No. _____

In the Supreme Court of the United States

GRETCHEN WHITMER, GOVERNOR OF MICHIGAN; JOCELYN BENSON, SECRETARY OF STATE OF MICHIGAN; JONATHAN BRATER, DIRECTOR OF THE MICHIGAN BUREAU OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES, APPLICANTS

v.

SAWARIMEDIA L.L.C., ET AL.

EMERGENCY APPLICATION TO STAY THE PRELIMINARY INJUNCTION PENDING A MERITS DECISION BY THE COURT OF APPEALS

To the Honorable Sonia Sotomayor,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

RESPONSE REQUESTED – July 17, 2020 at noon

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INTRODUCTION

The U.S. Constitution does not guarantee a right to initiate legislation. This Court has stated as much. It is Michigan law—under its Constitution—that expressly permits citizens to propose legislation, and the people of Michigan have expressly provided the mechanics for invoking the initiative process. In an effort to ease the effects of a global pandemic, the federal courts here have set aside the Michigan Constitution's long-standing and neutral requirements for citizen initiation of legislation. In so doing, the courts have threatened the core value of federalism that undergirds our democracy and preserves a space for a state to effect its laws. This Court should stay these decisions and allow Michigan to apply its law.

The U.S. Constitution has nothing to say about the wisdom or propriety of the procedural mechanics Michigan has put in place to govern lawmaking by initiative. See, e.g., *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) ("[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes.") (citation omitted). But the Sixth Circuit has subjected the state initiative processes to First Amendment review. See, e.g., *Schmitt* v. *LaRose*, 933 F.3d 628, 639 (6th Cir. 2019). Other circuits—the Tenth and the D.C. Circuits—have rightly recognized that when people propose legislation by initiative, they are engaging in legislative activity, not expressive activity. See *Initiative & Referendum Inst.* v. *Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (en banc) (McConnell, J.) ("The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum,

which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not."); *Marijuana Policy Project* v. *United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) (Tatel, J.) ("although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject"). And just two days ago, in a per curiam decision issued on an expedited basis, the Seventh Circuit refused to grant relief under basically the same circumstances as those presented here: a First Amendment, challenge to Illinois' signature requirement and 18-month deadline for initiatives and referenda, which was prompted by the Illinois Governor's adoption of social-distancing requirements to mitigate the spread of Covid-19. See *Morgan* v. *White*, ___ F.3d ___; 2020 WL 3818059, *2 (No. 20-1801) (7th Cir. July 8, 2020) (per curiam) ("The federal Constitution does not require any state or local government to put referenda or initiatives on the ballot. That is wholly a matter of state law. If we understand the Governor's orders, coupled with the signature requirements, as equivalent to a decision to skip all referenda for the 2020 election cycle, 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.") (citations omitted). Under this line of better-reasoned decisions, the First Amendment is likewise not implicated here either.

Plaintiffs are proponents of an initiative petition to amend Michigan's truth-in-sentencing law, 1893 Public Act 118, Mich. Comp. Laws § 800.33, to allow criminal defendants to qualify for good-time credits for their sentences while in prison. Under

the Michigan Constitution, Plaintiffs were required to file at least 340,047 valid signatures by the statutory deadline of May 27, 2020, to potentially gain access to the November 3, 2020 general election ballot.

Plaintiffs argued that the Covid-19 pandemic and the Michigan Governor's Stay-Home Orders made it impossible for them to meet the minimum signature requirement by the filing deadline. They did not, however, seek relief from those Orders, instead targeting the constitutional signature requirement and statutory filing deadline that generally govern how Michigan makes law by initiative.

On June 11, 2020, the district court enjoined the State from enforcing its signature requirement and filing deadline, but—following recent directives from the Sixth Circuit—the court did not impose any replacement for the requirements, instead directing the State to propose its own remedy for the supposed constitutional violation. Underlying the district court's order was the conclusion that the number of signatures required by Michigan's Constitution and the statutory filing deadline—in conjunction with the Governor's Stay-Home Orders—imposed a "severe burden" on Plaintiffs' access to the ballot and so violated their First Amendment rights.

