required number of signatures from the required geographic distribution by the July deadlines. As the district court in *Esshaki* concluded, without relief here, Plaintiffs "lack of a viable, alternative

means to procure the signatures" they need means that they face "virtual exclusion from the ballot." 2020 WL 1910154, at *3 (E.D. Mich. Apr. 20, 2020).

To be clear, this Court's decision is not a criticism of the Stay-at-Home Orders or Ohio's response to the COVID-19 crisis. Defendants Governor DeWine and Dr. Acton were some of the first in the nation to issue such orders to slow the spread of the coronavirus and are well-deserving of the national—and even global—praise they have received for their responses. See *The Leader We Wish We All Had*, N.Y. Times (May 5, 2020), https://www.nytimes.com/2020/05/05/opinion/coronavirus-ohio-amy-acton.html; *Coronavirus*: *The US governor who saw it coming early*, BBC (Apr. 1, 2020), https://www.bbc.com/news/world-us-canada-52113186. Undoubtedly their actions have flattened the curve and saved the lives of countless Ohioans.

Yet the impact of the Stay-at-Home Orders on Ohioans and the continued risk of close interactions cannot be ignored. The reality is that the Orders and the COVID-19 pandemic have made it impossible for Plaintiffs to satisfy Ohio's signature requirements. Because the burden imposed by the enforcement of the requirements in these circumstances is severe, strict scrutiny is warranted.

b. *Meyer v. Grant*

As explained in detail *supra*, this Court concludes that Sixth Circuit precedent requires application of the *Anderson-Burdick* framework to the issues presented in this action. The Court here, however, briefly addresses the OFSE Plaintiffs arguments that the more appropriate framework is that established under *Meyer v. Grant*, 486 U.S. 414, (1988); *see also Morgan v. White*, Case No. 20-C-2189, slip op. (N.D. Ill. May 18, 220) (Pallmeyer, C.J.) (applying *Meyer* in considering similar signature requirement and finding no severe burden there because, unlike the instant action, the plaintiffs' had slept on their rights to circulate petitions waiting until after the

pandemic hit to attempt to circulate petitions). Under *Meyer*, courts "apply 'exacting scrutiny,' and uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (striking down Ohio statute prohibiting distribution of anonymous campaign literature).

On their face, the witness and ink signature requirements do not "regulate pure speech." *See McIntyre*, 514 U.S. at 357. OFSE argues that Ohio's ink signature and witness requirements that require all circulation to be done in person, during the extraordinary circumstances of this moment, have effectively banned circulation because "[c]irculators cannot safely gather signatures in person in the midst of a pandemic without endangering their own and others' health." (OFSE Mot. at 8, ECF No. 15.) Because Ohio law does not provide for other forms of signature collection, such as electronic signatures, their "core political speech" through circulating "is altogether suppressed." (*Id*.)

Even so, whether this Court were to apply *Meyer's* exacting scrutiny or *Anderson-Burdick's* strict scrutiny, the result is the same—these two provisions cannot withstand constitutional scrutiny.

c. Strict Scrutiny under *Anderson-Burdick*

In order to survive the strict scrutiny analysis, Defendants must show these requirements are "narrowly drawn to advance a state interest of compelling importance." *See Burdick*, 504 U.S. at 434. The Court considers Plaintiffs' challenges to: 1) ink signature requirements set forth in Article II § 1g and Ohio Revised Code § 3501.38(B), and the witness requirements in Article II § 1g and Ohio Revised Code § 3501.38(E); and 2) the numerical and geographical requirements in Article II § 1a, Article II § 1g, and Ohio Revised Code § 731.28, and the deadlines for submission of signatures in Article II § 1a and Ohio Revised Code § 731.28.

i. Ink Signature and Witness Requirements

The Court first addresses the ink signature and witness requirements and concludes Defendants have not established they are "narrowly tailored *to the present circumstances*." *Esshaki*, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020).

In defense of the ink signature and witness requirements, Defendants contend that "states have a substantial interest in ensuring that submitted signatures are authentic," (*Id*. at 22 (citing *Buckley*, 525 U.S. at 205)), and that the Ohio Constitution confirms that "ensuring the validity of the signatures on petitions is an interest of the highest order of both the State and its people." (*Id*. at 23.) Defendants also assert that these requirements combat petition fraud by ensuring each elector signs for themselves and protecting against signatures being added later. (*Id*. at 23-24; *see also id*. at 30 ("un-witnessed, anonymous signature gathering invites fraud.").)

Defendants do not argue that these interests are "compelling" as required under strict scrutiny, because they contend that such an analysis is not warranted. But even assuming that ensuring they are compelling interests, the ink signature and witness requirements are narrowly tailored to achieve that interest in these particular circumstances. *See Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008) ("While eliminating election fraud is certainly a compelling state interest, [the statute] is not narrowly drawn.").

First, Defendants provide examples of how other signature requirements not challenged here (such as the requirement that every signer "be an elector of the state" and include "after his name the date of signing and his place of residence") achieve their interests, and that ink signatures are because "'boards of elections are required to compare petition signatures with voter registration cards to determine if the signatures are genuine[.]'" (Opp. at 23, ECF No. 40 (citing *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St.3d 205, 209, 602 N.E.2d 644 (1992)). But that requirement is

by directive of the Secretary of State, no by the Ohio Constitution or Revised Code. *See* Secretary of State Directive 2019-17.

Furthermore, there is no evidence that certain personally identifiable information, such as the last four digits of a signer's social security number as used for electronic voter registration and as proposed by Plaintiffs as methods to verify signatures, are any less reliable than boards of election employees comparing handwritten signatures, who likely have no training or expertise in handwriting analysis. Likewise, there is no evidence to support, nor reason to believe that enjoining enforcement of the ink signature and witness requirements and allowing electronic signatures would "likely inject fraud into Ohio's petition process." (Opp. at 2, ECF No. 40.); *see also See Citizens for Tax Reform*, 518 F.3d at 387 (finding statute was not narrowly tailored to eliminate election fraud because "there is no evidence in the record that most, many, or even more than a *de minimis* number of circulators who were paid by signature engaged in fraud in the past.").

Moreover, there are other provisions of Ohio law that "expressly deal with the potential danger that circulators might be tempted to pad their petitions with false signatures." *See Meyer*, 486 U.S. at 426-27. For example, false signatures are a fifth-degree felony under Ohio Revised Code § 3599.28. It is also a crime for a signer to sign a petition more than once, to sign someone else's name, sign if they know they are not a qualified voter, accept anything of value for signing a petition, or make a false affidavit or statement concerning signatures on a petition. *See* Ohio Rev. § 3599.13. Violation of those provisions results in up to a $500 fine or up to six months imprisonment. *Id*. "These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Meyer*, 486 U.S. at 427-28; cf. *First National Bank of Boston v. Bellotti*, 435 U.S. 765,

790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue").

OFSE and OFRW Plaintiffs have proposed a detailed system for collecting and submitting electronic signatures that contains many of the same safeguards as paper petitions in order to ensure signatures are authentic and prevent petition fraud, including the last four numbers of the signer's social security number to confirm identity, a method for circulators to monitor the online petitions, and various warnings about the criminal consequences of forging signatures and for election falsification. (*See* Leonard Decl., ECF No. 30-1; *see also* OFSE Reply at 18.) The interests in enforcing the ink signature and witness requirements—ensuring authenticity and combating fraud—can be achieved by the electronic system proposed by Intervenor Plaintiffs in conjunction with the other provisions in Ohio law not challenged here when considering the public health risks accompanying the close, person-to-person contact required to satisfy those requirements. Finally, the Court notes that large parts of the economy are conducted via electronic signatures, which can be linked to personal, secure identifiers and re-checked for errors or fraud.

In the context of the pandemic and the impact of the Stay-at-Home Orders on Plaintiffs' ability to safely come into close contact with potential signers, the enforcement of the ink signature and witness requirements is not narrowly tailored to a compelling state interest as applied to Plaintiffs *in these particular circumstances*. Accordingly, the Court finds that Plaintiffs have established they are likely to succeed on the merits of their challenges to the ink signature requirements set forth in Article II § 1g and Ohio Revised Code § 3501.38(B) for constitutional amendments and Ohio Revised Code § 3501.38(B) for local initiatives, as well as the witness requirements in Article II § 1g for constitutional amendments and Ohio Revised Code § 3501.38(E) for local initiatives.

ii. Numerical and Geographical Requirements and Deadlines

The Court next turns to the numerical and geographical requirements in Article II § 1a and II § 1g and Ohio Revised Code § 731.28, and the deadlines for submission of signatures in Article II § 1a and Ohio Revised Code § 731.28. For the following reasons, the Court finds the numerical and geographical requirements survive strict scrutiny, but the deadlines cannot.

Petitions for proposed local initiatives "must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election of the office of governor in the municipal corporation." Ohio Rev. Code § 731.28. In order to qualify local initiatives for the November 3, 2020 election, petitions must be filed with the city auditor or village clerk no later than approximately July 16, 2020. (Stip. Facts ¶ 13.)

Defendants argue "Ohio and its citizens have important interests in keep unauthorized initiatives off the ballot itself that outweigh the burden to Plaintiffs." (Opp. at 21, ECF No. 40.) They posit that the State's "substantial interests" in simplifying the ballot, preventing voter confusion, and maintaining voter confidence in the government and electoral process justify the requirements challenged here. (*Id*. at 21-22.)

