Petition Appendix

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

File Name: 20a0314p.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 capacity as the Governor of Ohio; LANCE HIMES, in his official capacity as the Interim Director of the Ohio Department of Health; FRANK LAROSE, in his official capacity as Ohio Secretary of State,

Defendants-Appellants.

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: September 16, 2020*

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

COUNSEL

ON BRIEF: Benjamin M. Flowers, Michael J. Hendershot, Stephen P. Carney, Shams H. Hirji, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants. Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, Oliver B. Hall, CENTER FOR COMPETITVE DEMOCRACY, Washington, D.C., Jeffrey T. Green, SIDLEY AUSTIN LLP, Washington, D.C., Naomi A. Igra, Stephen Chang, Jennifer H. Lee, Tyler Wolfe, SIDLEY AUSTIN LLP, San Francisco, California, for Plaintiffs-Appellees. Anne Marie Sferra, Christopher N. Slagle, Bryan M. Smeenk, BRICKER & ECKLER LLP, Columbus, Ohio, Paul A. Zevnik, MORGAN, LEWIS & BOCKIUS LLP, Washington, D.C., for Amici Curiae.

*This decision was originally filed as an unpublished opinion on September 16, 2020. The court has now designated the opinion for publication.

OPINION

PER CURIAM. The COVID-19 pandemic has upended life in many ways. In response to the unfolding public health crisis, states across the country imposed various orders in hopes of containing the virus. Ohio, for its part, asked its citizens to stay at home and restricted the size of gatherings.

This case, which we've seen before, involves the intersection of COVID-19, the state's responses to that pandemic, and some of Ohio's conditions that must be met before a ballot initiative can get on the ballot for Election Day. *See Thompson v. DeWine*, 959 F.3d 804, 806 (6th Cir.) (per curiam), *mot. to vacate stay denied*, --- S. Ct. ----, No. 19A1054, 2020 WL 3456705 (2020).

Plaintiffs say that Ohio's ballot initiative conditions are unconstitutional as applied during this pandemic and request that the federal courts relax them, at least for the time being. Plaintiffs' challenge is a curious one. There is no question that Ohio's ballot initiative conditions are, standing alone, constitutional, there is no question that Ohio is not responsible for COVID-19, and Plaintiffs are not challenging Ohio's restrictions on public gatherings and the like, which Ohio imposed to address the pandemic—so we assume those are constitutional as well. And yet, Plaintiffs contend that when you put all of this together, in effect, two constitutional rights plus one outside catalyst make one constitutional wrong. The district court agreed and granted a preliminary injunction. We stayed that order because we disagreed. And now, because we still disagree, we reverse the district court's grant of a preliminary injunction.

I.

To get an initiative on a municipal ballot, Ohio requires the ballot's proponents to gather signatures totaling at least ten percent of the number of electors who voted for governor in the municipality's previous election. Ohio Rev. Code Ann. § 731.28. The signatures must be original and affixed in ink, and the petition's circulator must witness them. *Id.* § 3501.38.

And the initiative's proponents must submit these signatures to the Ohio Secretary of State at least 110 days before the election.[1] *Id.* § 731.28.

Plaintiffs here are three Ohioans hoping to get initiatives on local ballots to decriminalize marijuana.[2] They argue that Ohio's ballot initiative requirements, as applied during the COVID-19 pandemic and given Ohio's stay-at-home orders and other pandemic restrictions, violate the First and Fourteenth Amendments. So they asked the district court to enjoin Ohio from enforcing the ballot initiative requirements. The district court agreed, at least in part. It granted plaintiffs' request for a preliminary injunction, enjoining Ohio from enforcing some of its ballot access requirements. And it ordered Ohio to accept electronically signed and witnessed petitions, extended the deadline for petition submission, and told Ohio to come up with a system that would "reduce the burden on ballot access."[3] *Thompson v. DeWine*, --- F. Supp. 3d ----, No. 2:20-CV-2129, 2020 WL 2557064, at *21 (S.D. Ohio 2020) (quotation omitted).

Ohio asked us to stay the district court's injunction while its appeal was pending. We did. *Thompson*, 959 F.3d at 813. We reasoned that Ohio's compelling interests in preventing fraud and ensuring a fair and orderly signature verification process outweighed the intermediate burden the requirements imposed on plaintiffs' First and Fourteenth Amendment rights. *Id.* at 811. Now, we review whether a preliminary injunction was warranted in the first place. For reasons we'll discuss below, we don't think it was. We thus reverse the district court's grant of a preliminary injunction.

II.

This case comes to us on appeal from an order granting an injunction. So we have jurisdiction under 28 U.S.C. § 1292. We review a district court's grant of a preliminary

[1]This date has already passed. But Ohio doesn't argue that the case is moot. And we are satisfied that we still have jurisdiction despite the date's passing. Plaintiffs ask us to place their initiative directly on the ballots—and that relief is still available, in theory, until Ohio prints its first round of ballots.

[2]Our original stay order covered these Plaintiffs and two Intervenor-Plaintiffs who sought to get proposed constitutional amendments on Ohio's November ballot. The Intervenor-Plaintiffs have since withdrawn from this litigation. *See* Order Granting Mot. to Withdraw by Intervenors-Appellees.

[3]The court upheld Ohio's signature quantity requirement.

injunction for abuse of discretion, "subjecting factual findings to clear-error review and examining legal conclusions de novo." *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When we evaluate 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) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). So we start there.

A.

If this all sounds familiar, that's because it is. In staying the district court's preliminary injunction, we went through the factors above and concluded that Plaintiffs aren't likely to succeed on the merits. *Thompson*, 959 F.3d at 811. We still think so.

The First Amendment doesn't guarantee the right to an initiative. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). But once the people of a state, in their sovereign authority, decide to allow initiatives, "the state may not place restrictions on the exercise of the initiative that unduly burden First Amendment rights." *Id.*

"[W]e evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework."[4] *Thompson*, 959 F.3d at 808; *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788

[4]Although Ohio recognizes this, it also argues that "[l]aws regulating ballot access for state initiatives do not implicate the First Amendment at all." (Appellants' Br. at 26.) But as Ohio admits, that's not the law in this circuit. (*Id.* at 29–30.) And "until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this." *Thompson*, 959 F.3d at 808 n.2. Still, we note that at least two other courts of appeals take Ohio's position. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–100 (10th Cir. 2006) (en banc); *Marijuana Pol'y 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." *Thompson*, 959 F.3d at 808 n.2 (collecting cases). So there's a circuit split on the applicability of *Anderson-Burdick* to laws regulating ballot access for initiatives. This has caused "predictably contrary conclusions as to whether and to what extent States must adapt the initiative process to account for new obstacles to collecting signatures." *Little v. Reclaim Idaho*, --- S. Ct. ----, No. 20A18, 2020 WL 4360897, at *1 (2020) (Roberts, C.J., concurring in the grant of a stay). That said, "the [Supreme] Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election administration." *Id.*

(1983). Under that framework, the level of scrutiny we apply to "state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. When the burden is severe, the state must narrowly draw the regulation to serve an "interest of compelling importance." *Id.* (quotation omitted). But when the law imposes "reasonable, nondiscriminatory restrictions," we subject it to rational-basis review. *Id.* (quotation omitted).

There's one more layer to *Anderson-Burdick*. A challenged law imposes an intermediate burden when the burden is somewhere between severe on the one hand and reasonable and nondiscriminatory on the other. *Kishore v. Whitmer*, --- F.3d ----, No. 20-1661, 2020 WL 4932749, at *2 (6th Cir. 2020). When the burden is intermediate, we weigh it against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789; *see also Thompson*, 959 F.3d at 808. In doing so, we consider "the extent to which those interests make it necessary to burden the plaintiff's rights." *Thompson*, 959 F.3d at 808 (quoting *Burdick*, 504 U.S. at 434). It's this level of scrutiny that we apply to Ohio's laws here.[5]

1. The Burden

We see no reason to depart from our previous holding that Ohio's ballot-access restrictions impose, at most, only an intermediate burden on plaintiffs' First Amendment rights, even during COVID-19.[6] *Id.* at 810–811. If anything, the interim between our stay order and now has reinforced our holding. The federal circuit tide has turned against Plaintiffs. The Eighth

[5]In a surreply, Plaintiffs expand on their previous argument that Ohio—by failing to answer Plaintiffs' complaint or file a Rule 12 motion—"admitted" Plaintiffs' claim from the complaint that it was "impossible" for them to collect signatures. *See* Fed. R. Civ. P. 8(b)(6). If this were true, perhaps stricter scrutiny would be appropriate. But we don't think "impossibility" here is a factual allegation that can be admitted in pleadings. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (collecting cases); *Bright v. Gallia County*, 753 F.3d 639, 652 (6th Cir. 2014) (explaining, in the context of a motion to dismiss, that "legal conclusions masquerading as factual allegations" don't turn legal questions into factual ones (quotations omitted)). And "a defendant's failure to deny conclusions of law does not constitute an admission of those conclusions." 5 C. Wright & A. Miller, Federal Practice & Procedure § 1279 (3d ed.). In any event, Ohio has consistently argued, both before the district court and before us, that it wasn't impossible for Plaintiffs to collect signatures.

[6]Plaintiffs argue that our stay order "carries limited weight." (Appellees' Br. at 24 n.29.) We don't need to decide the precedential weight to give to that order. But it's worth noting that we've since relied on it as "binding precedent." *Hawkins v. DeWine*, 968 F.3d 603, 604 (6th Cir. 2020).

Circuit, for instance, held that Arkansas's "in-person signature requirement, while implicating the First Amendment, imposes less-than-severe burdens on the plaintiffs' rights and survives the applicable lesser scrutiny." *Miller v. Thurston*, 967 F.3d 727, 741 (8th Cir. 2020); *see also Libertarian Party of Pa. v. Governor of Pa.*, 813 F. App'x 834, 835 (3d Cir. 2020) (mem.) (holding that Pennsylvania's ballot-access law, which includes a signature requirement, "survives intermediate scrutiny because it serves the Commonwealth's legitimate and sufficiently important interests in 'avoiding ballot clustering, ensuring viable candidates, and the orderly and efficient administration of elections.'"). And in *Morgan v. White*, the Seventh Circuit said that if Illinois wanted to just skip referenda for the year, "there is no federal problem": "Illinois may decide for itself whether a pandemic is a good time to be soliciting signatures on the streets in order to add referenda to a ballot." 964 F.3d 649, 652 (7th Cir. 2020).

And in addition, the Supreme Court stayed two injunctions against state enforcement of ballot access restrictions. *Little v. Reclaim Idaho*, --- S. Ct. ---, No. 20A18, 2020 WL 4360897 (2020); *Clarno v. People Not Politicians*, --- S. Ct. ----, No. 20A21, 2020 WL 4589742 (2020). And the Court left our previous ruling in place. *Thompson*, --- S. Ct. ----, 2020 WL 3456705 (2020).

Even without those developments, Plaintiffs still faced an uphill battle. We noted in our stay order that "[a]t bottom, a severe burden excludes or virtually excludes electors or initiatives from the ballot." 959 F.3d at 809. But Ohio's ballot access laws don't do that. *Id.* Instead, all throughout the pandemic, "Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders." *Id.* This included gathering signatures for petitions.[7] Even if that was unclear at first, Ohio made it clear by April 30—which gave Plaintiffs months to gather signatures. 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).

[7]Plaintiffs argue that Ohio's First Amendment exception to its stay-at-home orders was "too vague to alleviate the burden on Thompson." (Appellees' Br. at 31.) We confronted that argument head on in *Hawkins* and rejected it. *Hawkins*, 968 F.3d at 607 ("[T]he orders explicitly exempt First Amendment protected speech, and it is well-established that the act of collecting signatures for ballot access falls under that ambit.").

And even if prospective signatories were deciding to stay home or avoid strangers—thus reducing Plaintiffs' opportunities to interact with them—we don't attribute those decisions to Ohio. "[W]e must remember, First Amendment violations require state action." *Thompson*, 959 F.3d at 810. So "Plaintiffs' burden is less than severe" because Ohio hasn't excluded or virtually excluded them from the ballot. *Id.*; *see Hawkins v. DeWine*, 968 F.3d 603, 607 (6th Cir. 2020)

Plaintiffs argue that "total exclusion" from the ballot isn't essential for finding a severe burden. (Appellees' Br. at 25.) But the cases Plaintiffs cite don't support their theory. For instance, they rely on our recent decision in *Esshaki v. Whitmer* to claim that the "combined effect" of strictly enforced ballot access laws and stay-at-home orders can create a severe burden. *See* 813 F. App'x 170, 171 (6th Cir. 2020). This language, they say, means that "total exclusion" isn't necessary to make out a severe burden. And for extra support they cite *SawariMedia, LLC v. Whitmer*, where "neither this court, nor the district court applied a 'total exclusion' test to find severe burden." (Appellees' Br. at 28); *see* 963 F.3d 595 (6th Cir. 2020).

True, we held in *Esshaki* that "the combination of [Michigan's] strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access." 813 F. App'x at 171. But Plaintiffs omit *why* we held that way. We later clarified: "We held that there was a severe burden because Michigan's Stay-at-Home Order remained in effect through the deadline to submit ballot-access petitions, *effectively excluding* all candidates who had not already satisfied the signature requirements (and predicted a shutdown)." *Kishore*, --- F.3d ----, 2020 WL 4932749, at *3 (emphasis added). And *Kishore*'s explanation of why we found a severe burden in *Esshaki* applies with equal force to *SawariMedia*. The restrictions at issue there were "identical" to those in *Esshaki*. *SawariaMedia, LLC*, 963 F.3d at 597. So in finding a severe burden in both *Esshaki* and *SawariMedia*, we relied on the fact that Michigan's restrictions "effectively excluded" the plaintiffs from ballot access.

Plaintiffs also cite *Libertarian Party of Ky. v. Grimes*. That case noted that "the 'combined effect' of ballot-access restrictions can pose a severe burden." 835 F.3d 570, 575 (6th Cir. 2016). Fair enough. But again, Plaintiffs read the case too narrowly. In fact, *Libertarian Party of Ky.* explicitly stated—multiple times, at that—that the ballot access restrictions at issue

couldn't be a severe burden because they didn't "constitute exclusion or virtual exclusion." *Id.* at 575; *see id.* at 574 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.").