The district court's injunction of Michigan's lawmaking procedures was improper: the First Amendment should not apply to state requirements for a state petition to initiate state law where the requirements have nothing to do with any expressive conduct, and everything to do with creating law. And if the First Amendment does not apply, neither would the *Anderson-Burdick* test, which the district court applied to upend Michigan's requirements for citizen-initiated legislation.

Compounding this error, and well illustrating its dangers, the district court twice rebuffed the State Defendants' efforts to alter those lawmaking requirements in a way that, in the court's view, would remedy the supposed First Amendment violation. Despite the requirements providing no proper basis for relief under the First Amendment, the State Defendants attempted to accommodate the court's contrary ruling in two ways: (1) a 40-day extension of the filing deadline—the most the State Defendants could muster without encroaching on Michigan's constitutional requirements or completely eliminating any meaningful opportunity to review or challenge Plaintiffs' signatures; and alternatively, (2) a tolling of the expiration of Plaintiffs' signatures if they chose to pursue the 2022 ballot instead. But the district court rejected those remedies, suggesting that either a reduction of the constitutionally required signatures or a longer extension of the deadline was necessary. The district court also denied the State's emergency motion for stay pending appeal.

On June 25 and 26, 2020, the State Defendants sought an emergency stay of the district court's injunction from the Sixth Circuit, and filed with the Circuit an initial petition for en banc review. On July 2, 2020, the Sixth Circuit denied the emergency stay. The en banc petition remains pending. Immediate relief is necessary because the Sixth Circuit has ordered that if the State has not implemented a remedy by July 15, 2020, then the state initiative petition deadline could not be enforced against Plaintiffs, leaving unanswered what process would replace it. Appendix E, slip op., p. 5 ("We retain jurisdiction over this appeal but direct the district court to address any further remedy proposed by Defendants by no later than July 15, 2020.

If Defendants fail to propose a remedy that resolves the constitutional infirmity by that date, they will be precluded from enforcing the petition deadline against Plaintiffs, pending further review of any proposed remedy by this Court.") (emphasis added). Contemporaneous with the filing of this emergency application for stay, the State Defendants have asked the Sixth Circuit to provide them with a two-day extension of the deadline for complying with its order, to give this Court more time in which to review this emergency application.[1] Consistent with that filing, the State Defendants respectfully request a response to this application no later than **noon on Friday, July 17, 2020**.

OPINIONS BELOW

The district court's June 11, 2020 injunction order is attached as Appendix A. Its June 16, 2020 order denying the State's first proposed remedy is attached as Appendix B. Its June 23, 2020 order denying the State's second proposed remedy is attached as Appendix C. The district court's June 24, 2020 order denying the emergency motion for stay pending appeal is attached as Appendix D. The Sixth Circuit's July 2, 2020 order denying stay is attached as Appendix E.

JURISDICTION

This Court has jurisdiction to review the Sixth Circuit's stay decision under Supreme Court Rule 23.2 and 28 U.S.C. §§ 1254(1), 1651(a), 2101(f), and may issue a stay under this Court's Rule 23.

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[1] The Secretary of State is required by law to transmit all legislative initiatives to the Legislature 40 days before the ballot is certified, so all of her canvassing must be completed by July 24, 2020. See Mich. Const. art. II, § 9. A stay by this deadline would provide the Secretary seven days to complete her duties.

STATEMENT OF THE CASE

The people of Michigan, in their Constitution, reserved the right to legislate through ballot initiatives. Mich. Const. art. II, § 9. But before an initiative may be placed on the ballot, it must satisfy constitutional and statutory filing requirements. Two such requirements are relevant here.