Defendants contend that the numerical and geographic requirements are "supported by the regulatory interest of 'making sure that an initiative has sufficient grass roots support to be placed on the ballot.'" (*Id*. at 22 (quoting *Meyer*, 486 U.S. at 425-26.).) The State contends that this interest is "substantial." (*Id*.)

This Court agrees that the State "has a strong interest in ensuring that proposals are not submitted for enactment into law unless they have sufficient support." *See Taxpayers United*, 994 F.2d at 297 (6th Cir. 1993); *Buckley*, 525 U.S. at 205 (holding Colorado could "meet the State's substantial interests in regulating the ballot-initiative process" and "ensure grass roots support" by

"condition[ing] placement of an initiative proposal on the ballot on the proponent's submission of valid signatures representing five percent of the total votes cast for Secretary of State at the previous general election.").

The Supreme Court has held that "the State's interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot [is] compelling" and that "a state may require a preliminary showing of significant support before placing a candidate on the general election ballot." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (citing *American Party of Texas v. White*, 415 U.S. 767, 782 n. 14 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971)).

In the instant action, the State's interest in requiring sufficient grassroots support for proposed local initiatives and constitutional amendments to be placed on the ballot is perhaps even more compelling than for candidates because of the nature of those measures. Ohioans have reserved for themselves this right to initiate legislation and propose constitutional amendments. The numerical signature requirements for those initiatives ensures that only those measures supported by a significant number of voters make it on the ballot for enactment, and prevents voter confusion, ballot overcrowding, or frivolous initiatives from earning spots on the ballot. The geographical requirement also ensures that the support is statewide, and not just from Ohio's most populous counties.

Defendants assert that the deadlines for petitions to be submitted "advances the state's interest in providing sufficient time for the Secretary of State to verify signatures, and for that verification to occur in an orderly and fair fashion." (*Id*. at 24 (citing *American Party of Texas v. White*, 415 U.S. 767, 787, fn. 18 (1974).) While this Court agrees that ensuring the Secretary of State—and municipalities for local initiatives—have enough time to verify signatures without

disrupting preparations for the upcoming election is important, the July 1 and July 16 deadlines here, respectively, are not narrowly tailored in light of Plaintiffs' inability to safely circulate petitions in person beginning in mid-March and continuing to present day. *See Esshaki*, 2020 WL 1910154, at *7 (E.D. Mich. Apr. 20, 2020) ("The March 23, 2020 Stay-at-Home Order, for reasons already discussed, effectively halted signature-gathering by traditional means, reducing the available time prescribed by the Michigan Legislature to gather one thousand signatures by twenty-nine days."). Plaintiffs had made significant efforts to qualify their initiatives for the November 3, 2020 general election ballot months before much of Ohio was shutdown due to the virus, prohibiting Plaintiffs from safely collecting signatures in person. Cf. *Morgan v. White*, Case No. 20-C-2189, slip op. (N.D. Ill. May 18, 2020) (Pallmeyer, C.J.) (concluding plaintiffs could not show Illinois' Stay-at-Home Order caused the alleged burden on their ability to collect signatures in support of constitutional amendment rather than their own delay when the only party to begin circulation efforts started after the pandemic the week before filing suit and a month before deadline).

The Court comes to a different conclusion with respect to the numerical and geographical requirements, however. The most significant obstacle to Plaintiffs' alleged ability to meet the numerical and geographic requirements in light of the COVID-19 pandemic and Stay-at-Home Orders is their inability to collect signatures in person and the prohibition on electronic signatures. Based on the above holdings with respect to the submission deadlines, signature requirements, and the witness requirements, the resulting burden imposed by the numerical and geographical requirements is not as severe.

This is consistent with the *Esshaki* court's holding that Michigan did not show it had a compelling interest in enforcing "*the specific numerical requirements* . . . in the context of the

pandemic conditions and the upcoming August primary.") (emphasis in original). *See* 2020 WL 1910154, at *7 (E.D. Mich. Apr. 20, 2020). First, the Court emphasizes the compelling importance of the State's interest in ensuring that initiatives to enact legislation or to amend Ohio's constitution are submitted to Ohio's voters only if they have sufficient grassroots support, not just a "modicum of support" as is true for the candidates. Second, the *Esshaki* court emphasized that the specific signature requirement was not narrowly tailored because it did not account for the plaintiffs' inability to collect signatures in the twenty-nine days in between when Michigan's Stay-at-Home Order went into effect and the statutory deadline. *Id*. at. *7. The court explained that "a state action narrowly tailored to accomplish the same compelling state interest would correspondingly reduce the signature requirement to account for the lost twenty-nine days." *Id*.

In the case *sub judice*, the Court finds that reduction of the numerical and geographical requirements is not warranted given the compelling importance of ensuring the grassroots support for proposed initiatives (and that the support be statewide for constitutional amendments). Further, the Court's decision with respect to other requirements impeding Plaintiffs' ability to meet those requirements—the deadlines, the ink signature requirements, and the witness requirements—will have the effect of tailoring those requirements to the present circumstances. The Court therefore finds that Plaintiffs have established they are likely to succeed on the merits of their challenges to the deadlines for the submission of signatures in Article II § 1a and Ohio Revised Code § 731.28, but not with respect to the numerical and geographical requirements in Article II § 1a and II § 1g and Ohio Revised Code § 731.28.

B. Irreparable Injury

Defendants contend that Plaintiffs suffer no injury because they can go into the public and gather signatures. Plaintiffs disagree, maintaining that their loss of constitutional rights satisfies

the prong of the Rule 65 analysis. And, the OFRW Intervenors also argue that the "more than $1.5 million spent to qualify their proposal specifically for placement on the November 3, 2020 general election ballot—funds that would have all been expended 'for naught' if OFRW Intervenors cannot submit their proposal in 2020—does" constitute irreparable injury. Plaintiffs arguments are well taken.

While OFRW Intervenors are correct that "ordinarily, the payment of money is not considered irreparable," when "expenditures cannot be recouped, the resulting loss may be irreparable." (OFRW Reply at 17, ECF No. 42 (citing *Philip Morris USA, Inc. v. Scott*, 561 U.S. 1301, 1304 (2010)). The Court, however, need not make that determination here because "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citing *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir.2003)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

C. Substantial Harm to Others and Public Interest

The remaining factors, "harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The State contends enjoining enforcement of Ohio's signature requirements "will allow unfettered and automatic access to the general election ballot for innumerable petitions" and that as a result "Ohio's ballot will be cluttered with proposed initiated statutes, ordinances and constitutional amendments that do not have so much as the minimum level of support otherwise required by law." (Opp. at 27, ECF No. 40.) According Defendants, the "Plaintiffs urge this Court do what the *Esshaki* Court swiftly struck down just last week." (*Id*. at 29.) Defendants further argue

that Plaintiffs' requested relief is not in the public interest because the requirements Plaintiffs seek to enjoin ensure ballot integrity and that "[i]mplementing a system that utilizes unwitnessed, anonymous signature gathering invites fraud." (Opp. at 30, ECF No. 40.)

Plaintiffs respond that an injunction would be in the public's interest, and that any harm to the State is outweighed by the burden on Plaintiffs and the public. This Court agrees. Plaintiffs have established a likelihood of success on the merits of their First Amendment claims with respect to some of Ohio's signature requirements, and "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quotation omitted). Conversely, it is not in the public's interest to require Plaintiffs to go out into the public and risk their health and the public's health to collect signatures in person from voters. *See* 2020 WL 1910154, at *9 (E.D. Mich. Apr. 20, 2020).

There is no evidence that electronic signatures would "likely inject fraud into Ohio's petition process[.]" (Opp. at 2, ECF No. 40.) Moreover, Plaintiffs-Intervenors OFSE and OFRW have proposed a detailed system, developed and implemented at their own cost, for gathering, verifying, and submitting electronic signatures. OFRW states it has contracted with DocuSign, "the country's leading company for execution of electronic signatures on legal documents." (Leonard Decl. at ¶ 7, ECF No. 30-1.) They will establish a dedicated website that directs signers to a PDF of the petitions that closely mirrors paper versions and require the signer to provide the last 4 digits of their social security number to verify their identity. (*Id*. at ¶ 8.) The circulator will be the administrator of the on-line petition and will monitor the activity on the website, including for duplicate names and multiple uses of an IP address. (*Id*.) The Secretary of State will be provided the last 4 digits of the social security numbers to authenticate the identity of the signer. (*Id*.) According to OFSE Plaintiffs, "[t]he State would not itself need to implement the system; it would

merely have to accept electronically-signed petitions instead of insisting on wet-ink, physically-witnessed ones. The State already uses this method of verification when it registers voters electronically." (OFSE Reply at 19, ECF No. 43.)

The Court also finds that any burden to Defendants will be outweighed by the burden on Plaintiffs and the public of attempting to comply with the signature requirements as enforced against them in these current circumstances. *Libertarian Party of Illinois v. Pritzker*, No. 20-CV-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020). There is no risk that "Ohio's ballot will be cluttered" with unsupported initiatives because the numerical and geographical requirement will not be affected by the Court's ruling. Additionally, this Court's decision is limited to these Plaintiffs, in these particular circumstances, for the November 3, 2020 general election only. This order does not apply to other individuals or ballot issues not before this Court.

The balance of these factors therefore weighs in favor of an injunction.

V.