Since our stay order, we've already had the chance to take another look at the burden Ohio's ballot access regulations impose. *See Hawkins*, 968 F.3d at 604; *see also Kishore*, --- F.3d ----, 2020 WL 4932749, at *3. *Hawkins* involved a challenge to Ohio's requirements for running for President of the United States as an independent, which are virtually identical to those here. 968 F.3d at 604 (noting that Ohio requires independent presidential candidates to file "a nominating petition with no fewer than 5,000 signatures," which must be fixed in ink and witnessed by the circulator). Relying on our *Thompson* stay order, we held that "the burden imposed on Plaintiffs by Ohio's ballot-access statutes—in light of the state's response to the pandemic—is an intermediate one." *Id.* at 607. And in *Kishore*, we applied intermediate scrutiny to Michigan ballot access regulations that were "comparable to the burdens imposed upon the plaintiffs in *Thompson* and *Hawkins*." --- F.3d ----, 2020 WL 4932749, at *3.

To be sure, it may be harder for Plaintiffs to obtain signatures given the conditions. But "just because procuring signatures is now harder . . . doesn't mean that Plaintiffs are *excluded* from the ballot." *Thompson*, 959 F.3d at 810. The burden Plaintiffs face here is thus an intermediate one. That means we next weigh it against the interests Ohio puts forward to justify its regulations.

2. Ohio's Justifications

Ohio's ballot access laws place an intermediate burden on Plaintiffs' First and Fourteenth Amendment rights. So the next step in the *Anderson-Burdick* framework is "a flexible analysis in which we weigh the 'burden of the restriction' against the 'state's interests and chosen means of pursuing them.'" *Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 141 (2020).

Ohio articulates two interests relevant to this appeal. The first relates to the ink and attestation requirements: preventing fraud by ensuring the authenticity of signatures. There's no question this is a legitimate—indeed compelling—interest. "The State's interest in preserving

the integrity of the electoral process is undoubtedly important." *John Doe No. 1. v. Reed*, 561 U.S. 186, 197 (2010). And "states have a strong interest in 'ensuring that [their] elections are run fairly and honestly,' as well as in 'maintaining the integrity of [their] initiative process.'" *Schmitt*, 933 F.3d at 641 (quoting *Taxpayers United for Assessment Cuts*, 994 F.2d at 297).

So Ohio's first interest is important—what about its second? Ohio says that its deadlines allow it to verify signatures in a fair and orderly way, ensuring that interested parties have enough time to appeal an adverse decision in court. This is also an important interest. Indeed, "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

3. The Balancing Test

Finally, "[a]t the third step of *Anderson-Burdick* we assess whether the State's restrictions are constitutionally valid given the strength of its proffered interests." *Schmitt*, 933 F.3d at 641; *see Kishore*, 2020 WL 4932749, at *4. Remember, this stage of the analysis is flexible, and we give states considerable leeway to pursue their legitimate interests. *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 191 (1999). And all that's required for the State to win at this step is for its legitimate interests to outweigh the burden on Plaintiffs' First Amendment rights. *Thompson*, 959 F.3d at 811. The method the State chooses to pursue its interests need not be narrowly tailored. *Id.*

We've already done much of the heavy lifting here. We've previously held, in multiple cases, that the interests Ohio pursues through its ballot access laws "outweigh the intermediate burden those regulations place on Plaintiffs." *Id.*; *Hawkins*, 968 F.3d at 607; *see also Kishore* --- F.3d ----, 2020 WL 4932749, at *3 ("On balance, the State's well-established and legitimate interests in administering its own elections through candidate-eligibility and ballot-access requirements outweigh the intermediate burden imposed on Plaintiffs."). And "reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not

demonstrated sufficient grassroots support." *Little*, --- S. Ct. ----, 2020 WL 4360897, at *2 (Roberts, C.J., concurring in the grant of a stay).

* * *

In short, Ohio is likely to prevail on the merits—and that's the most important part of this analysis. Still, the remaining three preliminary injunction factors favor Ohio, too.

B.

First, irreparable harm. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). So "[u]nless 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].'" *Thompson*, 959 F.3d at 812 (quoting *Abbott v. Perez*, --- U.S. ----, 138 S. Ct. 2305, 2324 (2018)). Because we've already found that Ohio is likely to prevail on the merits here, it would cause the State irreparable harm if we blocked it from enforcing its constitutional ballot access laws.

Next, the balance of the equities. "When analyzing the balance of equities, '[the Supreme] Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.'" *Kishore*, --- F.3d ----, 2020 WL 4932749, at *4 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, --- U.S. ----, 140 S. Ct. 1205, 1207 (2020) (per curiam)). Ohio will soon print ballots for overseas and military voting. Ohio Rev. Code Ann. § 3509.01(B)(1). Because "federal courts are not supposed to change state election rules as elections approach," this factor also favors Ohio. *Thompson*, 959 F.3d at 813.

Finally, the public interest. It's in the public interest that we give effect to the will of the people "by enforcing the laws they and their representatives enact." *Id.* at 812. So all four preliminary injunction factors favor Ohio.

III.

Finally, we note that the Federal Constitution gives states, not federal courts, "the ability to choose among many permissible options when designing elections." *Id.* We don't "lightly tamper" with that authority. *Id.* Instead, the power to adapt or modify state law to changing conditions—especially during a pandemic—rests with state officials and the citizens of the state.

So while federal courts can sometimes enjoin unconstitutional state laws, we can't engage in "a plenary re-writing of the State's ballot-access provisions." *Esshaki*, 813 F. App'x at 172. Instead, "[t]he Constitution grants States broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for state offices." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (citations omitted).

We don't have the power to tell states how they should run their elections. If we find a state ballot-access requirement unconstitutional, we can enjoin its enforcement. *See, e.g.*, *Esshaki*, 813 F. App'x at 172. But otherwise, "state and local authorities have primary responsibility for curing constitutional violations." *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978); *Esshaki*, 813 F. App'x at 172 (holding that it "was not justified" for a district court to extend the deadline to file signed petitions and order the state to accept electronic signatures).

So when the district court here ordered Ohio to accept electronically signed and witnessed petitions and extended the deadline for submitting petitions, it overstepped its bounds. It effectively rewrote Ohio's constitution and statutes and "intrude[d] into the proper sphere of the States." *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring); *see Thompson*, 959 F.3d at 812 ("[T]he district court exceeded its authority by rewriting Ohio law with its injunction."). Federal courts don't have this authority.

IV.

For these reasons, we reverse the district court's grant of a preliminary injunction.

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; LANCE HIMES, in his official capacity as the Interim Director of the Ohio Department of Health; FRANK LAROSE, in his official capacity as Ohio Secretary of State,

Defendants - Appellants.

FILED
September 16, 2020
DEBORAH S. HUNT, Clerk

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

JUDGMENT

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

THIS CAUSE was heard on the record from the district court and submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's grant of a preliminary injunction is REVERSED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

(ORDER LIST: 591 U.S.)

THURSDAY, JUNE 25, 2020

ORDER IN PENDING CASE

19A1054 THOMPSON, CHAD, ET AL. V. DEWINE, GOV. OF OH, ET AL.

The application to vacate stay presented to Justice Sotomayor and by her referred to the Court is denied.

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

File Name: 20a0162p.06

UNITED STATES COURT OF APPEALS

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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.

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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

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.

No. 20-3526

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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,
Defendant-Appellants.

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

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August 26, 2020

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-3526 Case Name: Thompson, et al., v. DeWine, et al.

Name of counsel: Jeffrey T. Green

Pursuant to 6th Cir. R. 26.1, Plaintiffs, Chad Thompson, William Schmitt, Don Keeney
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on August 26, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey T. Green
Sidley Austin LLP
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT REGARDING ORAL ARGUMENT

This case involves a complex factual record and presents legal issues that will have a direct effect upon the First Amendment rights and the health and safety of Ohioans. For these reasons, Appellees believe the opportunity to address these issues in greater detail to this Court, and to respond to inquiries from this Court, will aid the Court in its decision-making process. Appellees accordingly respectfully request oral argument.

STATEMENT OF ISSUES

Whether the District Court abused its discretion by holding that (1) laws regulating ballot access for initiatives implicate the First Amendment; (2) the combined effect of strict enforcement of Ohio's In-Person Collection Laws and governmental COVID-19 health restrictions imposed a severe burden on Thompson; (3) the In-Person Collection Laws are not narrowly tailored to meet the challenges of the pandemic and do not survive strict scrutiny; and (4) Thompson was entitled to a negative injunction.

STANDARD OF REVIEW

A District Court's preliminary injunction is reviewed on interlocutory appeal for abuse of discretion. Review of a district order granting a preliminary injunction is therefore "highly deferential." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). Factual determinations are reviewed for clear error and legal conclusions are reviewed de novo. *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1116 (6th Cir. 1996). "The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007).

INTRODUCTION

This case is about ensuring First Amendment protection for the initiative process in a society transformed by a global pandemic. To get an initiative on the ballot, Ohio has historically required that circulators personally witness and collect ink signatures reflecting 10% of a municipality's gubernatorial vote. Under the State's Shutdown Orders, this requirement is legally and practically impossible to satisfy. Without some relief from strict enforcement of Ohio's In-Person Collection Laws[1], Ohioans cannot exercise their right—protected by the First Amendment—to participate in the initiative process. The district court understood that the First Amendment must be applied in a way that accounts for social restrictions under COVID-19; the injunction it ordered should stand.

COVID-19 has required all Ohioans to adjust the way they do business. But the State of Ohio persists in its view that it is business as usual for the ballot initiative process. Plaintiffs are residents of Ohio who regularly circulate initiative petitions seeking to decriminalize marijuana use under municipal codes. The combined effect of strict enforcement of the In-Person Collection Laws, Ohio's Shutdown Orders, and the pandemic created a severe burden on their circulation efforts. The District

[1] Ohio requires signatures to be original, "affixed in ink," and personally witnessed by circulators. *See* Ohio Rev. Code Ann. § 3501.38(B), (E). This brief uses the term "In-Person Collection Laws" to collectively refer to the in-person signature gathering laws enjoined by the District Court, including Ohio's statutory deadline requirement (which fell on July 16, 2020).

Court recognized this threat to direct democracy—and applied strict First Amendment scrutiny because in-person collection requirements—while ordinarily perfectly reasonable and justified—are not constitutional as applied in the midst of a pandemic.

The Motions Panel disagreed. It stayed the injunction because it considered that circulators could operate effectively during a pandemic. This Court should reject that reasoning in light of the realities that circulators like Thompson face and reinstate the injunction.

STATEMENT OF THE CASE

Plaintiffs/Appellees (hereinafter collectively "Thompson") are residents of Ohio who regularly circulate initiative petitions throughout Ohio seeking to decriminalize marijuana under municipal codes. Verified Complaint, R. 1, Page ID # 2; *see Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019). Because of the prior litigation in *Schmitt*, Ohio elections officials now recognize that Thompson's petitions are proper subject matter for local ballots provided they garner the requisite number of signatures, totaling 10% of the municipality's gubernatorial votes. *See* Ohio Rev. Code Ann. § 731.28.

Under Ohio's In-Person Collection Laws, those signatures must be original, "affixed in ink," and personally witnessed by circulators—a combination of conditions that amounts to the requirement of in-person signature collection. Ohio

Rev. Code Ann. § 3501.38(B), (E). Circulators of initiatives may not begin collecting signatures until they start the clock by filing a proposed initiative with the municipality. *See* Ohio Rev. Code Ann. § 731.32. Signatures for the November 3, 2020 general election were due by July 16, 2020. *See State ex rel. Harris v. Rubino*, 119 N.E.3d 1238, 1243 (Ohio 2018); Stipulated Facts, R. 35, Page ID # 470–471; Ohio Rev. Code Ann. § 731.28.

On February 27, 2020—before the COVID-19 crisis hit Ohio—Thompson timely filed his proposed initiatives with several Ohio cities in order to begin collecting signatures. Stipulated Facts, R. 35, Page ID # 469. Ohio's governor declared a state of emergency just eleven days later.[2]

A. The COVID-19 Crisis

1. The March 9, 2020 Ohio State of Emergency and Subsequent Events Essentially Close Ohio

Ohio was one of the first states in the nation to declare a state of emergency[3] and issue an order prohibiting mass gatherings.[4] The orders initiated a series of events that would significantly hamper Thompson's signature collection efforts.

[2] Governor of the State of Ohio, Executive Order 2020-01D (Mar. 9, 2020) ("Order 2020-01D"), https://tinyurl.com/Order2020-01D.
[3] Ohio's orders in response to the COVID-19 pandemic are referred to through the brief collectively as "Shutdown Orders."
[4] *See* Order 2020-01D; Ohio Dep't of Health, Dir.'s Order to Limit and/or Prohibit Mass Gatherings in Ohio, Mar. 12, 2020, https://tinyurl.com/y65dkyle.

They banned, with limited exceptions, all gatherings of 100 or more persons.[5] Parades and public events such as the Columbus International Auto Show or St. Patrick's Day Parade—all common events for circulators to gather signatures—were canceled. Stipulated Facts, R. 35, Page ID # 472.[6] Colleges and universities throughout Ohio—ordinarily high-yield locations for signature collection—also began to close their physical facilities, and they would remain closed for the rest of the semester. *See id.* Further closings followed in the next week, including the mandatory closings of public and private businesses, schools, recreational facilities and buildings (March 12, 2020), cancellation of Ohio's primary elections (March 16, 2020),[7] and strengthening of the ban on gatherings to include those with 50 or more persons (March 17, 2020). *See id.* at Page ID # 473–474.[8]

2. The March 22, 2020 Shutdown Order Deepens Ohio's Restrictions

On March 22, 2020, Defendants issued their most sweeping order directing all Ohioans to "stay at home or at their place of residence" unless subject to a

[5] *See* Dir.'s Order to Limit and/or Prohibit Mass Gatherings in Ohio, *supra* n.4.
[6] *See generally* Mark Ferenchik, *Coronavirus: What's Closed, Canceled in Columbus Area*, Columbus Dispatch, Mar. 12, 2020, https://tinyurl.com/y38chlsn.
[7] In Thompson's experience, polling places present the best single opportunity for collecting the signatures.
[8] Ohio Dep't of Health, Dir.'s Order In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020, Mar. 16, 2020, https://tinyurl.com/ya9b6jt9; Ohio Dep't of Health, Dir.'s Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio, Mar. 17, 2020, https://tinyurl.com/y4p4y6go.

specified exception, to maintain at least a six foot social distance between themselves and others, and to avoid altogether gatherings of *ten* or more people.[9] These orders imposed criminal penalties; Governor DeWine even encouraged Ohioans to report violations and stated that he and local authorities were prepared to prosecute.[10] Yet these orders remained silent on circulators, saying nothing about their rights to go into public, approach others, or in any other way collect signatures in person. Circulators, like everyone else, understood that Ohio's orders precluded their activities in the interest of public health.