First, the "signature requirement." Michigan's Constitution requires initiative proponents to gather a sufficient number of valid signatures equivalent to 8% of the number of electors who voted for Governor in the last gubernatorial election. Mich. Const. art. II, § 9.

Second, the "filing deadline." Those signatures must be filed with the Secretary of State no later than 160 days before the election at which the proposed law would appear on the ballot. Mich. Comp. Laws § 168.471. In the case of this year's November election, that deadline was May 27, 2020.

Also relevant is the requirement under Michigan's Constitution that, once a sufficient number of signatures are filed with the Secretary of State, the petition is given to the state legislature to review for 40 session days. Mich. Const. art. II, § 9. During that period, the Legislature may do one of three things. It may enact the proposal. It may reject the proposal, in which case it proceeds to the ballot for a popular vote. Or, it may reject the proposal and offer its own counter-proposal for placement on the ballot alongside the people's proposal. *Id*. This process must be completed no later than September 4, 2020, meaning that an initiative petition must be delivered to the Legislature for its 40-session-day review no later than July 24. Mich. Comp. Laws §§ 168.477, 168.474a, 168.480, 168.648. By state and federal law, absent voter

ballots must be available for delivery to overseas and military voters no later than September 21, 2020. Mich. Comp. Laws §§ 168.759a, 168.714; Mich. Const. art. II, § 4; 52 U.S.C. § 20302.

Michigan's Governor, Gretchen Whitmer, has endeavored to protect Michigan citizens from the Covid-19 pandemic. Between March 16 and May 30, she issued an array of orders restricting certain activities in order to suppress the spread of the virus. On March 13, 2020, Governor Whitmer issued Executive Order 2020-5 prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[2] But the order stated that its "prohibition [did] not abridge protections guaranteed by the state or federal constitution under these emergency circumstances."[3]

Three days later, on March 16, 2020, Governor Whitmer ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[4] And, on March 17, 2020, the Governor issued an order rescinding 2020-5, changing the cap on assemblages to 50 persons in a single shared

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[2] See EO No. 2020-5, available at https://www.michigan.gov/whitmer/ 0,9309,7-387-90499_90705-521595--,00.html.

[3] (*Id.*)

[4] See EO No. 2020-9, available at https://www.michigan.gov/whitmer/ 0,9309,7-387-90499_90705-521789--,00.html. Replaced by EO No. 2020-20.

indoor space, and expanding the scope of exceptions from that cap.[5] That order likewise stated that its "prohibition [did] not abridge protections guaranteed by the state or federal constitution under these emergency circumstances."[6]

On March 23, 2020, Governor Whitmer issued Executive Order No. 2020-21 (the "Stay-Home Order"), which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions.[7] The order also prohibited, with limited exceptions, all public and private gatherings of any number of people that are not part of a single household.[8] On April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay-Home Order through April 30, 2020.[9] She then extended it through May 15, 2020, pursuant to Executive Order 2020-59.[10]

These orders were interpreted to permit outdoor "expressive activities protected by the First Amendment," so long as "social distancing measures . . . including

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[5] See EO No. 2020-11, available at https://www.michigan.gov/ whitmer/0,9309,7-387-90499_90705-521890--,00.html.

[6] (*Id.*)

[7] See EO No. 2020-21, available at https://www.michigan.gov/whitmer/ 0,9309,7-387-90499_90705-522626--,00.html.

[8] (*Id.*)

[9] See EO No. 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf. See also EO No. 2020-43, https://www.michigan.gov/whitmer/ 0,9309,7-387-90499_90705-525927--,00.html.