Having found Plaintiffs are entitled to emergency injunctive relief, this Court is left to decide how to remedy these constitutional violations. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). "In formulating the appropriate remedy, 'a court need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.'" *Garbett v. Herbert*, 2020 WL 2064101, *17 (D. Utah. Apr. 29, 2020) (quoting *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087) (enjoining enforcement of some but not all requirements for candidate to qualify for ballot in light of COVID-19 pandemic).

This Court is without power to modify the requirements set forth in the Ohio Revised Code for local initiatives as sought by the Thompson Plaintiffs in light of the Sixth Circuit's decision in *Esshaki*, staying the district court's "plenary re-writing of the State's ballot-access provisions[.]" 2020 WL 2185553, at *2 (6th Cir. May 5, 2020). The Court will "instruct[] 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." *Id.*[3] Defendants shall report their proposed adjustments to the enjoined requirements to the Court by 12:00 pm on Tuesday, May 26, 2020.

While the legislature may remedy the constitutional violations in the Ohio Revised Code, it is without power to amend the Ohio Constitution—all constitutional amendments must be approved by the people of Ohio. *See* Ohio Const. Art. II, § 1a. Neither Defendant LaRose nor the Ohio General Assembly can modify the requirements in the Ohio Constitution that this Court has found unconstitutionally burdens Plaintiffs' First Amendment rights. Defendant LaRose affirmed his understanding of this in correspondence with OFSE Plaintiffs, where he stated he "is not free to modify or to refuse to enforce the explicit constitutional and statutory requirements for initiative petition signature gathering, even in the current crisis" and that "some of the requirements to which [OFSE Plaintiffs] are referring are in Ohio's Constitution which the legislature cannot change on its own. (*See* ECF No. 15-1.)

[3] The Court notes that after the Sixth Circuit's decision in *Esshaki*, Michigan agreed to reduce its signature collection requirement by 50%, which is what the district court had previously ordered, extended the filing deadline, and allowed candidates to collect signature images and submit petition sheets electronically. *See* Elections, The Office of Secretary of State Jocelyn Benson (Updated May 8, 2020), https://www.michigan.gov/sos/0,4670,7-127-1633---,00.html.

This Court, however, has the power to remedy those violations. *See Goldman-Frankie v. Austin*, 727 F.2d 603, 608 (6th Cir. 1984) (holding Michigan ballot access requirements, including provision of Michigan constitution, unconstitutional and affirming district court's order placing independent candidate for state office on the ballot after Michigan failed to remedy violations).

The Court therefore orders Defendants to accept electronically-signed and witnessed petitions collected through the on-line signature collection plans proposed by OFRW Plaintiffs and OFSE Plaintiffs as set forth in their briefing and supporting documents and discussed above. (*See* Leonard Decl., ECF No. 30-1; OFSE Reply at 18-19, ECF No. 43.) The Court further orders the parties to meet and confer regarding any technical or security issues to OFSE and OFRW Plaintiffs' on-line signature collection plan. The parties shall submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020.

VI.

For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motions for a Preliminary Injunction. (ECF Nos. 4, 15, 17-2.). The Court hereby:

- Enjoins enforcement of the ink signature requirement in Ohio Revised Code § 3501.38(B) and witness requirement in Ohio Revised Code § 3501.38(E) as applied to the Thompson Plaintiffs for the November 3, 2020 general election.
- Enjoins enforcement of the deadline in Ohio Revised Code § 731.28 as to Thompson Plaintiffs for the November 3, 2020 general election.
- Directs Defendants to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements "so as to reduce the burden on ballot access." *Esshaki*, 2020 WL 2185553, at *2.
- Enjoins enforcement of the ink signature and witness requirements in Article II § 1g and Ohio Revised Code § 3501.38(B) as applied to OFSE and OFRW Plaintiffs for the November 3, 2020 general election.
- Enjoins enforcement of the deadlines in Article II § 1a of the Ohio Constitution as to OFSE and OFRW Plaintiffs for the November 3, 2020 general election.

- Orders Defendants to accept electronically-signed and witnessed petitions from OFSE and OFRW Plaintiffs collected through the on-line signature collection plans set forth in their briefing and submitting documents.

- Orders Defendants to accept petitions from OFSE and OFRW Plaintiffs that are submitted to the Secretary of State by July 31, 2020.[4]

- Orders OFRW and OFSE Plaintiffs and Defendants to meet and confer regarding any technical or security issues to the on-line signature collection plans. The parties shall submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020.

IT IS SO ORDERED.

5/19/2020
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

[4] The Court selected this date for OFSE and OFRW Plaintiffs' submission of petitions in part to remedy the loss of time already incurred by Plaintiffs and because the Secretary of State is required to accept signatures until this date. Ohio Const. Art. II § 1g.

Attachment 4

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring in denial of application for injunctive relief.

The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This

power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks

emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from denial of application for injunctive relief.

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___, ___ (2017) (slip op., at 15); see also, *e.g., Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Ibid.*

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Ibid.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could "insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities." *Id.,* at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction. I respectfully dissent.

Attachment 6

District Court's Denial of Stay, May 22, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHAD THOMPSON, et al.,

Plaintiffs,

v.

CASE No. 2:20-CV-2129
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsea M. Vascura

GOVERNOR OF OHIO MICHAEL DEWINE, et al.,

Defendants.

OPINION AND ORDER

Three days ago, this Court enjoined Defendants from enforcing certain constitutional and statutory in-person signature gathering requirements. (ECF No. 44.) Defendants have appealed that decision and have requested that this Court stay its order pending appeal and to issue its decision on their request by Monday, May 25, 2020, Memorial Day. (ECF No. 46.) Plaintiffs have opposed Defendants' request. (ECF Nos. 47, 48, 49.) For the reasons set forth below, the Court **DENIES** Defendants' Motion.

I.

Ohio has experienced a public health crisis that continues to this day. On March 9, Defendant Ohio Governor Mike DeWine declared a state of emergency in response to the spread of the COVID-19 virus. Days later on March 11, 2020, the World Health Organization declared the disease a global pandemic, and President Donald Trump declared a national emergency on

March 13, 2020. Until very recently,[1] Ohioans had been ordered to stay home, with limited exceptions, since March 22, 2020, and to maintain social distancing staying at least six feet apart from each other.

Ohio held an election in 1864 during the Civil War. Because of the pandemic, Defendants cancelled Ohio's in-person primary election. This is so even though Defendants recognized that they lacked explicit constitutional or statutory authority to do so and after the Franklin County Court of Common Pleas rejected their request for a court order to that effect.[2] Defendants Governor DeWine and Secretary of State LaRose announced in a joint statement why it was unsafe to hold in-person voting:

> The only thing more important than a free and fair election is the health and safety of Ohioans. The Ohio Department of Health and the CDC have advised against anyone gathering in groups larger than 50 people, which will occur if the election goes forward. Additionally, Ohioans over 65 and those with certain health conditions have been advised to limit their nonessential contact with others, affecting their ability to vote or serve as poll workers. Logistically, under these extraordinary circumstances, it simply isn't possible to hold an election tomorrow that will be considered legitimate by Ohioans. They mustn't be forced to choose between their health and exercising their constitutional rights.

[1] On May 20, 2020, the Ohio Department of Health issued a new order replacing the previous "Stay Safe Ohio Order" that now strongly urges Ohioans, especially those who are high-risk, to stay at home as much as possible. Mass gatherings of more than 10 people are still prohibited. *See* Urgent Health Advisory Ohioans Protecting Ohioans, Ohio Department of Health (May 20, 2020), https://content.govdelivery.com/attachments/OHOOD/2020/05/20/file_attachments/1456370/Urgent%20Health%20Advisory.pdf.

[2] *See* Nick Corasaniti and Stephanie Saul, "Ohio's Governor Postpones Primary as Health Emergency is Declared Over Virus," NY Times (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/us/politics/virus-primary-2020-ohio.html ("By Monday afternoon, Mr. DeWine said he wanted the primary pushed back but did not have the authority to unilaterally delay the election and that a lawsuit would be filed to move the vote. On Monday evening, Judge Frye rejected the request. Dan Tierney, a spokesman for the governor, said Mr. LaRose would seek through the courts to have another date set for in-person voting in Ohio.")

See "Joint Statement from Governor DeWine and Secretary LaRose on Ohio Primary," Mike DeWine Governor of Ohio (Mar. 16, 2020), https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/joint-statement-governor-dewine-secretary-larose-on-ohio-primary.[3]

The hallmark a republican form of government is undoubtedly the conducting of elections. Defendant Ohio Department of Health Director Dr. Amy Acton closed all polling locations[4] and Defendant LaRose suspended in-person voting.[5] With few exceptions, all voting was conducted by absentee ballots until April 28, 2020. Defendant LaRose himself has recognized the unusual circumstances facing Ohio voters, stating: "In a usual year, I would not want to make large changes this late in the game, but this is not a usual year. These are unusual times. We have to respond to the unique situation we find ourselves in with these changes."[6]

One would know none of this from the Motion to Stay. Defendants now change course. arguing that their interest in following the constitutional and statutory signature requirements

[3] *See also* "Statement from Ohio Governor Mike DeWine on the March 17, 2020 Election," Mike DeWine Governor of Ohio (Mar. 16, 2020), https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/dewine-statement-on-march-17-2020-election ("During this time when we face an unprecedented public health crisis, to conduct an election tomorrow would would force poll workers and voters to place themselves at a unacceptable health risk of contracting coronavirus. As such, Health Director Dr. Amy Acton will order the polls closed as a health emergency. While the polls will be closed tomorrow, Secretary of State Frank LaRose will seek a remedy through the courts to extend voting options so that every voter who wants to vote will be granted that opportunity.").