Indeed, Defendants admitted that "[b]ecause of the presence of the pandemic in Ohio, the restrictions on businesses, the prohibitions on gatherings, the requirements of distancing, and the mandatory stay at home order, *it is literally impossible for people outside the same family unit to solicit others for signatures needed to support the initiative petitions needed to place initiatives and referenda on Ohio's November 2020 election ballot*." Verified Complaint, R. 1, Page ID # 14

[9] *See* Ohio Dep't of Health, Dir.'s Stay at Home Order Re: Dir.'s Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity, Mar. 22, 2020, https://tinyurl.com/t6uoej4.

[10] *See* Ian Cross, *Gov. DeWine Clarifies Enforcement, Reporting of Stay-at-home Order Violations*, News5Cleveland.com, Mar. 23, 2020, https://tinyurl.com/yxgymfga; Laura Mazade, *What Does the Stay-at-home Order Mean for Ohio*, Cincinnati Enquirer, Mar. 22, 2020, https://tinyurl.com/yyb6vfjt.

(emphasis added).[11] Defendants also admitted that at least prior to April 30, 2020, "[g]athering in-person signatures in Ohio under the current circumstances is *not only illegal* under Ohio law but risks spreading COVID-19." *Id*. (emphasis added).

Despite their admissions to the contrary, Defendants later claimed that signature collection was authorized by a vague exception for "First Amendment protected speech" ("First Amendment Exception") in the March 22, 2020 order. But no Ohioans understood the First Amendment Exception to mean that physical activities like parading and circulating, both of which are "protected" First Amendment activities, could continue. Likewise, Ohioans—including the Thompson circulators—reasonably interpreted the Shutdown Orders as prohibiting going door-to-door to seek signatures.[12] They reasonably understood that they must and should forego their otherwise protected First Amendment rights, stay home, and attempt to "flatten the curve" as demanded by the crisis and directed by the

[11] Because Defendants did not timely file an Answer to the Verified Complaint, have never filed an Answer to the Verified Complaint, did not file a timely Rule 12 Motion, and did not take the necessary steps to delay or excuse their failure to file a timely Answer, all well-pleaded allegations in the Verified Complaint are taken as true. *See* Fed. R. Civ. P. 8(b)(6); *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1334 (9th Cir. 1979) ("The allegations are to be treated as admitted since not denied").

[12] *See 6 Out-of-state Residents Arrested in Springfield Township for Violating Stay-at-home Order*, Local12wkrc.com, Apr. 15, 2020, https://tinyurl.com/y5z62nxq.

Governor. Thompson filed this action on April 27, 2020 seeking relief from Defendants' strict enforcement of the In-Person Collection Laws.[13]

3. The April 30, 2020 Shutdown Order Extends Ohio's Sweeping Restrictions

On April 30, 2020—three days after this case was filed—Ohio responded with a new order creating a purported exception for "petition or referendum circulators."[14] That same order, however, also extended Ohio's prior restrictions for businesses, most public places and virtually all gatherings until at least May 29, 2020. The order continued to ban gatherings including "Parades, fairs, festivals, and carnivals" and did not relax physical distancing requirements.[15] Even though circulators after April 30, 2020[16] could technically seek signatures without risk of criminal prosecution, they and those they could legally approach still were required to maintain six foot

[13] Thompson did not challenge Ohio's emergency safety orders—indeed, he always willingly complied with the Governor's orders for his and others' safety.
[14] Ohio Dep't of Health, Dir.'s Stay Safe Ohio Order Re: Dir.'s Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order, Apr. 30, 2020, https://tinyurl.com/y7s6cre2.
[15] *See* Ohio Dep't of Health, Coronavirus (COVID-19): Continued Business Closures, May 2, 2020, https://tinyurl.com/yb4hkpe5 [https://tinyurl.com/y36weop8]. *See also* Randy Ludlow, *Coronavirus in Ohio: Gov. Mike DeWine Warns Virus Remains 'A Dangerous Risk' Even as State Reopens*, Columbus Dispatch, May 12, 2020, https://tinyurl.com/yyr7eow7.
[16] The April 30, 2020 order was intended to extend restrictions only through May 29, 2020, but due to COVID-19's expanding impact has been extended for indefinite duration.

separation. Further, virtually all public gatherings of ten or more people were still prohibited, meaning audiences would be meager at best.

B. The District Court Enjoins Ohio's Ballot-Access Restrictions

The District Court on May 19, 2020 entered a preliminary injunction in Plaintiffs' favor (1) prohibiting enforcement of the in-person, "wet," witnessed signature collection requirements, (2) prohibiting enforcement of the July 16, 2020 deadline for the submission of signatures, and (3) 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.'" District Court Order, R. 44, Page ID # 675 (citation omitted).

In support of the preliminary injunction, the District Court concluded that Ohio's purported First Amendment Exception was irrelevant. "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 Shutdown Orders, unconstitutionally burden Plaintiffs' First Amendment rights *as applied here*." District Court Order, R. 44, Page ID # 653–654 (emphasis in original).

The District Court relied on the recent Sixth Circuit decision in *Esshaki v. Whitmer*, 813 F. App'x 170 (6th Cir. 2020), and applied the *Anderson-Burdick* balancing test:[17]

> 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*. . . .
>
> 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*.

Opinion & Order, R. 44, Page ID # 660, 666 (emphasis in original) (internal citations omitted). Weighing the remaining factors and the equities involved, the District Court ruled that some relief was necessary for Thompson, *id*. at Page ID # 673, and thus enjoined strict enforcement of the In-Person Collection Laws, directing Defendants to confer with Thompson and propose "adjustments" to the enjoined requirements. *Id*. at Page ID # 673, 675. Defendants, however, never conferred with Thompson, nor did they propose any adjustments. Instead, Defendants moved to stay the preliminary injunction.

[17] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

C. The Motions Panel Stays the District Court's Preliminary Injunction

A panel of this Court, Sutton, McKeague & Nalbandian, JJ. ("Motions Panel"), on May 26, 2020, stayed the District Court's preliminary injunction. *See* Per Curiam Order. In support of the stay, the Panel relied on the purported First Amendment Exception, *id*. at 6, Ohio's ostensibly announced re-opening at the end of May, *id*. at 7, Defendants' contradictory assertion that Thompson could have technically collected signatures before April 30, 2020, and Defendants' erroneous claim that Ohio was then in the first stage of fully re-opening. *Id*. It concluded that the emergency orders in combination with the COVID-19 pandemic did not severely burden Thompson's First Amendment rights and found the In-Person Collection Laws permissible under intermediate scrutiny. *Id*. at 9.

On June 16, 2020, Thompson asked the Supreme Court to vacate the stay. After ordering a Response from Defendants, the Supreme Court on June 25, 2020 denied Thompson's request. *See Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705, at *1 (U.S. June 25, 2020). The stay remained in place and Thompson struggled to qualify initiatives for local ballots in light of COVID-19's deadly expansion, Ohio's strict signature collection requirements, and Defendants' orders restricting people's interactions. Thompson will not—without restoration of the district court's injunction—succeed in the vast majority of cities targeted for the November 3, 2020 ballot.

D. Conditions in Ohio Worsen As the State Attempts Reopening

In their request for a stay, Defendants contended that Ohio was on the path to re-opening. Respondents' Opposition to Emergency Application to Vacate the Sixth Circuit's Stay at 6, *Thompson v. DeWine*, No. 19A1054 (U.S. June 22, 2020) (falsely asserting "[n]early all [emergency orders] have been eased or eliminated as the State 'reopens.'"). As a result, the Motions Panel assumed that any Shutdown Orders would be relaxed as Ohio re-opened over the summer affording Thompson meaningful opportunity to circulate before the July 16, 2020 deadline. *See* Per Curiam Order at 7. But it is not the case that "nearly all emergency orders" have been "eased or eliminated," as the Motions Panel had hoped.

Ohio still has not lifted most restrictions on meaningful public gatherings. It has not re-opened, and the limited activity it has allowed has led to an exponential spread of the COVID-19 virus. The reality is that Ohio is in no better shape now than it was when the crisis began. In the weeks following the Supreme Court's June 25, 2020 denial of Thompson's request to vacate this Court's stay, the COVID-19 crisis exploded once again.[18]

Ohio's alleged "re-opening" is severely limited. Ohio's May 29, 2020 order allowed some businesses to re-open in a limited fashion, but it also extended

[18] *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://tinyurl.com/t9j9fdw (last visited Aug. 25, 2020).

distancing requirements and bans on large gatherings until July 1, 2020. Those restrictions have since been extended indefinitely.[19] Ohio's Shutdown Orders continue to absolutely *prohibit* "[a]ll public and private gatherings of greater than 10 people," and require physical distancing in all permitted gatherings. All "entertainment venues" including "auditoriums, stadiums, [and] arenas"—where signature collection is common, efficient, and productive—remain closed. There are no sporting events, concerts, rallies, or celebrations to make mass signature collection possible. This prohibition, coupled with the other gathering bans, necessarily spells the end to meaningful in-person signature collection in Ohio for the foreseeable future; these restrictions were not relaxed before the July 16, 2020 deadline.

Moreover, Defendants have continued to implement new restrictions and strengthen existing restrictions. Governor DeWine issued a state-wide mask mandate, requiring "all individuals in the State of Ohio [to] wear facial coverings at all times" with limited exceptions.[20] Defendants now recommend travelers from

[19] *See* Ohio Dep't of Health, Dir.'s Order Re: Director's Updated and Revised Order for Business Guidance and Social Distancing, May 29, 2020, https://tinyurl.com/y2ea9b8q; Ohio Dep't of Health, Dir.'s Second Order to Extend the Expiration Date of Various Orders, July 7, 2020, https://tinyurl.com/y37ktajo (extending deadlines "until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order").

[20] Ohio Dep't of Health, Dir.'s Order for Facial Coverings Throughout the State of Ohio, July 23, 2020, https://tinyurl.com/y2oh5q7v.

designated states to "self-quarantine for 14 days" upon arrival.[21] Participation in county fairs is now restricted to "individuals who participate in either 4-H, FFA, or other youth organizations."[22]

This post-stay history exposes the falsity of Defendants' myth that "[t]hese orders have always been temporary," Appellants' Br. at 9, and that "the restrictions in these orders have lessened over time." *Id*. Restrictions have changed, but they have not been lifted. Public gatherings remain restricted in the same way now that they were in March and April. Physical separation is still required. People are still getting sick and dying.[23]

Contrary to Defendants' claim, "on the whole" Ohio has not magically re-opened in any meaningful way for circulators; in fact it is even more daunting and treacherous now to collect signatures than it was when the crisis began. *See* Veronica Stracqualurisi, *Birx Warns US is 'in a New Phase' of Coronavirus Pandemic with More Widespread Cases*, CNN, Aug. 2, 2020, https://tinyurl.com/yx8nv32d ("What we are seeing today is different from March

[21] Ohio Dep't of Health, COVID-19 Travel Advisory, Aug. 19, 2020, https://tinyurl.com/y5w3fugb.

[22] Ohio Dep't of Health, Dir.'s Amended Order Limiting County Fairs to Junior Fair Activities and Animal Exhibitions, with Exceptions, July 30 2020, https://tinyurl.com/y4h3g6fj.

[23] That businesses may re-open, moreover, is largely irrelevant for signature collection efforts; circulators do not and most-often cannot (because businesses will not allow it) gather signatures at workplaces.

and April. It is extraordinarily widespread. It's into the rural as equal urban areas"). Even the United States Census Bureau—which relies heavily on door-to-door solicitation—has delayed and compromised its solicitation efforts, delaying its door-to-door efforts and cutting the census one month short.[24]

E. Thompson Seeks to Lift Stay

On July 8, 2020, Thompson asked the Motions Panel to lift its stay, *see* Motion to Lift Stay, pointing out that the crisis had deepened in Ohio and the promised re-opening had not materialized. Further, a subsequent motions panel's diametrically different conclusion about a nearly identical exemption included in Michigan's safety orders, *see SawariMedia, LLC v. Whitmer*, No. 20-cv-11246, 2020 WL 3097266 at *5 (E.D. Mich. June 11, 2020), *stay denied*, 963 F.3d 595 (6th Cir. 2020),[25] casts considerable doubt on the Motions Panel's conclusion in this case.

[24] Hansi Lo Wang, *Census Door Knocking Cut A Month Short Amid Pressure to Finish Count*, NPR, July 30, 2020, https://tinyurl.com/y4en9cc6. Even the President recognized COVID-19's impact on door-to-door solicitation. *Id*. ("President Trump suggested that Congress did not have a choice in approving the [census bureau's] deadline extensions in light of the pandemic."); Michael Wines, *As Census Count Resumes, Doubts About Accuracy Continue to Grow*, N.Y. Times, Aug. 24, 2020, https://tinyurl.com/y3zxe78u (stating that COVID-19 "poses a daunting problem for door-knockers, said William F. Pewen, an epidemiologist working with the National Conference on Citizenship to assess the coronavirus crisis's impact on the census . . . . 'Doors are not going to open,' Dr. Pewen said, 'and we could miss thousands or millions of people.'").