[10] See EO No. 2020-59, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html.

remaining at least six feet from people from outside the person's household" were followed.[11]

In the weeks that followed, the Governor continued to extend the Stay-Home Order, incrementally loosening its restrictions each time.[12] Then, on June 1, 2020, Governor Whitmer issued Executive Order 2020-110, which, among other things, lifted the general "stay home" requirement and permitted indoor gatherings and events of up to 10 people and outdoor ones of up to 100 people.[13] The order provides that "nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution," and a FAQ for it specifically states that activities protected by the First Amendment are *not* prohibited.[14]

Because the First Amendment protects expressive conduct in the gathering of signatures in support of initiated legislation, all initiative proponents have, at all times, been free to solicit signatures throughout the pandemic. If Plaintiffs had any doubt about their ability to exercise their First Amendment rights, there were multiple, nationally-publicized protests in Michigan that occurred before Plaintiffs filed

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[11] See EO No. 2020-21, FAQ's, https://www.michigan.gov/ coronavirus/0,9753,7-406-98178_98455-522631--,00.html; EO No. 2020-42, FAQ's https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html; EO No. 2020-59, FAQs, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-527027--,00.html.

[12] See EO Nos. 2020-70, 2020-77, 2020-92, 2020-96, and 2020-100 available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html. These orders were likewise interpreted to permit outdoor, expressive First Amendment activities. See FAQ's for EOs 70, 77, 92 and 96, available at https://www.michigan.gov/ coronavirus/0,9753,7-406-98178_98455-521682--,00.html.

[13] See EO No. 2020-110 available at https://www.michigan.gov/ whitmer/0,9309,7-387-90499_90705-530620--,00.html.

[14] See FAQ's for EO No. 2020-110, available at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-530654--,00.html.

this action and that—if nothing else—effectively demonstrated that the Governor's orders did not prohibit expressive activities protected by the First Amendment.[15]

Nonetheless, Plaintiffs SawariMedia L.L.C. and individual petition supporters sought to enjoin Michigan's constitutional and statutory requirements for lawmaking by initiative on First Amendment grounds because the pandemic and the Executive Orders allegedly made gathering signatures too difficult to obtain by the May 27 deadline. (See, e.g., R.1, Complaint, PgID# 8, ¶42.). Plaintiffs seek by ballot initiative to reestablish good-time credits for prisoners who engage in good conduct while in prison, known as the Michigan Prisoner Rehabilitation Credit Act.[16]

On June 11, 2020, the district court granted Plaintiffs' request for a preliminary injunction. (Appendix A, slip, op., pp. 1–37.) Relying heavily on the Sixth Circuit's decision in *Esshaki* v. *Whitmer*, ___ F. App'x ___, 2020 WL 2185553 (6th Cir. May 5, 2020), the district court concluded that the Executive Orders imposed a severe burden on Plaintiffs' First Amendment rights under *Anderson-Burdick*. (Appendix A, slip op., p. 18.) The court enjoined enforcement of the signature requirement and filing deadline and, per *Esshaki*, left it to the State Defendants to come up with any replacement for those requirements. (*Id*. at 2.) The State Defendants proposed two alternatives, which were both rejected. The State Defendants moved for a stay pending appeal, which was denied on June 24, 2020. (Appendix D, slip op., pp. 1–18.)

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[15] See, e.g., https://abcnews.go.com/US/convoy-protesting-stay-home-orders-targets-michigans-capital/story?id=70138816

[16] See website for Michigan Prisoner Rehabilitation Credit Act, available at https://www.mprca.info/.

On June 25, 2020, the State Defendants filed an emergency motion for a stay with the Sixth Circuit and filed a petition for initial en banc review the next day. On July 2, 2020, the Sixth Circuit denied the State Defendants' emergency motion to stay the district court's injunction pending a determination of the appeal. (Appendix E, slip op., pp. 1–5). The petition for initial en banc review remains pending.

STANDARDS FOR GRANTING RELIEF

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Further, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id*.