[4] *See* Ohio Department of Health Issues Order on Closure of Polling Location, Mike DeWine Governor of Ohio (Mar. 16, 2020), https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/order-on-closure-of-polling-locations ("To conduct an election at this time would force poll workers and voters to face an unacceptable risk of contracting COVID-19.").

[5] *See* Secretary of State Directive 2020-06, Frank LaRose Ohio Secretary of State (Mar. 16, 2020), https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-06am.pdf (rescinded).

[6] *See* Rick Rouan, "Secretary of State Frank LaRose outlines changes needed for general election," The Columbus Dispatch (May 5, 2020), https://www.dispatch.com/news/20200505/secretary-of-state-frank-larose-outlines-changes-needed-for-general-election."

requiring close, face-to-face interactions, *must* be followed. In other words, the only thing more important than the health and safety of Ohioans is holding what, in their view, constitutes a free and fair election. This Court does not believe that these interests are mutually exclusive—*both may be accomplished* under the law of the Sixth Circuit.

As stated in its May 19, 2020 Opinion and Order, this Court does not question or criticize Defendants' response to the COVID-19 crisis or the decision to suspend in-person voting and extend the voting period. The Court emphasizes these facts to show Defendants understand the gravity of requiring Ohioans to choose between their health and their First Amendment rights. Yet Defendants inexplicably refuse to acknowledge those very same risks are present here.

In requesting a stay of this Court's Order, Defendants ignore the analysis of the applicable law and Sixth Circuit precedent. This Court is bound by the Sixth Circuit, which has disavowed a state's strict application of election regulations "without exception for or consideration of the COVID-19 pandemic or the Stay-at-Home Orders." *See Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020). Just two weeks ago, the Sixth Circuit held that these are unique historical circumstances, and that the combination of Michigan's "strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a serve burden on the plaintiffs' ballot access" and that those provisions were not "narrowly tailored *to the present circumstances*." *Id*. (emphasis in original).

Defendants also assert that this Court "rewrote" the Ohio Constitution and exceeded its authority in ordering relief for Plaintiffs. But this Court did no such thing.

This Court did not—as requested by Plaintiffs—modify the constitutional and statutory requirements that petitions contain a specific number of signatures from Ohio voters. The core of this constitutional amendment provision is the requirement that petitions contain signatures equal

to 10% of voters from 44 of Ohio's 88 counties to ensure enough Ohio voters support the measure before it is placed on the ballot. That has not changed. This Court agreed with Defendants that 440,000 valid signatures must still be submitted before the issue may be placed on the November 2020 ballot. This Court crafted a narrow remedy of a federal constitutional violation, while preserving the core of Ohio's provisions. *See McCarthy v. Briscoe*, 429 U.S. 1317 (1976) ("[F]ar from 'impos[ing] [its] own idea of democracy' on the State, [this Court] crafted this remedy to allow' a majority of the provisions to survive.").

As this Court previously said in upholding in Ohio's absentee voting scheme for the April 28, 2020 primary, the United States "Constitution does not require the best plan, just a lawful one." *League of Women Voters of Ohio, et al. v. LaRose*, No. 2:20-cv-1638 (S.D. Ohio. Apr. 3, 2020) (Watson, J.). Here, Defendants have offered no plan at all. Instead, they propose business as usual in a pandemic and allow violations of First Amendment rights of Ohio citizens to be ignored. Defendants' own actions demonstrate that otherwise neutral election laws are ill-suited to a pandemic and may offend First Amendment rights.

II.

In evaluating a motion to stay pending appeal, courts consider four factors that are traditionally considered when determining whether to grant a preliminary injunction: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (citing *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir.2002) (per curiam)). These four

factors are not prerequisites, but are "interconnected considerations that must be balanced together. *Id*. (citing *Mich. Coal. of Radioactive Material Users, Inc.*, 945 F.2d at 153).

III.

Defendants put forth many of the same arguments that were unsuccessful at the preliminary injunction stage. Defendants offer no new evidence or arguments that would persuade the Court to reconsider its decision, and their Motion completely ignores much of the Court's analysis of Plaintiffs' claims. Defendants have not shown they will suffer irreparable harm absent a stay. Plaintiffs, on the other hand, will. This Court found Plaintiffs were likely to succeed on the merits of their First Amendment claims, and every day that passes without a mechanism for them to safely collect signatures for their initiatives is another day they are harmed. Finally, the Court finds that a stay is not in the public interest, as it is always in the public interest to remedy constitutional violations. The balance of these factors weigh against granting a stay.

A. Likelihood of Success on the Merits

Defendants once again contend Plaintiffs' claims do not implicate the First Amendment. (Mot. to Stay at 2, ECF No. 46.) Defendants rely in part on courts of appeals decisions from outside of this circuit, and completely ignore the Sixth Circuit's holdings in *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), *reh'g en banc denied* (6th Cir. Sept. 4, 2019), *cert. pending*, No. 19-974 (filed Feb. 3, 2020) and *Committee to Impose Term Limits v. Ohio Ballot Board*, 885 F.3d 443 (6th Cir. 2018), which bind this Court and applied the *Anderson-Burdick* framework to statutes regulating Ohio's initiative process.

Defendants argue that "[t]his Court's order requiring the Defendants to accept the Plaintiffs' 'Plan B' for signature gathering offends the Ohio Constitution and is not required under the First Amendment." (Mot. at 3, ECF No. 46.) According to Defendants, "the Ohio Constitution

does not provide for contingencies or alternative plans for parties who cannot comply with its provisions." (*Id*.) This statement is true, but simply underscores that, other than an injunction, there is no remedy or cure for these constitutional deprivations in these unique circumstances. This Court did not hold there was any such exception in the Ohio Constitution. The issue before this Court was that certain signature requirements in the Ohio Constitution, as enforced against Plaintiffs in these extraordinary circumstances, offend the First Amendment to the United States Constitution. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").

Next, Defendants argue that if the First Amendment applies, then any burden on Plaintiffs is "more than justified by the State's significant regulatory interests" under the *Anderson-Burdick* framework. (Mot. to Stay, ECF No. 46.) Defendants completely ignore this Court's analysis of the burden on Plaintiffs under *Anderson-Burdick* and its reliance on the Sixth Circuit's decisions in *Schmitt* and *Esshaki*. (*See* Op. & Order at 22-23, ECF No. 44.)

Defendants repeat that the Stay-at Home Orders "specifically exempt Plaintiffs' signature gathering" and contend again that state action did not cause Plaintiffs' injuries. (Mot. to Stay at 3-4, ECF No. 46.) Defendants do not address the Court's finding that it is Ohio's strict enforcement of the signature requirements in light of the ongoing COVID-19 pandemic that was unconstitutional, not the Stay-at-Home Orders or the virus themselves. Moreover, Defendants' arguments insinuate that Plaintiffs should have been attempting to circulate while the Stay-at-Home Orders were in effect, beginning in the middle of March and continuing until very recently. As the district court in *Esshaki* rightly noted, "this argument both defies good sense and flies in the face of all other guidance that the State was offering to citizens at the time." 2020 WL 2020 WL 1910154, at *5 (E.D. Mich. Apr. 20, 2020).

Beginning on March 22, 2020, Ohioans were ordered to stay home and maintain social distancing. Even if petition circulation was exempt from the Orders, Defendants cannot seriously suggest that Plaintiffs should have been going out in public, possibly exposing themselves and potential signers to the COVID-19 disease, at the same time when Defendants were urging Ohioans to stay home and avoid close contact. Defendants themselves have recognized the importance of not forcing Ohioans "to choose between their health and exercising their constitutional rights."

Defendants assert generally that only strict compliance of the electronic signature and witness requirements in the Ohio Constitution can ensure submitted signatures are authentic, serving the state's "substantial regulatory interests in orderly elections and in protecting the Ohio Constitution and election laws." (Mot. to Stay at 4, ECF No. 46.) But Defendants have failed to provide any evidence to this Court that OFRW Plaintiffs' detailed proposal for signatures to be electronically signed and witnessed would lead to fraudulent signatures. Defendants never addressed this plan at the preliminary injunction stage, and they fail to make any argument against it here, other than to say electronic signatures could not comply with the Ohio Constitution's witness requirement, which this Court also enjoined.

As this Court explained, OFRW Plaintiffs' proposal included a method for verifying signers' identities using the last four numbers of their social security numbers, and the warnings regarding the penalties for forging signatures and election falsification that are found on paper petitions. (*See* Op. & Order at 31, ECF No. 44.) The last four digits of voters' social security numbers were sufficient to request absentee ballots in the primary election[7] and are used to register

[7] *See* 2020 Primary Frequently Asked Questions, Frank LaRose Ohio Secretary of State, https://www.sos.state.oh.us/elections/voters/2020-primary-frequently-asked-questions/ (explaining voters who could not print an absentee ballot request could write certain information, including either their drivers license number, last four digits of their Social Security number, or include a copy of their ID, on a blank sheet of paper and mail it to their board of elections).

to vote.[8] Defendants have offered no reason why this information would be insufficient to validate signatures here. Moreover, the Court instructed the parties to meet and confer regarding any technical or security issues to the on-line signature collection plans and to submit their findings to the Court within seven days of its decision, giving Defendants *another* opportunity to address OFRW Plaintiffs' proposed plan. (Op. & Order at 41, ECF No. 44.)