[25] Plaintiffs in *SawariMedia* have since sought to dismiss their complaint before the district court, a request which is currently before the district court. *See* Notice of Voluntary Dismissal, *SawariMedia*, No. 4:20-cv-11246, (E.D. Mich., July 23, 2020).

While recognizing that Thompson's Motion was "arguable," the Panel on July 13, 2020 refused to lift the stay. *See* Order Denying Emergency Motion.

SUMMARY OF THE ARGUMENT

1. Laws regulating ballot access for initiatives implicate the First Amendment under binding Sixth Circuit precedent. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296–97 (6th Cir. 1993); *Comm. to Impose Term Limits on the Ohio Sup. Ct. and to Preclude Special Legal Status for Members of and Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd.*, 885 F. 3d 443, 446 (6th Cir. 2018); *Schmitt*, 933 F.3d 628.

2. Under the *Anderson-Burdick* First Amendment test applied in the Sixth Circuit, the combined effect of strict enforcement of the In-Person Collection Laws, Ohio's Shutdown Orders, and the pandemic imposed a severe burden on Thompson's circulation efforts. *See Esshaki*, 813 F. App'x at 171 *aff'g in part*, *Esshaki v. Whitmer*, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020); *SawariMedia*, 963 F.3d at 597; *SawariMedia*, 2020 WL 3097266, at *11. The Sixth Circuit does

not apply a "total exclusion" test to determine whether a restriction constitutes a severe burden.

3. Ohio's In-Person Collection Laws are not narrowly tailored to the circumstances of the pandemic and do not survive strict scrutiny. *See Esshaki*, 813 F. App'x at 172; *SawariMedia,* 963 F.3d at 597.

4. Defendants' strict enforcement of Ohio's In-Person Collection Laws does not even survive intermediate scrutiny. *See* Opinion & Order, R. 44, at Page ID # 656 n.2.

5. The District Court did not abuse its discretion by awarding a negative injunction to Thompson, the only remaining appellee in this case. *Esshaki,* 813 F. App'x at 172.

ARGUMENT

I. Laws Regulating Ballot Access for Initiatives Implicate the First Amendment in the Sixth Circuit and in Courts Across the Country

A. Ballot Initiatives Implicate Core Political Speech and Strict Scrutiny Under *Meyer-Buckley*

Ballot initiatives implicate "core political speech." *Meyer v. Grant*, 486 U.S. 414, 422 (1988); "First Amendment protections" are accordingly "at [their] zenith" and "exacting scrutiny" is required. *Id.* at 425, 420. For citizens in nearly half the states in the Union, ballot initiatives are "basic instrument[s] of democratic government." *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188,

196 (2003). In *Meyer*, the Supreme Court applied the First Amendment to invalidate Colorado's requirement that those circulating initiatives designed to amend the State Constitution do so without pay. The *Meyer* Court observed that two particular circumstances created severe burdens warranting strict scrutiny: regulations that (1) restrict one-on-one communication between petition circulators and voters and (2) make it less likely that proponents will be able to garner signatures necessary to place an initiative on the ballot, thus "limiting their ability to make the matter the focus of statewide discussion." 486 U.S. at 414. Following *Meyer*, the Supreme Court applied these principles and invalidated restrictions warning courts to be "vigilant" and "guard against undue hindrances to political conversations and the exchange of ideas." *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999) (striking down Colorado requirements regarding initiative petition circulators including requirement that circulators be registered voters, wear identification badges, and that proponents report paid circulators).

Applying *Meyer*, the Ninth Circuit has held that "ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *See Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). During a global pandemic, this standard should be straightforward. Strict adherence to the In-Person Collection Laws, in combination with the Shutdown Orders and the global pandemic

significantly inhibits the ability of initiative proponents to place initiatives on the ballot, triggering strict scrutiny because of the burden on core political speech.[26] *See League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 725 (M.D. Tenn. 2019) (applying *Meyer-Buckley* strict scrutiny for core political speech).

B. The Sixth Circuit Has Consistently and Repeatedly Held that the First Amendment Applies to Ballot Initiatives

This Court has repeatedly and unambiguously held that once a State chooses to allow citizens to place initiatives on ballots, the process is subject to First Amendment scrutiny.

a. In *Taxpayers United for Assessment Cuts*, 994 F.2d at 296–97, this Court stated that although "the right to initiate legislation is a wholly state-created right," the First Amendment still restricts states to placing "nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation." *See also Comm. to Impose Term Limits*, 885 F. 3d 443 at 448 (applying *Anderson-Burdick* First Amendment framework to assess Ohio's single subject requirement on initiatives); *Schmitt*, 933 F.3d 628 (applying *Anderson-Burdick* First Amendment framework and intermediate scrutiny to assess subject matter restrictions on initiatives). Here, the In-Person Collection Laws constitute the "regulation of

[26] Thompson preserves his argument that *Meyer-Buckley* strict scrutiny is the governing standard applicable to this initiative case and that the In-Person Collection Laws do not survive that analysis.

election mechanics" so *Anderson-Burdick* applies. *See Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (Readler, J., concurring) ("*Anderson-Burdick* is tailored to the regulation of election mechanics.").

b. The Motions Panel recognized that this precedent is controlling. *See* Per Curiam Order at 5 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."). Other panels have continued to apply the First Amendment amidst the pandemic. *See Harkins v. DeWine*, No. 20-3717, 2020 WL 4435524 (6th Cir. Aug. 3, 2020); *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020); *Esshaki v. Whitmer*, 813 F. App'x 170 (6th Cir. 2020). And Defendants admit this is the law. Appellants' Br. at 29 ("Alas, that is not the law in the Sixth Circuit. Instead, this Court has repeatedly assumed . . . that the First Amendment's Free Speech Clause covers laws that regulate the mechanics of state-initiative processes.").

C. The Sixth Circuit is on the Correct Side of an Emerging Circuit Split

Defendants note a broad Circuit split[27] over the applicability of the First Amendment to the initiative process. The Chief Justice recently agreed, and even

[27] The Seventh, Eighth, and Tenth Circuits have held that the First Amendment is not implicated by ballot initiatives so long as the State does not restrict political discussion or petition circulation. *See, e.g.*, *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (en banc); *Dobrovolny v. Moore*, 126 F. 3d 1111, 1113 (8th Cir. 1997). By contrast, this Circuit and the Ninth Circuit have

added that this split now entails COVID-19's impact on this First Amendment problem. *See Little v. Reclaim Idaho*, No. 20A18, slip op., 2020 WL 4360897, at *1 (U.S. July 30, 2020) (Roberts, C.J., concurring) ("[T]he Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election administration.").[28] For the reasons presented above, *see supra* Section I.A-

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held that First Amendment scrutiny of the State's interests is required when presented with challenges to such restrictions. *See, e.g.*, Per Curiam Order at 4–5; *Angle*, 673 F. 3d at 1133. *See also People Not Politicians Or. v. Clarno*, No. 6:20-cv-01053-MC, 2020 WL 3960440, at *3–4 (D. Or. July 13, 2020) (applying *Angle* in granting preliminary injunction to initiative organizers), *appeal filed*, No. 20-3560, 2020 WL 4742183 (9th Cir. July 15, 2020); *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (finding First Amendment implicated by subject matter restrictions on initiatives and applying intermediate scrutiny).

[28] The Supreme Court has recently granted stays in *Little* and *Clarno*. In *Little*, the Court issued a stay in light what four Justices described as a Circuit split, *see* 2020 WL 4360897 at *1 (Roberts, C.J., concurring). In *Clarno*, the Ninth Circuit had denied the government's attempt to stay the appeal, but the Supreme Court granted a stay on August 11, 2020. Justices Sotomayor and Ginsburg stated that they would deny the application. 2020 WL 4589742, at *1.

Plaintiffs in *Little* and *Clarno* were not particularly diligent in bringing their respective challenges. Plaintiffs in *Little* waited more than a month after their signature deadline to file their challenge. 2020 WL 4360897, at *2–3. Plaintiffs in *Clarno* waited until only three days remained before the filing deadline to seek relief. Complaint at 2, *People Not Politicians Or. v. Clarno*, No. 6:20-cv-01053-MC (D. Or. June 30, 2020). The Supreme Court repeatedly admonished litigants that election challenges on the eve of deadlines are disfavored. *See Little*, 2020 WL 4360897, at *2 (discussing more than a month delay in seeking relief); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

This case is different: Thompson was extremely diligent in bringing his challenge, filing suit well in advance of the July 16, 2020 deadline.

B, the Supreme Court's decisions in *Meyer* and *Buckley* and the Sixth and Ninth Circuit's application of these standards make clear that the First Amendment applies to the content-neutral mechanics surrounding the ballot initiative process.

II. Under *Anderson-Burdick* the In-Person Collection Laws are Unconstitutional As Applied

A. During a Pandemic, the Combined Effect of Strict Enforcement of In-Person Collection Laws and Ohio's Shutdown Orders Impose a Severe Burden on Circulators Warranting Strict Scrutiny

1. A Total Exclusion Litmus Test Was Not the Law Before the Pandemic

Defendants argue that the burden imposed on a circulator, like Thompson, cannot be severe under *Anderson-Burdick* unless a restriction "totally denie[s]" ballot access or makes it "virtually impossible." Appellants' Br. at 32. But this Court has held that "[i]n some circumstances, the 'combined effect' of ballot-access restrictions can pose a severe burden." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016).

a. A long and continuous line of binding Supreme Court precedent confirms that restrictions on ballot access can be "severe" without requiring "total exclusion." Even John Anderson was not totally banned from the ballot. *Anderson*, 460 U.S. at 792. He challenged an early-filing deadline—a mere "limit" on ballot access—yet the Court struck the deadline down "not only" because it "totally exclude[d]" any candidate who decided to run after the deadline, but also because

"[i]t also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline." *Id*. This result was reaffirmed in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008), where the Supreme Court plainly stated that there is no "litmus test for measuring the severity of a burden that a state law imposes." Instead, the assessment of a burden's severity requires a "practical assessment of the challenged scheme's justifications and effects." *Stone v. Bd. of Election Comm'rs for the City of Chicago*, 750 F.3d 678, 681 (7th Cir. 2014). *See also id.* ("The Supreme Court has often stated that in this area there is no 'litmus-paper test' to 'separate valid from invalid restrictions.'" (quoting *Anderson*, 460 U.S. at 789)); *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016) ("The Supreme Court and our sister circuits have emphasized the need for context-specific analysis in ballot access cases.").

b. This Court has *never* required any total exclusion litmus test approach with ballot access restrictions. In *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 694 (6th Cir. 2015), this Court considered "severe" a requirement that recognized minor parties "obtain 5% of the total number of votes cast for gubernatorial candidates in the last gubernatorial election" because "established major parties . . . [were] given four years to obtain the same level of electoral success." Although the state did not totally deny ballot access to minor parties, this Court concluded that this challenged restriction imposed a severe burden. *See also Libertarian Party of*

Ohio v. Blackwell, 462 F.3d 579 (6th Cir. 2006) (holding that combination of Ohio laws regulating early filing and number of signatures was severe burden on candidate's ballot access).

c. Defendants advance the total exclusion test by misconstruing and cherry-picking from just one lone decision—*Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020).[29] *See* Appellants' Br. at 31 ("*First*, a severe burden is one that 'totally denie[s]' the right at stake" (quoting *Mays*, 951 F.3d at 786)).[30] *Mays* is not a ballot *access* case, i.e., a case to determine whether an initiative or candidate will be on the ballot. Rather, *Mays* involved restrictions on whether a class of individuals (inmates) could vote by absentee ballot. *Mays* is, at best, a straightforward application of a test for an equal protection challenge answering an entirely different question—who gets to vote—rather than the question here—who gets to be on the

[29] The Motions Panel's description of *Anderson-Burdick* balancing in granting a stay in this case, Per Curiam Order at 4–5, carries limited weight. As made clear by the Supreme Court in *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." Likewise, "a motions panel's legal analysis, performed during the course of deciding an emergency motion for a stay, is not binding on later merits panels." *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1081 (9th Cir. 2020).

[30] Defendants' reference to "virtually impossible" language from *Storer*, 415 U.S. at 728 is inapposite. *Storer*'s "past experience" test weighs the history of a candidates' exclusion from the ballot as demonstrative in determining a severe burden. *Id*. at 742. Here, where the In-Person Collection Laws are challenged as applied during a once-in-a-lifetime pandemic, there is simply no relevant historical experience to point to.

ballot. *See Mays*, 951 F.3d at 786 (applying *Rosario* test for strict scrutiny where "the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote"); *id.* at 787 ("Because Plaintiffs are not totally denied *a chance to vote* by Ohio's absentee ballot deadlines, strict scrutiny is inappropriate." (emphasis added)).

d. Reliance on *Mays* is further misplaced because the *Mays* Court itself recognizes that ballot access restrictions are a quintessential situation in which Courts find a severe burden under *Anderson-Burdick*. *Id.* at 784 ("[W]hen States impose severe restrictions on the right to vote, such as poll taxes *or limiting access to the ballot*, strict scrutiny applies."). The only relevant holding from *Mays* is that laws "limiting access to the ballot"—without any express litmus test—can be sufficiently "severe" to trigger strict scrutiny.

2. A Total Exclusion Litmus Test Is Not the Law Now

Decisions addressing the COVID-19 pandemic confirm that total exclusion is not required for a restriction on ballot access to be "severe" under *Anderson-Burdick*.

a. Under the unique circumstances of a global pandemic, this Circuit has held that the combined effect of a "State's strict enforcement of the ballot-access provisions and [its] Stay-at-Home Orders impose[] a severe burden on the plaintiffs' ballot access, so strict scrutiny applie[s]." *See Esshaki v. Whitmer*,

813 F. App'x 170, 171 (6th Cir. 2020) *stay granted in part*, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020). There, Michigan's Governor had issued two executive orders on March 23 and April 9, 2020,[31] that were virtually identical to those issued in Ohio at the same time. *See Esshaki*, 2020 WL 1910154, 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." *Id*. Michigan also argued precisely what Ohio argues here, that circulators should have braved the crisis and gathered signatures.