This Court did not invent the notion of electronic signatures. As it noted, large parts of the economy use electronic signatures that can be verified and checked for fraud or errors. (*Id*. at 31.) This Court's Local Rules authorize the use of electronic signatures on filings, which Defendants availed themselves of here, and equates them to "hand-signed signatures for all purposes, including Fed. R. Civ. P. 11 or any rule or statute." *See* S.D. Ohio Civ. R. 83.5.

Other courts have ordered states to accept electronic signatures for petitions and several states have adopted electronic signatures for petitions on their own, strongly supporting the reliability of such methods. *Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020) (reducing Illinois' statutory signature requirements for all candidates to 10 percent of previous levels, extending their filing deadlines from June 22, 2020 until August 7, 2020, and enjoining Illinois's in-person, witnessed, wet and notarized signature collection process in favor of electronic signatures); *Goldstein v. Sec'y of Commonwealth*, No. SJC-12931, 2020 WL 1903931, at *6 (Mass. Apr. 17, 2020) (holding that the minimum signature requirement and the need to provide "wet signatures" "which may only impose a modest burden on candidates in ordinary times, now impose a severe burden on, or significant interference with, a candidate's right to gain access to the . . . primary ballot, and the government has not advanced a compelling

[8] *See* Register to Vote or Update Your Voter Registration Information, Frank LaRose Ohio Secretary of State, https://olvr.ohiosos.gov/ (last accessed May 22, 2020) ("To register online you will need to provide the following . . . Last four digits of your Social Security Number.").

interest"); *Omari Faulkner for Virginia v. Va. Dep't. of Elections*, CL 20-1456 (Va. Cir. Ct. Mar. 25, 2020) (granting preliminary injunction and reducing candidate signature gathering requirements, and allowing electronic signatures); *Michelle Ferrigno Warren v. Colorado Secretary of State Jena Griswold*, Denver County (Colo.) Dist. Ct. No. 20CV31077 (Apr. 21, 2020) (placing a candidate for U.S. Senate on the state's primary election ballot, even though she had not collected a sufficient number of signatures required by Colorado law); *Dennis v. Secretary of the Commonwealth*, Mass. Case No. SJ-2020-278 (issuing a judgment extending its April 17, 2020 decision in *Goldstein* to allow four ballot initiative campaigns to collect signatures electronically); Fla. Emergency R. 1SER20-2 (Apr. 2, 2020) (allowing electronic signatures because of COVID-19 pandemic); N.J. Exec. Order Nos. 105, 120 (Mar. 19, 2020, Apr. 8, 2020) (same); Utah Exec. Order No. 2020-8 (Mar. 26, 2020) (same).

Similarly, Defendant Secretary LaRose has publicly advocated for Ohio to adopt a digital absentee ballot request system for the November election instead of the current system that requires a paper form:

> "It just does not meet expectations in the year 2020 to require people to print a form and to put a wet ink signature on a dead tree piece of paper to fold it up, root through their junk drawer to find a stamp and mail it to their board of elections," he said. "That is from the last century and needs to be replaced with a modern, online absentee request system."

See Darrel Rowland & Rick Rouan, *After a Problem-Plagued Primary, Ohio Leaders Disagree About November Plan*, Columbus Dispatch (April 28, 2020), https://www.dispatch.com/news/20200428/after-problem-plagued-primary-ohio-leaders-disagree-about-november-election-plan.

It is impossible to reconcile this statement with one made yesterday in a formal filing to the United States Court of Appeals for the Sixth Circuit, where Defendants stated:

> It is common knowledge that even the most thoughtfully designed online systems are vulnerable to attack, and that petitions signed electronically and emailed or submitted online can be manipulated.

(*See* Defendants-Appellants' Combined Emergency Mot. for an Administrative Stay and a Stay Pending Appeal at 17-18, Doc. 8.)

Finally, Defendants contend the "Court's extension of these deadlines has wide ranging implications for other ballot petition requirements such as deadlines for challenges to petitions before the Ohio Supreme Court as set forth in Article II of the Ohio Constitution." (Mot. to Stay at 4, ECF No. 46.) The Court is aware of these deadlines, and noted in its decision that the Court extended the submission deadline to July 31, 2020 because it is the last date the Secretary of State is already required by law to accept signatures under the current scheme. (Op. & Order at 41, ECF No. 44.) Specifically, under current Ohio law, petitioners are permitted 10 additional days after receiving notice from the Secretary of State that their signatures are insufficient to collect and file additional signatures. *See* Ohio Const., Art II. § 1g. This year, that date would be July 31, 2020—10 days after the Secretary of State's July 21, 2020 deadline for determining the sufficiency of the signatures. *Id.* This is the date the Court chose for OFRW and OSFE Plaintiffs to submit their signatures.

The Secretary of State must then determine the sufficiency of these supplemental signatures by August 30, 2020. Challenges to supplemental signatures must be filed in the Ohio Supreme Court by September 9, 2020. The Secretary of State must certify the form of official ballots for the November 3, 2020 general election to county boards of elections by September 14, 2020. The Ohio Supreme Court must rule on any challenge to the supplemental signatures by September 19, 2020. Defendants have offered no explanation why these deadlines for

supplemental signatures, already codified in the Ohio Constitution and statutes, would not work here.

B. Harm to Defendants, Harm to Others, and the Public Interest

Defendants next contend the Court's "wrongful injunction" of Ohio's enforcement of the signature requirements "irreparably harms not only the State, but not all Ohioans." (Mot. at 5, ECF No. 5.) Defendants assert this Court has rewritten Ohio's Constitution, affecting the state itself and Ohio citizens. (*Id*.) Defendants misstate this Court's decision.

This Court did not hold that the signature requirements in Ohio's Constitution were facially invalid or order permanent relief. This Court found that those requirements were unconstitutional only as applied to these particular plaintiffs in these extraordinary and unprecedented times, and temporarily enjoined enforcement of those statutes for the November 3, 2020 election only.

Moreover, Defendants ignore that the Court did not touch the requirements that petitions contain a certain number of signatures from, for the constitutional amendment plaintiffs, a specific geographic distribution. The Court recognized the compelling importance of these requirements, particularly for Plaintiffs seeking to amend Ohio's Constitution who must collect signatures from 10 percent of Ohio voters who voted in the last gubernatorial election, 5 percent of which must come from 44 of Ohio's 88 counties. These requirements remain in full effect and will ensure that Plaintiffs' proposed measures have sufficient statewide grassroots support.

Finally, Defendants contend this Court places an "incredible burden upon the individual Defendants who have been tasked with solving the Thompson Plaintiffs' problems in one week." (*See also* Mot. at 1, ECF No. 46 ("The Secretary of State and the 88 county boards of elections must create and implement these significant and unprecedented processes before July 31, 2020, the deadline to which the petition submissions was extended.").) Defendants overstate this burden.

This Court directed Defendants to update the Court by Tuesday, May 26, 2020 "regarding adjustments to the enjoined requirements 'so as to reduce the burden on ballot access'" for Thompson Plaintiffs. (*See* Op. & Order at 40, ECF No. 46 (citing *Esshaki*, 2020 WL 2185553 at *2).) This Court did not require a plan be implemented and enacted into law by that date, and notes that Michigan agreed to and announced reasonable adjustments to its signature requirements just three days after the Sixth Circuit's decision in *Esshaki*. *See* Elections, The Office of Secretary of State Jocelyn Benson (Updated May 8, 2020), https://www.michigan.gov/sos/0,4670,7-127-1633---,00.html.

The Court's ordered relief does not require Defendants to create and implement an electronic signature plan—it directed Defendants to accept electronically signed and witnessed petitions from OSFE and OFRW Plaintiffs by July 31, 2020. Those Plaintiffs have developed electronic signature plans. Defendants offer no reason why they could not adopt the same plan for Thompson Plaintiffs. That is, Thompson Plaintiffs can be responsible for implementing an e-signature platform like OFRW and OSFE Plaintiffs.

This Court spent extended discussions with the parties on the record to ensure no factual disputes were unresolved. The Court specifically advised the parties that it would not resolve any factual disputes on briefs or affidavits. The parties were encouraged to offer testimony in the event facts were not agreed upon. All parties stated on the record that there were no disputed facts. This Court did not resolve facts before issuing its decision and will not attempt to resolve disputed facts at this point either.

Defendants have not shown they will suffer irreparable harm absent a stay, and it is not in the public interest to grant a stay. "It is always in the public interest to prevent the violation of a

party's constitutional rights." *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quotation omitted).

Conversely, Plaintiffs will be harmed if a stay is granted. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). This Court found Plaintiffs were likely to succeed on the merits of their First Amendment claims, and every day that passes that Plaintiffs are prohibited from collecting signatures is another day they are harmed. Time is of the essence.

C. Remedy

Finally, this Court did not exceed its authority in ordering specific relief for OSFE and OFRW Plaintiffs. If the Court did not order relief for these Plaintiffs, it would effectively be defying the Sixth Circuit's decision in *Esshaki*. This Court is aware that *Esshaki* involved a challenge by a candidate seeking access to the ballot, rather than initiative petitions. As this Court explained in its decision, that distinction is precisely why the Court did not reduce the numerical and geographical requirements. This Court recognized the compelling importance of ensuring constitutional amendments and local initiatives have more than just the "modicum of support" required for candidates.

Defendant Secretary LaRose cannot remedy these violations. The Ohio General Assembly is powerless to amend the Ohio Constitution on its own. Instead, only the people of Ohio can amend the Ohio Constitution. This case is about groups of Ohioans seeking to just do that, but who cannot exercise their First Amendment rights in support of their amendments. Defendants have offered no explanation as to how the people of Ohio could remedy the First Amendment violations

found here in time for the November election. Surely Defendants do not intend to allow these First Amendment violations to go unremedied.

IV.

For the reasons set forth above, the Court **DENIES** Defendants' Motion to Stay.

IT IS SO ORDERED.

05/22/2020
DATE

s/ Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

Attachment 7

Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative in a Pandemic*, 2020 U. CHIC. L. REV. ONLINE 1, 6 (May 27, 2020) (cited with permission)

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DIRECT DEMOCRACY DENIED:
THE RIGHT TO INITIATIVE IN A PANDEMIC

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DIRECT DEMOCRACY DENIED: THE RIGHT TO INITIATIVE IN A PANDEMIC

RICHARD L. HASEN*

I. INTRODUCTION

Putting aside the Supreme Court's controversial decision in *Republican National Committee v. Democratic National Committee*,[1] the case over extending the date for receipt of absentee ballots in the April 2020 Wisconsin primary, courts so far have done a fairly good job protecting voting rights during the COVID-19 pandemic. From easing candidate and party signature requirements for ballot access,[2] to temporarily eliminating witness[3] or notarization[4] requirements for casting an absentee ballot, to interpreting the excuse provisions in for-cause absentee ballot laws to cover voters without coronavirus immunity who fear voting in person,[5] courts have recognized that election laws that ordinarily do not burden voters can become burdensome in a pandemic. Courts have interpreted such laws to avoid disenfranchisement, and sometimes temporarily suspended or altered them.[6]

That welcome thumb on the scale favoring voters, however, has not extended uniformly to claims for the easing of signature gathering rules by ballot

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[1] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020). I provide a critique of the opinion in Part II.A of Richard L. Hasen, *Three Pathologies of American Voting Rights Iluminated by the COVID-10 Pandemic, and How to Treat and Cure Them* (draft dated May 18, 2020), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3604668.

[2] Esshaki v. Witmer, No. 20-1336, 2020 WL 2185553, *1 (6th Cir. May 5, 2020).

[3] League of Women Voters of Va. v. Va. State Bd. of Elections, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020) (approving consent decree).

[4] League of Women Voters of Okla. v. Ziriax, 2020 OK 26, https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=486523. After the ruling, the Oklahoma Legislature reinstated the notarization requirement. Barbara Hoberock, *Gov. Stitt Signs Fast-Moving Bill to Restore Notary Requirements on Oklahoma Absentee Ballots*, TULSA WORLD, May 8, 2020, https://www.tulsaworld.com/news/state-and-regional/gov-stitt-signs-fast-moving-bill-to-restore-notary-requirement-on-oklahoma-absentee-ballots/article_13753f29-d58c-5bae-aa61-cbeb0ca1b76e.html#1.

[5] Tex. Democratic Party v. DeBeauvoir, Order on Application for Temporary Injunctions and Plea to the Jurisdiction, No. D-1-GN-20-001610, at 3-4 (Tex, 201st Jud. Distr., Apr. 17, 2020), https://electionlawblog.org/wp-content/uploads/texas-excuse-order-1.pdf.

[6] *See* Hasen, *supra* note 1, Parts II.B, II.C (analyzing how courts have adjudicated election law disputes in light of the COVID-19 pandemic).

measure proponents. In four cases I examine,[7] courts have rejected the demands of initiative proponents to ease requirements to qualify a measure for the ballot, such as allowing electronic instead of "wet" (in person) signatures, and easing witness requirements, total number of signatures required, or geographic requirements for signature collection. In just one case, *Thompson v. DeWine*,[8] a federal district court ordered Ohio to alter its procedures for qualifying proposed measures for the ballot, including allowing the acceptance of electronic signatures. The decision, however, was put on hold by the Sixth Circuit in a stay order that was very dismissive of the rights of direct democracy and that portends bad things to come.[9]

In this short analysis, I argue that some of the reasons courts and states have offered against easing ballot measure qualification requirements during a pandemic are weak, and that the district court in *Thompson* was right to see that normal ballot qualification rules can impose a severe First Amendment burden on direct democracy proponents under pandemic conditions. The problem, as illustrated by the *Thompson* case, is fashioning appropriate relief consistent with principles of federalism and separation of powers. It is difficult to craft a remedy would put the plaintiffs in the position they would have been in had there been no pandemic and that does not usurp the state's general role in enforcing its election rules or undermine sound principles of election administration and fairness.

II.
DIRECT DEMOCRACY AS INFERIOR DEMOCRACY

States and local governments do not have to offer voters the devices of direct democracy such as the initiative, referendum, or recall as a means of supplementing the regular legislative process, but when they do, activity related to these direct democracy measures is protected by the First Amendment. In *Meyer v. Grant*,[10] for example, the Supreme Court struck down a Colorado rule that barred

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[7] Arizonans for Fair Elections v. Hobbs, No. CV-20-00658-PHX-DWL, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020); Bambenek v. White, No. 3:20-cv-3107, 2020 WL 2123951, *2 (C.D. Ill. May 1, 2020); Morgan v. White, No. 1-20-cv-02189, https://electionlawblog.org/wp-content/uploads/Morgan-v.-White.pdf (N.D. Ill. May 18, 2020); Thompson v. DeWine, ___ F.3d. ___, 2020 WL 2702483 (6th Cir. May 26, 2020). Although beyond the scope of this article, a federal district court also rejected an attempt to relax signature requirements for a gubernatorial recall in Nevada. Fight for Nevada v. Cegavske, No. 2:20-cv-00837-RFB-EJY, https://www.scribd.com/document/461649223/Fight-for-Nevada-TRO-rejection (D. Nevada, May 15, 2020). The court distinguished cases relaxing signature requirements for candidate and party ballot qualification, calling them "very different" from qualifying a recall for the ballot. *Id*. (slip op. at 7-8).

[8] 2020 WL 2557064 (S.D. Ohio, May 19, 2020).

[9] *Thompson*, 2020 WL 2702483. *See infra* Part III.

[10] 486 U.S. 414 (1988).

paying ballot petition circulators. "The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion."[11] And in *Buckley v. American Constitutional Law Foundation*,[12] the Court struck down, among other things, a Colorado law requiring petition circulators be registered voters and to wear badges indicating whether or not they were paid circulators.

As lower courts have considered First-Amendment challenges to various aspects of laws regulating ballot petitions and direct democracy, they typically have applied a sliding scale balancing test, commonly known as the *Anderson-Burdick* test, which requires the state to justify laws imposing severe burdens on plaintiffs under strict scrutiny and less severe burdens under looser standards of review.[13]

Ballot circulation is generally an in-person activity, in which a ballot circulator typically sets up a table in a popular area such as outside of a supermarket and asks voters to sign petitions to put the measure on the ballot.[14] To qualify a measure to appear on the ballot for voter approval, ballot circulators must comply with standards such as a minimum number of signatures collected in a finite period of time

Signature collection that is usually not burdensome in ordinary times has become extremely burdensome during the pandemic when states put in place orders confining people to their homes except for essential activities. Even in areas without formal orders, signature collection can be very difficult as health experts have cautioned against unnecessary close contact with other people and with surfaces such as the pens and clipboards that are typically used to collect signatures

As in cases involving other election laws that have become burdensome in light of the COVID-19 pandemic,[15] proponents of state and local ballot measures have asked federal courts for relief from the usual election rules in light of the

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[11] *Id*. at 422-23 (footnote omitted).
[12] 525 U.S. 182 (1999).
[13] The test is named after two Supreme Court cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). For more on the test, see Hasen, *supra* note 1, at notes 117-24 and accompanying text and Part II.B; Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (forthcoming 2020). On lower court application of *Anderson-Burdick* to First Amendment ballot measure cases, see *Thompson*, 2020 WL 2557064, at *10 ("Importantly, this Court is bound by the Sixth Circuit, which has twice in the last two years applied the *Anderson-Burdick* framework to First Amendment challenges to Ohio's statutory requirements for initiative petitions.").
[14] *Thompson*, 2020 WL 2557064 at *14.
[15] *See* Hasen, *supra* note 1, at Part II.B (describing COVID-19-related election litigation).

difficulty of meeting the rules during the pandemic. For the most part, courts have been unsympathetic to the claims of ballot measure proponents even while other courts have granted relief to minor political parties and candidates who also need to collect signatures to remain on the ballot.[16]

For example, in *Morgan v. White*,[17] plaintiffs were Illinois registered voters who wished to circulate a constitutional amendment referendum on the Illinois Democracy Amendment and an initiative for a local government referendum in Evanston, Illinois.[18] As is typical, Illinois requires ballot circulators to collect a certain number of signatures on paper (so-called "wet" signatures) as well as requires ballot circulators to add a sworn statement "certifying that the signatures on that sheet . . . were signed in his or her presence."[19] Circulators must file the original signed witness sheets with election authorities.