The District Court rejected Michigan'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 and applied strict scrutiny to conclude that an injunction was warranted. *Id*. at *6 ("[T]his 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 . . . have created a severe burden on Plaintiff's exercise of his free speech and free

[31] Governor of the State of Mich., Executive Order 2020-21 (COVID-19) (Mar. 23, 2020), https://tinyurl.com/twemboq; Governor of the State of Mich., Executive Order 2020-42 (COVID-19) (Apr. 8, 2020), https://tinyurl.com/rbeqvsl.

association rights under the First Amendment . . . ."). This Court affirmed the District Court's judgment "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." *Esshaki*, 813 F. App'x at 171. Accordingly, "strict scrutiny applied, and even assuming that the State's interest . . . is compelling, the provisions are not narrowly tailored to the present circumstances." *Id*. The Court accordingly sustained "the district court's order enjoin[ing] the State from enforcing the ballot-access provisions at issue unless the State provides some reasonable accommodations to aggrieved candidates."[32] *Id*. at 172. Neither the district court, nor this Court applied a "total exclusion" test to reach its conclusion.

b. This Court reached a similar conclusion in *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020). There, the district court assessed whether Michigan's in-person collection requirements and deadlines imposed a severe burden for initiatives like in *Esshaki*. The district court in *SawariMedia*[33] held that the restrictions were a severe burden because "the Plaintiffs here faced a daunting

[32] The Sixth Circuit remanded to the district court only to address remedy. *See Esshaki*, 813 F. App'x at 172 ("[W]e are instructing 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.").

[33] Michigan appealed and asked this Court to stay the District Court's preliminary injunction under this Panel's holding in *Thompson*. The Panel (Norris, Clay and Larsen, JJ.) on July 2, 2020 refused to do so. *SawariMedia*, 2020 WL 3097266 *stay denied*, 963 F.3d 595 (6th Cir. 2020).

signature requirement with a firm deadline in the midst of the COVID-19 pandemic," including a time period where Michigan residents were continuously required to stay in their homes, such that the State "pulled the rug out from under the ability [of Plaintiffs] to collect signatures" and did not provide any "viable, alternative means" to contend against exclusion from the ballot. *See SawariMedia*, 2020 WL 3097266 at *6–8. This Court declined to stay the appeal, finding the burdens at issue to be identical to the burden in *Esshaki*. *See SawariMedia*, 963 F.3d at 597. Again, neither this Court, nor the district court applied a "total exclusion" test to find severe burden.

c. The Motions Panel's divergent application of *Anderson-Burdick* has been critiqued as "deeply problematic" and "very dismissive of the rights of direct democracy." Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative During a Pandemic*, 2020 U. Chi. L. Rev. Online (June 26, 2020), https://tinyurl.com/y5p8uqpp (arguing the Motions Panel "[d]ismiss[ed] the realities of how the pandemic had essentially ended successful petitioning activity," and "suggest[ed] without evidence that petition circulators would have an easier time collecting signatures in Ohio than in Michigan as the pandemic spread in both states").

3. The First Amendment is Implicated Equally by Restrictions on Candidates' and Initiatives' Circulators

Burdens placed on the efforts of circulators of candidate petitions and initiative petitions must be judged equally under *Anderson-Burdick*.

a. This Court has long applied the *Anderson-Burdick* framework in candidate access cases. *See, e.g.*, *Hawkins*, 2020 WL 4435524; *Green Party of Tenn.*, 791 F.3d at 692–93; *Blackwell*, 462 F.3d at 586. That same reasoning applies equally to initiative cases. If a burden—such as the State's enforcement of the challenged provisions during a pandemic—is severe for circulators of candidate petitions, such as those in *Esshaki*, it must also be severe for circulators of initiatives like in *SawariMedia* or this case. There is no principled constitutional basis for conducting the analysis differently and recent Sixth Circuit case law has certainly found no reason to discern differences in applicability between candidates and ballot initiatives. *See Hawkins*, 2020 WL 4435524, at *1–2 (applying the Motions Panel's initiative decision in *Thompson* to Ohio candidate access case using identical reasoning); *SawariMedia,* 963 F.3d at 597 (applying *Esshaki* candidate access decision to Michigan ballot initiative case).

b. Defendants make much of the fact that there is no First Amendment right to utilize initiatives in the first instance. While this is correct statement of the law, it is a red herring. Candidates for most offices have no constitutional right to

run, either.[34] *See Bullock v. Carter*, 405 U.S. 134, 142–43 & n.19 (1972). States need not open the vast majority of offices they do to popular elections. If the First Amendment did not apply when elections are not mandated, it would not apply to any of these elections, either. But it plainly does, as made clear by years of precedent.[35]

The Supreme Court, in *McCullen v. Coakley*, recently reiterated the protections afforded "petition campaigns" in the strongest terms:

> [W]e have observed that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." And "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

573 U.S. 464, 488–89 (2014) (internal citations omitted).

4. Ohio's Vague First Amendment Exception Did Not Lessen the Severe Burden on Thompson's Circulation Efforts

Defendants contend that Thompson suffered only an intermediate burden because the First Amendment Exception for protected speech made it possible for

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[34] Under the Federal Constitution, the only offices that must be voted on are the United States House, *see* U.S. Const. art. I, § 2, cl. 1; the Senate, *see* U.S. Const. amend. XVII; and the most numerous branch of the State Legislature. *See* U.S. Const. art. I, § 2, cl. 1. No other office that is commonly filled by elections today need be filled in that fashion. Not President, not Governor, not State Senate, not gubernatorial cabinet positions, not Mayor, nor Council Member.

[35] Defendants suggest that initiatives are different from candidates because supporters of initiatives can try again during the next election. Appellants' Br. at 51. But the same is true of candidates. They are no different in this regard.

Thompson to collect signatures during the pandemic. That contention is wrong. The First Amendment Exception is too vague to alleviate the burden on Thompson.

a. The Supreme Court recently confirmed this point in *South Bay United Pentecostal Church v. Gavin*, 140 S. Ct. 1613, 1614 (2020). There, the Chief Justice explained that it is "quite improbable" that Americans have protected First Amendment rights during times of crisis to ignore content-neutral shelter-in-place restrictions. *See also Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020) (mem.) (denying emergency relief on whether Free Speech or Free Exercise clause protected activity from COVID-19 restrictions on movement and gathering). These recent Supreme Court cases cast serious doubt over the efficacy of Ohio's vague First Amendment Exception. No one can know beforehand—in the face of novel content-neutral health restrictions enacted during this pandemic—that they have an iron-clad First Amendment right to ignore such laws. Application of the First Amendment was too uncertain to lessen the burden on Thompson.

b. The District Court in *SawariMedia* noted this problem. Michigan's emergency orders included a First Amendment exception similar to Ohio's, providing that restrictions imposed did not "abridge protections guaranteed by the state or federal constitution *under these emergency circumstances*." *SawariMedia*, 2020 WL 3097266, at *8. Addressing this exception, the District Court observed

that there was "no obvious answer[] to the question[]" of whether Michigan's First Amendment Exception authorized circulation and signature collection, but there is "at least some authority for the proposition that liberties that citizens enjoy under the Constitution may be subject to at least some otherwise impermissible restraints during a public health crisis." *Id.* at *8 n.18 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925 (6th Cir. 2020)). Therefore, the exception did not excuse Michigan's constitutional obligation to accommodate circulators during the COVID-19 pandemic. *See SawariMedia*, 2020 WL 2097266, at *15 ("strict application of Michigan's signature requirement and filing deadline for ballot initiatives" still violated the First Amendment).

c. Moreover, in support of this argument Defendants go so far as to contradict their principal and desired argument—that the First Amendment does not apply *at all* to Thompson's signature gathering activities for initiatives. *See* Appellants' Br. at 10 ("Under well-settled law, the First Amendment protects the gathering of signatures in support of initiatives" (citing *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988))). Defendants cannot have it both ways and ask the Court to both deny First Amendment Protections to Thompson's signature gathering activities, while also relying on an unconstitutionally vague First Amendment protection to establish intermediate burden.

d. The Motions Panel ignored the reality of the situation. *See Stone*, 750 F.3d at 681 (assessment of severe burden requires a "practical assessment of the challenged scheme's justifications and effects"). Thompson and his fellow circulators faced criminal charges if they attempted door-to-door collection regardless of any vague First Amendment Exception in the Shutdown orders. Door-to-door solicitors in Ohio, after all, were being arrested.[36] Citizens exercising their First Amendment rights, moreover, should not be forced to make this choice; they should not have to bet their lives, safety, and potential criminal charges based on the possibility that State officials might apply a vague exception to the state orders.

5. Thompson Has Been and Continues to Be Severely Burdened

Thompson suffered and continues to suffer a severe burden due to the combined effect of strict enforcement of the In-Person Collection Laws, the Shutdown Orders, and the COVID-19 pandemic.

a. The District Court's factual findings[37] correctly recognize the reality of the on-the-ground challenges to circulation in Ohio that severely burdened

[36] *See 6 Out-of-state Residents Arrested in Springfield Township for Violating Stay-at-home Order*, *supra* n.12.

[37] The District Court's factual findings should be reviewed for clear error. *See* Order at 5, *Libertarian Party of Ill. v. Cadigan*, No. 20-1961 (7th Cir. Aug. 20, 2020) (District Court's findings concerning inability to gather signatures was not clearly erroneous).

Thompson's circulation efforts. *See* Opinion & Order, R. 44, at Page ID # 661 ("Life as Ohioans knew it has drastically changed . . . Sporting events and concerts have been cancelled. All polling locations were closed for the March 17, 2020 primary election . . . Gatherings of 10 or more people have been prohibited . . . Ohioans have been directed to maintain social distancing, staying at least six feet apart from each other, and to wear masks or facial coverings."). *See Stone*, 750 F.3d at 681 (assessment of severe burden requires a "*practical assessment* of the challenged scheme's justifications and effects" (emphasis added)). The Shutdown Orders "strongly discourage[]—if not prohibit[]" the close person-to-person contacts required to collect signatures in person. *See* Opinion & Order, R. 44, Page ID # 661 ("[T]he public places where Plaintiffs may have solicited these signatures have been closed, and the public events drawing large crowds for Plaintiffs have cancelled and mass gatherings cancelled."). Thus, Thompson could not "safely and effectively circulate their petition in person." *Id.*

b. In contrast, the Motions Panel relied on assumptions contravening common sense. It asserted that Thompson could "steriliz[e] writing instruments between signatures." Per Curiam Order at 8. But sanitizing pens and clipboards cannot guarantee safety.[38] COVID-19 transmits between individuals in close

[38] *COVID-19 Overview and Infection Prevention and Control Priorities in Non-US Healthcare Settings*, Centers for Disease Control (Aug. 12, 2020), https://tinyurl.com/y3tan4bw.

proximity—it does not require physical contact. All of this activity would violate the social distancing directives imposed by the Shutdown Orders. Equally troubling is the Motions Panel's suggestion that Thompson advertise petitions via social media and perform house calls to interested electors, *see id.*; house calls would only exacerbate the transmission of COVID-19. And the likelihood that electors would welcome strangers to their doors who may have recently visited thousands of other homes is slim at best.

c. Because of Defendants' restrictions, Thompson lost more than four months of circulation time. Governor DeWine's original state of emergency orders, and later orders remained in place past the July 16, 2020 deadline for signature collection. *See supra* Statement of the Case Section A-E. This Court in *Esshaki* found that just one month of impediment on circulation time amounted to a severe burden. *See Esshaki*, 813 F. App'x at 171 (Stay-at-Home Order issued on March 23 and signature deadline April 21).

d. Thompson filed his proposed ordinances with local officials on February 27, 2020—just eleven days before Governor DeWine declared a state of emergency and enforced the first of many bans on public gatherings. Thus, Thompson had only eleven days to meaningfully collect signatures without impediment. Stipulated Facts, R. 35, at Page ID # 469–470. This Court has found a time period of meaningful collection nearly five times that amount to still

constitute a severe burden. *See SawariMedia*, 2020 WL 3097266, at *2–3 (finding severe burden where initiative circulators had fifty-four days to collect signatures before the governor declared a state of emergency).[39]

e. Even after Defendants formally "allowed" signature collection on April 30, 2020, Thompson remained severely burdened because meaningful signature collection was and still is virtually impossible under the circumstances. By that time, Thompson had already lost nearly two months of circulation time—double the time lost in *Esshaki*. *See Esshaki*, 813 F. App'x at 171. And despite the order's new exception for "petition or referendum circulators," the order continued to ban gatherings and did not relax any physical distancing requirements. Thus, even though after April 30, 2020 Thompson could technically seek signatures without risk of criminal prosecution, he was still required to maintain a six-foot separation, and virtually all public gatherings of ten or more people were still prohibited. In other words, Thompson's ability to meaningfully collect signatures remains severely burdened.

[39] Defendants erroneously assert that Thompson had "months" to collect signatures. Appellants' Br. at 21. This assertion is factually incorrect and contradicted by Defendants' admission in the District Court that signature collection was both "impossible" and "illegal." *See supra* n.11. Because Thompson filed his proposed initiatives on February 27, 2020, he had only *eleven days* to collect signatures before Ohio entered a state of emergency.

f. The burden on Thompson's rights exceeds even the burden found to be severe in *SawariMedia*. In light of the pandemic and Defendants' Shutdown Orders, it is both impractical and unsafe to even attempt close contact with 10% of a municipality's gubernatorial vote from Ohio's last election. Both this Court and the Eastern District of Michigan recognized this reality in *SawariMedia*, finding that Michigan's numerical signature requirement amounting to 8% of the last gubernatorial election—a number less than Ohio's 10% requirement—was severely burdensome when viewed in combination with the pandemic and Michigan's restrictions on free movement. *See SawariMedia*, 963 F.3d at 597; *SawariMedia*, 2020 WL 3097266, at *11.

g. Defendants attempt to minimize Thompson's burden arguing that he has few signatures to collect. Appellants' Br. at 36. This claim is false. The cherry-picked villages that Defendants point to are small, but many of the Cities that Thompson targets are quite large. For example, in Akron where the population approaches 200,000, Ohio law and the Akron City Charter require that Thompson collect roughly 10,000 signatures. *See* Stipulated Facts, R. 35, Page ID # 469. Putting together all of the Villages and Cities that Thompson targeted for the November 3, 2020 election, the total number of signatures swells well beyond

10,000.40 Further, gathering those signatures requires visiting multiple municipalities across the State in a limited amount of time during the COVID-19 health crisis and a statewide shutdown.

h. This severe burden is ongoing. Defendants offer that "even if the challengers fail to qualify their initiatives for the November 2020 ballot, they can try again at the very next election." Appellants' Br. at 59. Yet the next election for local initiatives is the May 4, 2021 primary and signatures for ballot access will be due on or about January 14, 2021. There is no indication that the COVID-19 crisis will be over by that time, and no indication that Ohio will have relaxed its emergency orders. Consequently, the preliminary injunction is just as important now as it was on May 19, 2020.