Plaintiffs sought a court order modifying some of these rules and extending the deadline for submitting signatures. The court held that the plaintiffs lacked standing, because they had not circulated petitions for the first 16 months of the 18-month period to collect signatures for the upcoming election and so they could not show they were injured by the existing ballot access rules.[20] Plaintiffs argued they were waiting for a reform commission to first make recommendations about election reform before they decided to circulate the petition on the same topic, but the court concluded that "[n]othing in the record supports an inference that, absent [the stay-at-home order of the Illinois governor], Plaintiffs would have been able to collect necessary signatures in the weeks between the issuance of the order and [the deadline]."[21]

The court further held that even if the plaintiffs had standing, they should lose on the merits. After stating that "there is no constitutional right to place referenda on the ballot,"[22] the court distinguished cases in which other courts had loosened requirements for minor parties and candidates to appears on the ballot as somehow more worthy of protection.[23] Despite the flexible *Anderson-Burdick* balancing test, the court applied rational basis review, which is easy for the state to satisfy in order to justify its restrictions.[24]

The court held that the challenge to requiring a wet signature and witness statements was more weighty given COVID-19, but concluded that there should be no relief for plaintiffs because "[t]hese circumstances are caused by the virus

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[16] *E.g.*, Esshaki v. Witmer, No. 20-1336, 2020 WL 2185553, *1 (6th Cir. May 5, 2020).
[17] Morgan v. White, No. 1-20-cv-02189 (N.D. Ill. May 18, 2020).
[18] *Id*. at 1.
[19] *Id*. at 3.
[20] *Id.* at 6.
[21] *Id.* at 7.
[22] *Id*. at 9.
[23] *Id*. at 9 n.6.
[24] *Id*. at 10.

itself…not by state law. It is only when state law prevents certain individuals from circulating petitions that Frist Amendment harms are implicated."[25] Finally, the court concluded that it was plaintiffs' own dilatory conduct, rather than state law, that was responsible for its predicament.[26]

Similar reasoning appears in the other two cases rejecting arguments to loosen ballot access requirements in light of the virus. In *Bambenek v White*,[27] a different federal district court reviewing another challenge to Illinois rules for ballot measures followed the reasoning in *Morgan*.[28] The *Bambenek* court distinguished cases giving relief to political parties collecting signatures, cases which "concern[] placing candidates on the ballot, which implicates unique constitutional concerns, as opposed to this case which involves placing a proposed constitutional amendment and various referenda on the ballot and therefore does not implicate precisely the same constitutional concerns."[29] The court, citing *Morgan*, described that court as distinguishing candidate ballot access from a "state-created right to non-binding ballot initiatives"[30]—even though plaintiffs were proposing a binding ballot measure, not an advisory one.[31] The court also found that easing the ballot access rules for initiative proponents would place a burden on state defendants,[32] and that the plaintiffs waited too long to file suit.[33]

In *Arizonans for Fair Elections v. Hobbs*,[34] plaintiffs who wished to circulate ballot measures for the 2020 general election ballot sought a change in ballot measure qualification rules, including allowing the electronic submission of signatures through a system that had already been set up for Arizona candidates to collect qualifying signatures.[35] The court rejected the relief on a number of grounds. First, plaintiffs had challenged only Arizona's statutory rules concerning the ballot measure qualification process, and not the requirements in the state constitution

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[25] *Id.* at 11. *See also id.* at 14.

[26] *Id.* at 11-12. The court also noted that changes in the laws would burden election administrators who need to determine if measures qualify for the ballot and then prepare them for inclusion. "Preventing Defendants from being able to fulfill these statutory duties [on time] not only imposes harm on them but also appears contrary to the public interest." *Id*. at 13.

[27] Bambenek v. White, 2020 WL 2123951 (C.D. Ill. May 1, 2020).

[28] *Id*. at *2.

[29] *Id*.

[30] *Id*. a *2.

[31] The case that the *Bambenek* court erroneously relied on for this proposition, *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935 (7th. Cir. 2018) involved a binding referendum, not an advisory voter plebiscite.

[32] As to those plaintiffs in the case seeking to place a measure on local ballots, the court noted that the deadline for signature submission was August 3, and it was speculative whether the virus would affect signature gathering during the summer. *Bambenek*, 2020 WL 2123951. at *3.

[33] *Id*.

[34] 2020 WL 1905747 (D. Ariz. Apr. 17, 2020).

[35] *Id.* at *2.

requiring, among other things, in-person signature qualification. Given this limited challenge, the court concluded that the relief plaintiffs sought would not help them.[36] Second, the court characterized plaintiffs' conduct as dilatory, in that other ballot measure committees had gathered enough signatures but "the two committees in this case didn't start organizing and gathering signatures until the second half of 2019."[37] Further, given that the pandemic could lift before the July 2020 deadline for the submission of signatures, the court held that plaintiffs did not demonstrate that "Arizona law creates a severe burden that would prevent a reasonably diligent initiative committee from placing its proposed initiative on the ballot."[38]

The court also expressed separation of powers and federalism concerns, raising doubt about the power of the federal court "to rewrite state election laws that have been in place since the 1910s." Finally, the court was concerned about the "array of granular policy choices this Court would need to make in order to effectively implement: relief for the plaintiffs."[39] As in *Morgan*, the *Arizonans for Fair Elections* court distinguished cases granting relief for plaintiffs wishing to vote during the pandemic on grounds that those were "vote restriction" cases to which a "reasonable diligence" standard would not apply.[40]

Some of the points made by these three courts are meritorious.[41] For example, a ballot measure proponent who challenges statutory requirements but fails to challenge state constitutional requirements for in-person signature gathering cannot expect a federal court to be able to grant effective relief. And an initiative proponent who would have no chance of qualifying a ballot measure under normal conditions should not expect relief from a federal court to account for increased difficulty created by the pandemic. A court should put plaintiff in the rightful position, which is the position they would have been in had there been no wrong.[42]

But these cases are deeply problematic. They denigrate the rights that ballot measure proponents are seeking to vindicate in these cases by unfavorably comparing them to the rights of candidates to get on the ballot. Once a jurisdiction offers direct democracy options to the public, severe burdens on that right should be subject to closer scrutiny. The courts' arguments seeking to distinguish candidate ballot access from ballot measure ballot access are unsupported by any reasoning. Both involve voting rights and both involve severe burdens caused by the pandemic. If the external shock of COVID-19 is enough to justify judicial

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[36] *Id*.
[37] *Id.*; *see also id*. at *10-*11.
[38] *Id*.
[39] *Id.*
[40] *Id*. at *12-*13.
[41] I address the federalism and separation of powers issues in Part III below.
[42] DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 14-15 (5th ed. 2019).

changes in candidate signature requirements, it should for ballot measures as well.[43] Cases in both areas should be judged under the flexible *Anderson-Burdick* standard.

The ballot measure cases also appear to impose too high a standard for ballot measure proponents' standing requirements and for obtaining relief. As the *Bambenek* court recognized, "signature collection efforts for referenda drives…tend to ramp up in the final weeks."[44] That ballot measure proponents did not seek to gather signatures during the entire window for signature gathering should not be evidence of dilatory conduct. A court should instead ask if plaintiffs had a realistic chance of qualifying a measure for the ballot had there been no pandemic.

III.
FASHIONING APPROPRIATE DIRECT DEMOCRACY RELIEF IN A PANDEMIC

I am much more sympathetic to the constitutional analysis of the federal district court in *Thompson v. DeWine*,[45] a case brought by proponents of a ballot measure in Ohio. But the case demonstrates the difficulty of federal courts appropriately granting relief, especially given election administration issues and given separation of powers and federalism concerns as raised in the *Arizonans for Fair Elections*[46] case. And given the Sixth Circuit's analysis granting a stay in *Thompson*, the case likely will soon be reversed.

As to constitutional rights, the district court agreed that once a state offers direct democracy devices, limits on the practice may violate the Constitution and are subject to *Anderson-Burdick* balancing.[47] The court also recognized that it was appropriate to take the COVID-19 pandemic into account when balancing, and that normally non-severe ballot access rules become severe under pandemic conditions.[48] The state's stay-at-home orders and other restrictions have "pulled the rug out from under [plaintiffs'] ability to collect signatures,"[49] creating a severe burden on plaintiffs' rights.[50] This synergistic approach is fairer than the *Morgan*

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[43] One answer to the argument that these laws infringe First Amendment rights is that ballot measure proponents could simply decide to propose a measure in a later election. But we would not accept such an answer if applied to a candidate kept off the ballot for lack of enough signatures during a pandemic. Just like a candidate expresses her First Amendment right by choosing to run in a particular election, so too do ballot proponents pick the times for attempting to place measures on the ballot.

[44] *Bambenek*, 2020 WL 2123951, *3.

[45] 2020 WL 2557064 (S.D. Ohio, May 19, 2020).

[46] 2020 WL 1905747, at *11-*12.

[47] *Thompson*, 2020 WL 2557064 at *7-*12.

[48] *Id.* at *10-*12.

[49] *Id*. at *12.

[50] *Id.* and *12-*13.

court's nonsensical view that these problem were "caused by the virus itself…not by state law.'[51]

Once the court concluded that Ohio's ballot access laws imposed a severe burden on plaintiffs rights and other factors meriting injunctive relief, the question became one of remedy. The court recognized that state officials were without power to waive those requirements for ballot access contained in the state constitution, and so while it deferred to state officials to some extent, it ordered the state "to accept electronically-signed and witnessed petitions collected through the on-line signature collection plans" that the plaintiffs had proposed for their ballot measure drives.[52] The court also extended the deadlines for collection of signatures and ordered the parties to meet as to appropriate standards for electronic signature collection.[53]

The *Thompson* court did a good job trying to put the plaintiffs in the position they would have been in if there had been no pandemic and, following the Sixth Circuit precedent in the *Esshaki* case extending petitioning deadline for political parties,[54] the district court gave state officials maximum flexibility to cure the constitutional defects created by the confluence of the coronavirus and state law.

But these cases do raise a host of difficult problems of election administration, federalism, and separation of powers. To begin with, state deadlines for ballot qualification are necessary so that election officials have time to adequately determine whether measures qualify for the ballot, and if they do, properly prepare them for inclusion in ballot materials. As a court extends deadlines, it puts more pressure on election officials to do more in less time under their own pandemic-related stresses. Having state officials process electronic ballot measure signatures under pandemic conditions when they have not done so before may be difficult. Before a court grants relief to ballot measure proponents, it should insure that the new procedures will not unduly interfere with the other responsibilities of election officials.

Second, as the courts rejecting relief for ballot measure proponents have noted, having a federal court intervene in state and local ballot measure machinery is both intrusive and difficult work.[55] There is no set way for courts to ease rules. States might consider electronic submission of ballots (in states that already have some such system in place), or a reduction of the number of required signatures, or an end to witness requirements, or an extension of deadlines or some other relief.

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[51] *Morgan*, No. 1-20-cv-02189, at 11.

[52] *Thompson*, 2020 WL 2557064 at *20.

[53] *Id*. at *21. Given the adjustments of deadlines and the acceptance of electronic signature, the court found it unnecessary to reduce the state's numerical and geographical requirements for signature collection. *Id.* at *18.

[54] *Esshaki*, 2020 WL 2185553.

[55] Having a state court rather than a federal court make these changes removes the federalism concern but the election administration and separation of powers concerns remain.

Unlike a legislature that can consider input from a variety of sources on how to best balance these kinds of questions, courts can only take advice offered by the party, by witnesses, or by others submitting formal amicus briefs. The chances are high that in setting forth detailed changes in procedures a court will get things wrong.

So how best to engage in this balancing? The *Thompson* court seems to have the balance right. While it put a thumb on the scale favoring plaintiffs' rights when it came to the question of whether or not there is a constitutional violation, it offered deference to the state over how to best remedy the loss of plaintiffs' constitutional rights. It ordered the parties to meet and confer as to how to best put the electronic signature collection mechanism into place, and the court should continue to be open to state concerns about burden, cost, and availability of a remedy.

A Sixth Circuit panel, granting a stay of the district court's order for the state of Ohio, viewed the matter very differently. The court applied the *Anderson-Burdick* framework as binding circuit precedent, but left open the possibility of an *en banc* change of standard going forward.[56] Dismissing the realities of how the pandemic had essentially ended successful petitioning activity,[57] the court held the law imposed only a minor burden on plaintiffs. It declared that "just because

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[56] *Thompson*, 2020 WL 2702483, at *2 n.2 ("But until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this."). Ohio in seeking initial en banc consideration of the district court's order in *Thompson*, argued that *Anderson-Burdick* should not even apply to challenges to the mechanics of the initiative process. Petition for Initial En Banc Review, Thompson v. DeWine, No. 20-3526 (6th Cir. May 21, 2020), https://www.bloomberglaw.com/product/blaw/document/X2U08L8GSKV9SVA4KMOCA5G18RU?update=true. In the petition, the sate conceded that existing Sixth Circuit authority requires use of the *Anderson-Burdick* balancing test to determine whether state ballot measure procedures are unduly burdensome. It asked for en banc review to reverse those precedents, arguing that D.C. Circuit and Tenth Circuit cases reject *Anderson-Burdick* in this context and pointing to a purported circuit split. In fact, the D.C. case, *Marijuana Policy Project v. U.S.*, 304 F3d 82 (D.C. Cir. 2002) does not mention the *Anderson-Burdick* test and instead held that federal legislation barring the District of Columbia from passing any laws on the subject of marijuana legalization did not violate the First Amendment. The Tenth Circuit case, *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), upheld against First Amendment challenge a provision of the Utah constitution requiring wildlife-related ballot measures to pass by a supermajority vote. This case too did not mention *Anderson-Burdick*, and neither case involved claims as in *Thompson* that the *mechanics* of the ballot measure process imposed a severe burden on ballot measure proponents in violation of the First Amendment.

[57] *Thompson*, 2020 WL 2702483, at *4 ("Plaintiffs' claim effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds) as they would without the pandemic. But that's not necessarily true. There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them and bring the petitions to the electors' home to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.").

procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot."[58] The court did not explain how anything short of full exclusion of the plaintiffs from the ballot could count as merely a minor burden. The court rejected the district court's order even assuming an intermediate burden, holding the state's rules appeared justified on antifraud and election administration grounds even in the midst of a pandemic.[59]

The Sixth Circuit panel distinguished the Circuit's earlier *Esshaki* case, which had eased ballot access rules for party and candidate qualification in Michigan, on grounds that Ohio's stay-at-home order did not formally ban First Amendment activity like petition circulating.[60] It noted that Ohio was beginning to lift its stay-at-home order,[61] suggesting without evidence that petition circulators would have an easier time collecting signatures in Ohio than in Michigan as the pandemic spread in both states.

Finally, the Sixth Circuit, turning to the federalism and separation of powers issues that the district court flagged before granting plaintiffs relief, held that the district court exceeded its powers in granting plaintiffs a remedy:

> The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections. And because that's where the decision-making authority is, federal courts don't lightly tamper with election regulations. These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into unchartered waters. It may well be that the new methods for gathering signatures and verifying them proposed by Plaintiffs (using electronic signatures gathered online by third parties and identified by social security number) will prove workable. But they may also pose serious security concerns and other, as yet unrealized, problems. So the decision to drastically alter Ohio's election procedures must rest with the Ohio Secretary of State and other elected officials, not the courts.[62]

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[58] *Id*. (original emphasis).

[59] *Id*. at n.3, *5 ("Defendants claim the witness and ink requirements help prevent fraud by ensuring that the signatures are authentic. And the deadlines allow them time to verify signatures in an orderly and fair fashion, while also providing initiative proponents time to challenge any adverse decision in court. [¶] These interests are not only legitimate, they are compelling.").

[60] *Id.* at *3.

[61] *Id*. at *4

[62] *Id*. at *6. The court also cautioned against court orders issued too close to the election, citing the *Purcell* Principle and *Purcell v. Gonzalez*, 549 U.S. 1 (2006). For a critique of the principle as applied in the context of the pandemic, see Hasen, *supra* note 1 (draft at 44-45); for a more general critique, see Richard L. Hasen, *Reining in The Purcell Principle*, 43 FLA. ST. U. L. REV. 427 (2015).

The decision of the Sixth Circuit is unfortunate. The district court's resolution of the difficult issues posed by ballot circulation during a pandemic may not have been perfect, but they demonstrate the efforts of a court that both takes the First Amendment rights of ballot measure proponents seriously and considers the real costs of a federal court changing election rules in the midst of a pandemic. A court sensitive to federalism and separation of powers concerns can craft targeted relief to protect the right to ballot circulation.

The Sixth Circuit, in contrast, has put a thumb on the scale favoring the state, denigrating the right to petition along the way, and minimizing the real costs that the pandemic has placed on democratic petitioning activity. The court weighed federalism and separation of powers issues too heavily as it dismissed the burdens on the right to petition as minor. Most importantly, the Sixth Circuit decision sends a disturbing signal about how some courts may approach burdens on fundamental voting rights questions during the pandemic.[63]

[63] As this Article went into production, a federal district court relaxed some Arkansas provisions related to the circulation of initiative petitions. Miller v. Thurston, 2020 WL 2617312 (W.D. Ark. May 25, 2020). The court applied the *Anderson/Burdick* framework, *id*. at *3, and decided to allow petition circulators to collect individual signatures from voters, signed under penalty of perjury, rather than requiring circulators to witness signatures and attest to their authenticity. It rejected other requests of the plaintiffs, such as lowering the number of required signatures. Arkansas may choose to appeal this ruling.

Attachment 8

South Bay United Pentecostal Church v. Gavin, 590 U.S. __,

No. 19A1044 (May 29, 2020)

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring in denial of application for injunctive relief.

The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This

power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks

emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

SUPREME COURT OF THE UNITED STATES

No. 19A1044

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.
v. GAVIN NEWSOM, GOVERNOR OF
CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from denial of application for injunctive relief.

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___, ___ (2017) (slip op., at 15); see also, *e.g., Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Ibid.*

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Ibid.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could "insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities." *Id.,* at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction. I respectfully dissent.

Attachment 9

Sixth Circuit's Denial of En Banc Relief

and Refusal to Vacate Stay

No. 20-3526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 16, 2020
DEBORAH S. HUNT, Clerk

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellees,

v.

RICHARD MICHAEL DEWINE, IN HIS CAPACITY AS THE GOVERNOR OF OHIO; AMY ACTON, IN HER OFFICIAL CAPACITY AS DIRECTOR OF OHIO DEPARTMENT OF HEALTH; FRANK LAROSE, IN HIS OFFICIAL CAPACITY AS OHIO SECRETARY OF STATE,

Defendants-Appellants,

OHIOANS FOR SECURE AND FAIR ELECTIONS, ET AL.

Proposed Intervenors-Appellees.

O R D E R

The court having received a petition for initial hearing en banc, petition for rehearing en banc, motion for reconsideration, and motion to vacate the stay pending appeal, and the petitions and motions having been circulated to all active judges of this court, and no judge of this court having favored the suggestion,

It is **ORDERED** that the petitions and motions are hereby denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: June 16, 2020

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Re: Case No. 20-3526, *Chad Thompson, et al v. Richard Dewine, et al*
Originating Case No.: 2:20-cv-02129

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

Enclosure