6. Thompson was Effectively Denied Access to the Ballot and Meets Any Total Exclusion Litmus Test

Although this Court does not apply a total exclusion test, it is nonetheless noteworthy that Thompson would satisfy it here. Thompson was virtually excluded from local ballots because Ohio's temporal and numerical ballot-access requirements, in combination with the COVID-19 crisis and Defendants' orders,

[40] Circulators around the country are experiencing the same issues. For example, in Oregon a "historically short list of ballot measures" will go before voters in November election, with one of seventy-two ballots submitted for review reaching the required signature threshold. Gary A. Warner, *Pandemic Leads to Unusually Short List of Ballot Measures*, The Bulletin, July 3, 2020, https://tinyurl.com/y39b373c.

made it impossible for him to qualify most of his initiatives.[41] *See supra* Section II.A.3.b; Opinion & Order, R. 44, Page ID # 637. *See also Esshaki*, 2020 WL 1910154, at *6 ("[l]ack of a viable alternative means to procure the signatures" means they faced "virtual exclusion from the ballot"). Defendants have admitted, after all, that COVID-19 and the Governor's emergency orders made it "impossible" and "illegal" to collect signatures from March 12, 2020 until at least April 30, 2020.[42] Thompson filed his initiatives and could begin collecting signatures only on February 27, 2020. He had until July 16, 2020. He therefore lost half of his allotted collection time completely. This is necessarily a severe burden during that time-frame, even under Defendants' proposed test. And during the remaining time, Thompson and his circulators have been impeded by Ohio's remaining restrictions on gatherings and free movement.

[41] Absent additional relief to be provided by this Court, Thompson has succeeded only in qualifying petitions in four small villages for the November 4, 2020 ballot; each of the four qualifying petitions only required a few dozen signatures, whereas a successful petition in larger cities like Akron, for example, requires approximately 10,000—a virtually impossible task amidst the ongoing Shutdown Order restrictions. *See generally* Stipulated Facts, R. 35, Page ID # 469–470; Kyle Jaeger, *Four More Ohio Cities Will Vote On Marijuana Decriminalization This November*, Marijuana Moment, Aug. 13, 2020, https://tinyurl.com/yysg9rxv.

[42] *See supra* n.11.

B. Ohio's In-Person Collection Laws Do Not Survive Strict Scrutiny

1. Ohio Cannot Demonstrate That Strict Enforcement of the In-Person Collection Laws During the Pandemic Is Necessary to Further Any Compelling State Interest

Defendants assert a myriad of purported governmental interests to attempt to justify their continued strict adherence to the In-Person Collection Laws. For example, Defendants assert that these requirements ensure grass-roots support, authenticity, and that deadlines provide election officials time to review signatures. Appellants' Br. at 5. But a state must utilize the "least drastic means" to achieve these electoral interests, with the tailoring requirement being particularly important "where restrictions on access to the ballot are involved." *Ill. State Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979).

a. Other states have demonstrated that less restrictive means are feasible and practical in the midst of this once-in-a-lifetime pandemic. States have reduced the number of signatures required for ballot access. *See* Governor of the State of N.Y., Executive Order 202.2 (Mar. 14, 2020), https://tinyurl.com/y29g3f4v (reducing statutory signature requirement by 30 percent); *Cooper v. Raffensperger*, No. 1:20-cv-0131-ELR, 2020 WL 3892454, at *9 (N.D. Ga. July 9, 2020) (directing "the Secretary [of State] to reduce the signature requirements for third-party candidates by 30%); *Libertarian Party of Illinois v. Pritzker*, No. 20-cv-2112, 2020

WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) ("Reducing the required number of signatures to 10 percent [for third-party candidates].").

States now permit mail-in signatures for ballot initiatives. Montana Declaratory Order No. SOS-2020-DR-0001, (May 8, 2020) https://tinyurl.com/y5w2kwwl (permitting citizens to download petition materials, sign, and mail documents); *see also* Hunter Pauli, *Montana Oks Mail-in Ballot Initiative Signatures*, Montana Free Press (May 8.2020), https://tinyurl.com/y6knkcbk; *Goldstein v. Sec'y of Commonwealth*, 142 N.E.3d 560, 574 (Mass. 2020) (accepting government suggestion of "modest" alteration by allowing mail return of signatures).

And numerous states and cities now permit return of petitions by electronic means. *See* Chairman, D.C. City Council Coronavirus Omnibus Temporary Amendment Act of 2020 at 5, https://tinyurl.com/yxw6c32p (permitting electronic distribution of petitions to circulators and electronic return of scanned petitions); Governor of the State of Utah, Executive Order 2020-12 (Apr. 15, 2020), https://tinyurl.com/y4v4gzcr (suspending witness requirement and allowing petitioners to gather physically signed petitions by fax and email); *Goldstein*, 142 N.E.3d at 574 (accepting government suggestion of "modest" alteration by allowing voters to apply electronic signature on computer or sign by hand for electronic return by email). Others have taken the further step of moving from wet ink signatures to

electronic signatures. Governor of the State of Md., Md. SBE Policy 2020-01 (Apr. 22, 2020), https://tinyurl.com/yxgp66z9 (allowing electronic signatures); Secretary of State, Fla. Emergency R. 11SER20-2 (Apr. 2, 2020), https://tinyurl.com/y4ob88xp (removing ink signature requirement for candidate petitions); Governor of the State of N.J., Executive Order 132 (Apr. 29, 2020), https://tinyurl.com/yy8x8qar (allowing voters to collect petitions electronically via online form).[43] Vermont has suspended its signature requirement entirely. *See* H. 681, 2019–2020 Gen. Assemb., Adjourned Sess. (Vt. 2020).

b. The District Court's decision is in accord with courts across the country. The Seventh Circuit, for example, has found the unique challenges of COVID-19's interference in ballot access efforts merit relief, regardless of the exact terms of emergency shelter orders. In *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961 (7th Cir. Aug. 20, 2020), the State Elections Board attempted to use the Motions Panel's ruling in *Thompson* to stay an order directing it to relax signature collection requirements virtually identical to those in

[43] See Office of the Governor, *Governor Murphy Signs Executive Order Allowing Electronic Petition Submission and Signature Collection for Initiatives and Referenda*, (Apr. 29, 2020), https://tinyurl.com/y4a4gfs3 (executive order allowing local initiative campaigns to collect signatures electronically because "[n]ow is not the time for anyone to be going door-to-door or collect signatures for any purpose").

Ohio. The Seventh Circuit denied the request on June 21, 2020. *See Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 3421662 (7th Cir. June 21, 2020) (recognizing "the serious safety concerns and substantial limitations on public gatherings that animated the parties' initial agreement and persist despite some loosening of restrictions in recent weeks"). Those same twin concerns are present in Ohio; public gatherings are even more restricted and safety is at risk.

On August 20, 2020, the Seventh Circuit affirmed the district court's injunction extending the deadline, allowing electronic signatures without personal witnessing, and reducing the number of required signatures to not less 10% of the amount required by statute. *See* Order at 3, *Libertarian Party of Ill. v. Cadigan*, No. 20-1961 (7th Cir. Aug. 20, 2020) (district court's factual findings—including finding that Illinois's stay-at-home orders impeded plaintiff's ability to gather signatures—were not clearly erroneous).

Other courts have also required accommodations. *See, e.g.*, *Esshaki*, 2020 WL 1910154, *stay denied in part*, 813 Fed. Appx. 170 (6th Cir. 2020); *Acosta v. Pablo Restrepo*, No. 1:20-cv-00262-MSM-LDA, 2020 WL 3495777 (D. R.I. June 25, 2020) (awarding injunction modifying statutory ballot access qualification process for candidate and adopting government's proposed offer of email execution for nominating petitions); *Constitution Party of Va. v. Va. State Bd. of Elections*, No. 3:20-cv-349, 2020 WL 4001087, at *6 (E.D. Va., July 15, 2020) (finding that severe

burden caused by cancellation of large public gatherings, infeasibility of door-to-door signature gathering made existing signature requirements "almost impossible" for plaintiffs to get on ballot and did not survive strict scrutiny as applied during COVID-19 pandemic); *Goldstein*, 142 N.E.3d at 570 (finding minimum signature requirements, which "in ordinary times impose only modest burdens" to impose severe burden during pandemic and that government did not advance compelling interest to apply those same requirements during pandemic); *Thomas v. Andino*, Nos. 3:20-cv-1552, 3:20-cv-01730 (JMC), 2020 WL 2617329, at *21 (D. S.C., May 25, 2020) (enjoining South Carolina's witness requirement for absentee ballots because "the character and magnitude of the burdens imposed on . . . Plaintiffs in having to place their health at risk during the COVID-19 pandemic likely outweigh the extent to which the Witness Requirement advances the state's interests of voter fraud and integrity"); Petition for Writ of Mandate–Final Ruling at 6, *Macarro v. Padilla*, No. 34-2020-80003404 (Cal. Sup. Ct. July 2, 2020) (applying strict scrutiny to extend deadline for initiative signature gathering "[t]o avoid a First Amendment violation"); Opinion & Order at 9–10, *Fair & Equal Michigan v. Benson*, No. 20-000095-MM (Mich. Ct. Cl. June 10, 2020) (applying strict scrutiny in granting preliminary injunction to initiative proponents as to time limitation on signature validity); *Libertarian Party of New Hampshire v. Sununu*, No. 20-CV-688-JL, 2020 WL 4340308, at *23 (D. N.H. July 28, 2020) (granting relief for candidate ballot access

because of First Amendment violation); *Cooper*, 2020 WL 3892454, at *10 (same); *Garbett v. Herbert*, No. 2:20-cv-245-RJS, 2020 WL 2064101, at *19 (D. Utah Apr. 29, 2020) (same); Order at 6–8, *Lean on McLean v. Showalter*, No. CL20-1959 (Va. Cir. Ct. May 18, 2020) (same).

To be sure, some Courts have denied relief relying significantly on a flawed premise that the First Amendment does not apply to the initiative process. Because the Sixth Circuit has already rejected that premise, *see supra* Section I.B., the reasoning in those out-of-circuit cases does not apply here. *See, e.g.*, *Morgan v. White*, 964 F.3d 649, 652 (7th Cir. 2020)[44] (relying in large part on Seventh Circuit's view that the First Amendment does not apply to initiatives in *Jones*, 892 F.3d 935, in affirming District Court's refusal to order relief for circulators of initiatives); *Miller v. Thurston*, 967 F.3d 727, 737 (8th Cir. 2020) (relying heavily on *Dobrovolny*, 126 F.3d 1111, which ruled First Amendment did not apply to initiative process, in overturning District Court's finding of First Amendment violation).

C. Ohio's In-Person Collection Laws Do Not Even Survive Intermediate Scrutiny

Even if the Court were to find that the combination of strict adherence to the In-Person Collection Laws and health orders regarding the pandemic did not

[44] *See also Sinner v. Jaeger*, No. 3:20-cv-00076, 2020 WL 3244143 (D. N.D. June 15, 2020) (finding no First Amendment violation).

somehow constitute a "severe burden," the In-Person Collection Laws should still be struck down as unconstitutional under intermediate *Anderson-Burdick* scrutiny.

The district court expressly found 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*." Opinion & Order, R. 44, Page ID # 656 n.2 (emphasis added).

The regulatory interests asserted by the government—a desire for authenticity and combating fraud and adherence to timelines—do not sufficiently justify even the intermediate burden imposed on Thompson in the midst of a pandemic. And the government's interests could have been satisfied by a panoply of less restrictive alternatives. *See supra* Section II.A.5.

III. Injunctive Relief Is Required to Remedy Thompson's Injury

A. The Preliminary Injunction Factors Weigh in Favor of Granting Thompson Equitable Relief

Success on the merits. Thompson will succeed on the merits because Ohio's In-Person Collection Laws and the Shutdown Orders severely burden Thompson's circulation activities and cannot survive strict scrutiny as applied during this pandemic. *See supra* Section II.A-C.

Irreparable harm. Thompson was irreparably harmed when he was virtually excluded from accessing local ballots by the combined force of the Shutdown Orders

and the strict enforcement of In-Person Collection Laws during the COVID-19 health crisis. The Supreme Court has made clear that the denial of First Amendment rights "for even minimal periods of time[]unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And according to this Court, "irreparable injury is presumed" when "constitutional rights are threatened or impaired." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citing *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003)).

Harm to other parties. Defendants will suffer no harm under the District Court's injunction. The District Court left to Defendants the authority to fashion relief consistent with its interests. Such relief could be as simple as authorizing digital/analog signatures as opposed to originals. Were Ohio to authorize this simple solution, petitions could be freely exchanged by e-mail. Instead, however, Defendants adhere to their old-world preference for dangerous door-to-door, in-person solicitation during a pandemic that has already claimed the lives of thousands of Ohioans. Ohio has absolutely no explanation for its unwillingness to grant relief to petition circulators during the pandemic when it has made other reasonable accommodations to protect public health such as postponing its primary election. And without the District Court's preliminary injunction, it is obvious that Ohio will not change its dangerous status quo.

Public interest. Voters suffer irreparable harm to their First Amendment rights when they are denied the right to vote on ballot issues. As stated by this Court, "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) (citation omitted).

Further, enforcement of Ohio's In-Person Collection Laws during the COVID-19 health crisis puts voters—and all Ohioans for that matter—at grave risk. Ohio's strict ballot-access provisions require circulators to personally meet with thousands upon thousands of people throughout Ohio. Contrary to Defendants' claim, hand sanitizer cannot guarantee safety. Given the highly infectious nature of this disease, it is a moral certainty that Ohio's horse-and-buggy in-person signature requirement will make more people sick. Thousands of Ohioan's have already died from COVID-19. Defendants should not put more Ohioans' lives at risk to maintain antiquated ballot-access requirements in the Age of Information.

B. The District Court Did Not Abuse Its Discretion By Awarding Thompson A Negative Preliminary Injunction

District Courts may not order "plenary re-writing of [a] State's ballot-access provisions," *Esshaki*, 813 F. App'x at 172, but they can instruct the government to propose alternatives to unconstitutionally restrictive ballot access provisions. *See id.* (directing 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 . . . ballot-access provisions constitutional under the circumstances"). In *Esshaki*, this Court upheld the district court's preliminary injunction enjoining Michigan from enforcing its ballot-access provisions "unless the State provid[ed] some reasonable accommodations." *Id.*

This Court similarly kept in place a negative injunction in *SawariMedia*, 963 F.3d at 598. The defendants offered a proposal that refused to adjust either Michigan's numerical requirements or its in-person requirement for collecting signatures. *See* State Defendants' Notice of Proposed Remedy, *SawariMedia, LLC v. Whitmer*, No. 20-11246, (E.D. Mich. June 15, 2020). The court rejected the proposal as "contraven[ing] the terms of the Court's injunction." Status Conference Order, *SawariMedia, LLC v. Whitmer*, No. 20-11246, (E.D. Mich. June 16, 2020). The Defendants appealed to this Court for an emergency stay. *SawariMedia*, 963 F.3d at 596. This Court denied the defendants' appeal, holding that the defendants "failed to show a likelihood that the district court abused its discretion by rejecting their proposed remedy." *Id.* at 597.

The remedy awarded to Thompson is nearly indistinguishable from those awarded and upheld in *Esshaki* and *SawariMedia*. In both *Esshaki* and *SawariMedia*, the upheld remedies were negative injunctions that enjoined burdensome ballot-access provisions and requested the government to propose remedial adjustments that would ease burdens on ballot access. The District Court's

remedy for Thompson was no different. It merely (1) enjoined enforcement of Ohio's "wet" and witnessed signature requirement, (2) enjoined enforcement of Ohio's signature deadline, and (3) directed Defendants to propose adjustments to the enjoined requirements "so as to reduce the burden on ballot access." R. 44, Page ID # 674. Like in *Esshaki* and *SawariMedia*, the District Court properly issued a negative, prohibitory injunction that this Court should have upheld.

Defendants confuse the District Court's negative injunction with the affirmative relief awarded to the Plaintiff-Intervenors, who are no longer appellees in this case.[45] They fail to mention that *none* of the affirmative relief awarded by the District Court applies to Thompson, who exclusively challenged the laws applicable to Ohio's local initiative process.

C. Thompson Is Also Entitled to Affirmative Relief

Here, even if the District Court only awarded Thompson a negative injunction, it was within the court's power to fashion affirmative relief in this ballot access case. For instance, the Supreme Court in *Anderson* upheld affirmative relief where it was required to remedy a constitutional violation. *See Anderson*, 460 U.S. 780 (reversing circuit court and upholding district court issuance of affirmative relief requiring Ohio to place petitioner's name on ballot). The Sixth Circuit has similarly required affirmative relief. *See Graveline v. Johnson*, 747 F. App'x 408, 411, 416 (6th Cir.

[45] *See* Order Granting Motion to Dismiss Intervenors-Appellees.

2018) (district court did not abuse its discretion in candidate ballot access case by requiring that plaintiff immediately present petition to the Bureau of Elections, accept filing as complete, and find that plaintiff had at least 5,000 valid signatures).

Here, the district court did not provide affirmative relief to Thompson, but it could have, and should have, exercised that power to remedy the severe burden imposed by the combined effect of Defendants' Shutdown Orders and the strict enforcement of Ohio's In-Person Collection Laws during the COVID-19 health crisis.

CONCLUSION

The District Court did not abuse its discretion. Far from it, it did what was necessary both to protect First Amendment rights and the health and safety of Ohioans. Appellees respectfully request that the decision below be AFFIRMED.

Respectfully submitted,

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Dated: August 26, 2020

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

I hereby certify that this brief complies with the type-volume requirements for a principal brief and contains 11,968 words. *See* Fed. R. App. P. (32)(a)(7)(B)(i).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman Font.

/s/ Jeffrey T. Green
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CERTIFICATE OF SERVICE

I hereby certify on August 26, 2020, the foregoing was filed electronically and served upon all parties for whom counsel has entered an appearance via the Court's CM/ECF system.

/s/ Jeffrey T. Green
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DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic records:

***Chad Thompson, et al., v. Mike DeWine, et al.*, Case No. 2:20-cv-2129**

Date Filed	R. No.; Page ID #	Document Description
4/27/2020	R. 1; 2, 14	Verified Complaint
5/6/2020	R. 35; 469–474	Stipulated Facts
5/19/2020	R. 44; 637, 653–654, 656, 658, 660–661, 666, 673–675	Opinion and Order

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

Chad Thompson, William Schmitt, and Don Keeney,

Plaintiffs,

v. **Case No. _____**

Richard "Mike" DeWine, in his official capacity as Governor of Ohio,

Amy Acton, in her official capacity as Director of Ohio Department of Health,

and

TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION REQUESTED

Frank LaRose, in his official capacity as Ohio Secretary of State,

Defendants.

VERIFIED COMPLAINT

Nature of the Case

1. This is an action to declare unconstitutional, enjoin and/or modify Ohio's in-person signature collection and witnessing requirements and the deadlines required for the presentation of collected signatures for popular measures such as initiatives and referenda presented to local governments in Ohio for inclusion on Ohio's November 3, 2020 general election ballot in light of the current public health emergency caused by COVID-19 and Defendant DeWine's and Defendant Acton's emergency orders effectively shutting down the State.

Jurisdiction

2. Jurisdiction in this case is predicated on 28 U.S.C. § 1331, this being a case arising under the Constitution of the United States and 42 U.S.C. § 1983.

Venue

3. Venue is proper in this District and Division under 28 U.S.C. 1391(b) because all the Defendants reside in this District and Division, are residents of Ohio, and a substantial part of the events giving rise to Plaintiffs' claims occurred in this District and Division.

Parties

4. Plaintiffs, Chad Thompson, William Schmitt and Don Keeney, are registered voters in the State of Ohio who regularly circulate petitions to have initiatives placed on local election ballots throughout Ohio and in adjacent States. *See*, *e.g.*, *Schmitt v. Husted*, 933 F.3d 628 (6th Cir. 2019) (describing Thompson's and Schmitt's circulation efforts for initiatives presented in Windham and Garrettsville, Ohio), cert. pending, No. 19-974 (U.S., Feb. 4, 2020); *Hyman v. City of Salem*, 396 F. Supp.3d 666 (N.D. W.Va. 2019) (describing Thompson's circulation efforts for local initiative).

5. Plaintiffs routinely and regularly circulate in Ohio proposed popular measures in the form of initiatives in cities and villages that seek to amend local ordinances and laws that criminalize and/or penalize marijuana possession.

6. Plaintiffs have succeeded in placing several of these initiatives on local ballots in cities and villages across Ohio and in adjacent States over the past several election cycles.

7. Plaintiffs seek to place these same initiatives on local November 3, 2020 election ballots in cities and villages across Ohio, including but not limited to Adena, Ohio and Cadiz, Ohio.

8. Plaintiffs on February 27, 2020 filed proposed initiatives in compliance with O.R.C. § 731.32's first filing requirement with the relevant city auditors and village clerks in Jacksonville, Ohio, Timble, Ohio, and previously in Maumee, Ohio, in order to have those initiatives once sufficient signatures were collected included on local November 3, 2020 ballots.

9. Plaintiffs have been prevented from collecting the needed supporting signatures of Ohio voters required by Ohio law in order to place their initiatives on these and other local November 3, 2020 election ballots by the COVID-19 pandemic and Defendant DeWine's and Defendant Acton's emergency orders.

10. Defendant Richard "Mike" DeWine is the Governor of Ohio and is responsible for issuing Ohio's many emergency orders banning gatherings, shuttering businesses and other public places, requiring that people stay and shelter at home, and making it impossible for Plaintiffs to collect the signatures needed to place their initiatives on local November 3, 2020 election ballots in cities and villages across Ohio.

11. Defendant Amy Action is the Director of Ohio's Department of Health and is responsible for issuing Ohio's many emergency orders banning gatherings, shuttering businesses and other public places, requiring that people stay and shelter at home, and making it impossible for Plaintiffs to collect the signatures needed to place their initiatives on local November 3, 2020 election ballots in cities and villages across Ohio.

12. Defendant Frank LaRose is Ohio's Secretary of State and as such 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. *See* O.R.C. § 3501.05(B), (C) & (M); *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992); *Hunter v. Hamilton County Board of Elections*, 850 F. Supp.2d 795, 806 (S.D. Ohio 2012) ("The

Ohio Secretary of State is the state's chief elections officer. …The Secretary of State's election-related duties include "[i]ssu[ing] instructions by directives and advisories ... to members of the boards as to the proper methods of conducting elections;" "[p]repar[ing] rules and instructions for the conduct of elections;" and "[c]ompel[ling] the observance by election officers in the several counties of the requirements of the election laws."') (citations omitted).

13. 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.

Ohio Circulation and Signature Collection Requirements

14. Ohio, like many States, recognizes the right of its citizens to use popular democratic measures to make law at both the local and state-wide levels.

15. Initiatives and referenda are recognized forms of popular democracy in Ohio both under Ohio's Constitution and its Revised Code, and are recognized both for state-wide and local elections.

16. Ohio adopted popular democracy, including the initiative, as part of its Constitution in 1912. *See* Ohio Const., art. II, § 1.a; The Ohio Legislature: 133rd General Assembly: Ohio Constitution: The 1851 Constitution with Amendments to 2017 (stating this provision took effect in September 1912);[1] *see generally* DAVID SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 16 (Table 1-1) (1989).

17. Contemporaneous with its adoption of popular democracy in 1912, Ohio adopted its present method of petitioning to include popular measures on ballots, that is, collecting signatures in-person from a number of voters to support placing the proposed initiative on the

[1] https://www.legislature.ohio.gov/laws/ohio-constitution/section?const=2.01a.

ballot. *See, e.g.*, Ohio Const., art. II, § 1.a. ("the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution").

18. Notwithstanding enormous technological advances since 1912, Ohio's signature collection process for popular measures has remained virtually unchanged for over one hundred years.

19. Signature collection as a method of supporting candidates for office in Ohio, by way of comparison, was first implemented in 1929 when the definition of "qualified political party" found in § 4785-61 of the General Code (the immediate predecessor to O.R.C. § 3517.01) was altered to add language stating that "those political associations that presented nominating petitions supported by signatures from voters equal in number to 15% of the total vote for Governor in the preceding election," 1932 OAG 4587 at 10003 (Sep. 1, 1932) (quoting § 4785-61, General Code)), would be qualified political parties.

20. In contrast, Ohio like most States has adopted statutes like the Uniform Electronic Transactions Act to modernize practically all other aspects of its economy and polity; § 1306.06 of the Ohio Revised Code, for example, provides that:

> (A) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
>
> (B) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
>
> (C) If a law requires a record to be in writing, an electronic record satisfies the law.
>
> (D) If a law requires a signature, an electronic signature satisfies the law.

O.R.C. § 1306.06.

21. For local governments, Ohio's Constitution guarantees the right to popular democracy in Article II, § 1.f., also adopted in 1912, which states:

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Ohio Const., art. II, § 1.f.[2]

22. Section 731.28 of the Ohio Revised Code implements Article II of the Ohio Constitution by providing 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."

23. In order to place an initiative on a local election ballot, a citizen of Ohio must comply with the requirements of Chapter 731 of the Ohio Revised Code.

24. Local initiatives in Ohio must be supported by voters' signatures that are gathered and witnessed in-person by circulators who can attest to their validity.

25. The process of petitioning to place a popular measure on a local election ballot begins with the filing of the "proposed ordinance measure" as an initiative or referendum "before circulating such petition … with the city auditor or the village clerk." O.R.C. § 731.32.

26. There is no specific, stated deadline for filing a popular measure with village auditors and village clerks under O.R.C. § 731.32 or any other statute.

27. Following the filing of a proposed ordinance measure with the city auditor or the village clerk, circulators of initiative petitions may begin collecting supporting signatures by circulating among voters "a full and correct copy of the title and text of the proposed ordinance or other measure," O.R.C. § 731.31, and having voters sign their names in support of the proposed ordinance measure's inclusion on the local ballot.

[2] https://www.legislature.ohio.gov/laws/ohio-constitution/section?const=2.01f.

28. "Each signer of any such petition 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." *Id.*

29. "Petitions shall be governed in all other respects by the rules set forth in section 3501.38 of the Revised Code." O.R.C. § 731.31.

30. Ohio Revised Code § 3501.38 provides, in relevant part:

> (A) Only electors qualified to vote on the candidacy or issue which is the subject of the petition shall sign a petition. Each signer shall be a registered elector pursuant to section 3503.01 of the Revised Code. The facts of qualification shall be determined as of the date when the petition is filed.
>
> (B) Signatures shall be affixed in ink. Each signer may also print the signer's name, so as to clearly identify the signer's signature.
>
> (C) Each signer shall place on the petition after the signer's name the date of signing and the location of the sig ner's voting residence, including the street and number if in a municipal corporation or the rural route number, post office address, or township if outside a municipal corporation. The voting address given on the petition shall be the address appearing in the registration records at the board of elections.

31. Section 3501.38(E) of the Ohio Revised Code states in relevant part:

> the circulator shall indicate the number of signatures contained on it, and shall 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.

32. Section 3501.38 also states:

> (J) All declarations of candidacy, nominating petitions, or other petitions under this section shall be accompanied by the following statement in boldface capital letters: WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.
>
> (K) All separate petition papers shall be filed at the same time, as one instrument.

33. Section 731.28 of the Ohio Revised Code provides that an "initiative petition 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."

34. "When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, transmit a certified copy of the text of the proposed ordinance or measure to the board of elections." O.R.C. § 731.28.

35. "The board shall examine all signatures on the petition to determine the number of electors of the municipal corporation who signed the petition. The board shall return the petition to the auditor or clerk within ten days after receiving it, together with a statement attesting to the number of such electors who signed the petition." *Id.*

36. Upon receipt of the proposed measure and supporting signatures from the local board of elections found to be sufficient by the local board of elections, the city auditor or village clerk then has a ministerial duty to certify to the board of elections by 4 pm on the day that occurs ninety days before the next election "the validity and sufficiency of the petition." *State ex rel. Harris v. Rubino*, 155 Ohio St.3d 123, 127, 119 N.E.3d 1238, 1243 (2018).

37. Under Ohio law, including Ohio Revised Code §§ 731.28 & .31, a person proposing to place a popular measure on a local election ballot through Ohio's initiative process must gather signatures from a number of voters equal to 10% of the number of votes cast in the last gubernatorial election in that locale and submit those signatures to the city auditor or village clerk no later than at least twenty days before the ninety-day deadline stated in Ohio Revised Code § 731.28. *See generally State ex rel. Harris v. Rubino,* 155 Ohio St.3d 123, 127, 119

N.E.3d 1238, 1243 (2018) ("The statute thus sets out the following procedure: (1) petitioners submit the municipal initiative petition to the city auditor, (2) the auditor holds the petition for 10 days, (3) the auditor transmits the petition to the board of elections to determine the number of valid signatures, (4) the board certifies the number of valid signatures and returns the petition to the auditor [within ten days, *see* O.R.C. § 731.28], (5) the auditor certifies to the board the validity and sufficiency of the petition, and (6) the board submits the petition to the electors at the next election occurring 90 days after the auditor's certification.").

38. For the November 2020 general election ballot, the ninety-day deadline stated in O.R.C. § 731.28 is August 5, 2020.

39. Plaintiffs in the present case must gather signatures from a number of voters equal to 10% 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 15, 2020 in order to have that initiative included on the cities' and villages' November 3, 2020 election ballots.

40. Because the number of voters who vote in gubernatorial elections varies between cities and village in Ohio, no single figure exists for initiative petitioners who seek to comply with O.R.C. § 731.28.

Enter the Pandemic

41. Because of the global COVID-19 pandemic, Defendant DeWine on March 9, 2020 declared a state of emergency in Ohio. *See* Executive Order 2020-01D.[3]

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

42. Before Defendant DeWine's declaration of emergency in Ohio, the World Health Organization (WHO) on January 30, 2020 declared a Public Health Emergency of International Concern.

43. On January 31, 2020, the 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.[4]

44. 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.[5]

45. On March 3, 2020, Defendant DeWine announced that the Arnold Sports Festival, a large gathering of athletes and spectators in downtown Columbus, Ohio, 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.[6]

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

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

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

46. On March 13, 2020, the Columbus Metropolitan Library, one of the largest public libraries in the State, closed its branches. *See* Press Release: Columbus Metropolitan Library to close in response to COVID-19 coronavirus, March 13, 2020.[7]

47. Parades and 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.[8]

48. 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 Novel Coronavirus Disease (COVID-19) Outbreak.[9]

49. Beginning with 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,[10] colleges and universities throughout Ohio began closing their physical facilities and remaining closed until unknown future dates.

50. On March 12, 2020, Defendant DeWine and his Director of Ohio's Department of Health began ordering mandatory emergency closings throughout Ohio, including the following:

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[7] https://www.columbuslibrary.org/press/columbus-metropolitan-library-close-response-covid-19-coronavirus.

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

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

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

A. On March 12, 2020, Defendant DeWine ordered all private and public schools, grades K through 12, closed; *see* News Release: Governor DeWine Announces School Closures;[11]

B. On March 12, 2020, Defendant DeWine's Department of Health banned all gatherings of 100 or more persons; *see* Director's Order: In re: Order to Limit and/or Prohibit Mass Gatherings in Ohio;[12]

C. On March 17, 2020, Defendant DeWine's Department of Health's ban on mass gatherings was extended to ban gatherings of 50 or more persons and to direct the closures of most recreational activities in Ohio; *see* Director's Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings in Ohio;[13]

D. On March 15, 2020, Defendant DeWine's Department of Health closed all restaurants, liquor stores and eating establishments and limited them to carry-out 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;[14]

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

[12] 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.

[13] 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.

[14] https://coronavirus.ohio.gov/wps/wcm/connect/gov/aa5aa123-c6c9-4e95-8a0d-bc77409c7296/Health+Director+Order+Limit+Food%2C+Alcohol+Sales+to+Carry+Out+Delivery+Only.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-aa5aa123-c6c9-4e95-8a0d-bc77409c7296-n58291W.

E. On March 16, 2020, Defendant DeWine's Department of Health closed all polling places in Ohio and thereby canceled Ohio's March 17, 2020 primary election, *see* Director's Order: In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020,[15] resulting in a rescheduling of the primary election by mail-in vote only on April 28, 2020; *see* Ohio Secretary of State Directive 2020-07;[16]

F. On March 19, 2020, Defendant DeWine's Department of Health closed all barber shops, hair salons, day spas, tattoo parlors, and similar places of business; *see* Director's Order;[17] and

G. On March 22, 2020, Defendant DeWine's Department of Health 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 completely banning 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.[18]

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[15] 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.

[16] https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-07pdf.pdf.

[17] 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.

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

51. The aforementioned orders remain in place throughout Ohio at the time of the filing of this Verified Complaint and there is no reasonable forecast as to when they will be lifted or altered in the future.

52. Because of the presence of the pandemic in Ohio, the restrictions on businesses, the prohibitions on gatherings, the requirements of distancing, and the mandatory stay at home order, it is literally impossible for people outside the same family unit to solicit others for signatures needed to support the initiative petitions needed to place initiatives and referenda on Ohio's November 2020 election ballot.

53. Petition circulators rely heavily on public events and gatherings, such as sporting events, festivals, parades, conferences, concerts, rallies, and primary elections (including the canceled March 17, 2020 primary election) to collect signatures.

54. Petition circulators rely heavily on the human traffic that occurs inside and outside businesses and places of public accommodation, such as office buildings, college campuses, parks, theaters, shopping malls, libraries and commons to collect signatures.

55. Signature collection by mail is inefficient and unproductive, as pointed out by the United States District Court in *Esshaki v. Whitmer*, 2020 WL 1910154, *5 (E.D. Mich., Apr. 20, 2020) ("in the context of the COVID-19 pandemic, the efficacy of a mail-based campaign is unproven and questionable at best. Conducting an effective mail campaign in the current environment presents a significant hurdle").

56. Gathering in-person signatures in Ohio under the current circumstances is not only illegal under Ohio law but risks spreading COVID-19.

57. Several states, because of the pandemic, have either voluntarily or by judicial order either reduced or eliminated the number of signatures required for a candidate to be placed on the

ballot. *See, e.g., Esshaki v. Whitmer*, 2020 WL 1910154, at *12 (E.D. Mich., Apr. 20, 2020) (reducing the statutory signature requirement in Michigan by 50 percent); *Goldstein v. Sec'y of Commonwealth*, 2020 WL 1903931, at *9 (Mass., Apr. 17, 2020) (reducing the signature requirement in Massachusetts by 50 percent); N.Y. Exec. Order No. 202.2 (Mar. 14, 2020) (reducing the statutory signature requirement to 30 percent); H. 681, 2019–2020 Gen. Assemb., Adjourned Sess. (Vt. 2020) (suspending Vermont's statutory signature requirement entirely).

58. In Illinois, a federal Court last week in *Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), reduced Illinois's statutory signature requirements for all candidates to 10 percent of previous levels, extended their filing deadlines from June 22, 2020 until August 7, 2020, enjoined Illinois's in-person, witnessed, wet and notarized signature collection process in order to allow the electronic dissemination and collection of supporting signatures, and even directly placed on Illinois's ballots the candidates of the Libertarian and Green Parties in contests where the two parties had previously placed candidates in earlier elections.

59. Oklahoma's Governor has indefinitely suspended the deadlines imposed on signature collection for State initiatives. *See* Michael Rogers, Oklahoma Secretary of State and Education, Letter dated March 18, 2020.[19]

Injury-in-Fact Caused Plaintiffs

60. Ohio law, together with the COVID-19 outbreak and Defendants' orders, directly cause injury-in-fact to Plaintiffs and Plaintiffs' First and Fourteenth Amendment rights.

[19]https://www.boisestatepublicradio.org/sites/idaho/files/202003/sos_prpnt_ntc_and_sc_order_03-18-20.pdf.

61. Plaintiffs' injuries are fairly traceable to the Ohio laws requiring in person signature collection for candidates, the COVID-19 pandemic, and the Defendants' orders described in this action.

62. This Court has the power to properly redress Plaintiffs' injuries by issuing prospective injunctive and declaratory relief either placing their initiatives or prohibiting enforcement of Ohio's signature requirements for popular measures such as initiatives and referenda for local elections during Ohio's November 3, 2020 general election.

63. This Court has authority to and may properly redress Plaintiffs' injuries by ordering appropriate relief by either directing that Plaintiffs' initiatives be placed on local election ballots or by enjoining enforcement of Ohio's in-person signature collection requirement, extending the deadline for submitting supporting signatures to city auditors, village clerks and local election boards of elections in order to qualify popular measures for local November 3, 2020 election ballots, directing Defendants to develop efficient and realistic procedures and practices for gathering supporting signatures from voters and submitting them to local officials electronically in order to qualify initiatives for local November 3, 2020 election ballots, and reducing the number of needed voters' signatures in support of proposed popular measures to no more than ten percent of the number now prescribed by Ohio law.

FIRST CAUSE OF ACTION
FIRST AMENDMENT

64. All previous paragraphs and allegations are incorporated herein.

65. Under present circumstances, Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election violate rights guaranteed to these Plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

66. A real and actual controversy exists between the parties.

67. Plaintiffs have no adequate remedy at law other than this action for declaratory and equitable relief.

68. Plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

SECOND CAUSE OF ACTION
FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE

69. All previous paragraphs and allegations are incorporated herein.

70. Under present circumstances, Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election violate rights guaranteed to these Plaintiffs by the Equal Protection Clause of the Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

71. A real and actual controversy exists between the parties.

72. Plaintiffs have no adequate remedy at law other than this action for declaratory and equitable relief.

73. Plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

THIRD CAUSE OF ACTION
FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

74. All previous paragraphs and allegations are incorporated herein.

75. Under present circumstances, Ohio's emergency orders prohibiting in-person meetings have so altered Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election that they have not only made it impossible for those proposing popular measures to comply with existing Ohio law, they have changed Ohio's ballot

requirements in the midst of the 2020 election and thereby violated rights guaranteed to these Plaintiffs by the Due Process Clause of the Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

76. A real and actual controversy exists between the parties.

77. Plaintiffs have no adequate remedy at law other than this action for declaratory and equitable relief.

78. Plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

DEMAND FOR RELIEF

79. **WHEREFORE**, the Plaintiffs respectfully pray that this Court:

(1) Assume original jurisdiction over this case;

(2) Issue a temporary restraining order, preliminary injunction and/or permanent injunction against Defendants either directing Defendants to immediately place Plaintiffs' marijuana decriminalization initiatives on local November 3, 2020 election ballots without the need for supporting signatures from Ohio voters, or alternatively:

(3) Issue a temporary restraining order, preliminary injunction and/or permanent injunction against Defendants (i) prohibiting enforcement of Ohio's in-person supporting signature requirements for candidates for office for Ohio's November 3, 2020 general election; (ii) extending the deadline for submitting supporting signatures to city auditors, village clerks and local election boards of elections in order to qualify popular measures for local November 3, 2020 election ballots to September 1, 2020; (iii) directing Defendants to develop at their expense timely, efficient and realistic procedures and practices for gathering supporting signatures from voters and submitting them to local officials electronically in order to qualify initiatives for local

November 3, 2020 election ballots; and (iv) reducing the number of needed voters' signatures in support of proposed popular measures for local November 3, 2020 election ballots in Ohio to no more than ten percent of the number now prescribed by Ohio law; and

(4) Issue a declaratory judgment against Defendants stating that, in light of the current public health emergency caused by the COVID-19 pandemic and executive orders requiring that Ohio citizens stay at home and shelter in place, Ohio's supporting in-person signature requirements and submission deadlines for popular measures proposed for local November 3, 2020 elections in Ohio violate the First and Fourteenth Amendments to the United States Constitution; and

(5) Order Defendants to pay to Plaintiffs their costs and a reasonable attorney's fees under 42 U.S.C. § 1988(b); and

(6) Retain jurisdiction over this matter and order Defendants to provide to Plaintiffs any additional relief the Court deems just.

Respectfully submitted,

/s/ Mark R. Brown

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Pro hac vice pending

VERIFICATION OF PLAINTIFF
(pursuant to 28 U.S.C. § 1746)

I, Chad Thompson, verify under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 4-27-2020

Chad Thompson
Plaintiff

VERIFICATION OF PLAINTIFF
(pursuant to 28 U.S.C. § 1746)

I, William Schmitt, verify under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 4-27-2020

William Schmitt
Plaintiff

VERIFICATION OF PLAINTIFF
(pursuant to 28 U.S.C. § 1746)

I, Don Keeney, verify under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: April 27, 2020

Don Keeney
Plaintiff

CERTIFICATE OF SERVICE

I certify that this Verified Complaint was electronically served by e-mail delivery on Defendants through their attorney, Julie Pfeiffer, Associate Assistant Attorney General – Constitutional Offices, Office of Ohio Attorney General Dave Yost, 30 East Broad Street, Columbus, OH 43215, julie.pfeiffer@OhioAttorneyGeneral.gov, this 27th day of April 2020.

/s/ Mark R. Brown
Mark R. Brown