Here, rather than seeking a stay pending the filing of a petition for a writ of certiorari, Michigan seeks a stay pending a decision on the merits by the court of appeals. This Court has repeatedly granted this lesser relief in the past. *Ashcroft* v. *N. Jersey Media Grp., Inc.*, 536 U.S. 954 (2002); *United States* v. *Oakland Cannabis Buyers' Co-op.*, 530 U.S. 1298 (2000); *McNary* v. *Haitian Centers Council, Inc.*, 503 U.S. 1000 (1992). If a petition for certiorari proves necessary, there is both a reasonable probability that there would be four votes in support of certiorari and a fair prospect that a majority would vote to reverse.

REASONS FOR GRANTING THE APPLICATION

I. The State Defendants are likely to prevail on the merits because the injunction is premised upon the Sixth Circuit's erroneous application of *Anderson-Burdick* to Michigan's requirements for lawmaking by initiative, which do not implicate the First Amendment.

The circuits are divided on the question whether the First Amendment applies to non-discriminatory, content-neutral ballot initiative requirements that regulate "the people's legislative powers (rather than political speech or voting)." See *Thompson* v. *Dewine*, 959 F.3d 804, 808 n.2 (6th Cir. 2020) (noting that at least two circuits have held that restrictions on the people's ability to legislate do not "implicate the First Amendment," but that the Sixth Circuit would apply the *Anderson-Burdick* framework "until this court sitting en banc takes up the question").

The D.C. and Tenth Circuits have each held that laws regulating the initiative process for enacting laws do not implicate the First Amendment. *Marijuana Policy Project* v. *United States*, 304 F.3d 82, 84–87 (D.C. Cir. 2002); *Initiative & Referendum Inst.* v. *Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006). Also, in a decision issued on July 8, the Seventh Circuit held that initiatives and referenda are "wholly a matter of state law," and that there would be no federal problem if the state decided to "skip all referenda for the 2020 election cycle." *Morgan* v. *White*, ___ F.3d ___; 2020 WL 3818059, *2 (No. 20-1801) (7th Cir. July 8, 2020) (per curiam). And the Fifth Circuit has held that, unlike the advocacy involved in circulating an initiative petition, the procedural steps of receiving a completed voter registration and taking it to be filed were not "inherently expressive" activities entitled to First Amendment protection. *Voting for America Inc.* v. *Steen*, 732 F.3d 382, 392–93 (5th Cir. 2013).

In contrast, the Sixth Circuit has applied the "*Anderson-Burdick*" test to laws governing the ballot-initiative process where the people exercise legislative powers conferred under state law. See, e.g., *Schmitt* v. *LaRose*, 933 F.3d 628, 634 (6th Cir. 2019) (applying *Anderson-Burdick* to uphold an Ohio constitutional provision that reserves the power of legislation by initiative). Indeed, just last month, the Sixth Circuit applied *Anderson-Burdick* to a case challenging Ohio's signature-gathering mechanics for initiatives. *Thompson*, 959 F.3d at 808. Ohio successfully secured a stay pending appeal regarding whether the district court had properly applied the *Anderson-Burdick* standard, but the Sixth Circuit denied Ohio's petition for initial en banc review regarding whether the First Amendment, and with it the *Anderson-Burdick* standard, should even apply in the first place.[17]

The Sixth Circuit is on the wrong side of this split. Under *Anderson-Burdick*, a court considering a First Amendment 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* v. *Takushi*, 504 U.S. 428, 434 (1992) (quotation marks omitted); see also *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983).

[17] The Eighth Circuit, for its part, is considering this issue now, and will rule any day after a July 8, 2020 argument. See *Miller* v. *Thurston*, No. 20-2095. There, the district court enjoined Arkansas's in-person and affidavit signature-gathering requirements for initiatives in light of the Covid-19 pandemic, and Arkansas urges the Circuit to find, among other things, that the First Amendment does not apply to those requirements, relying on *Dobrovolny* v. *Moore*, 126 F.3d 1111 (8th Cir. 1997).

As the Court recognized in *Burdick*, "[c]ommon sense, as well as constitutional law compels the conclusion that government must play an active role in structuring elections; 'as a practical matter there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick*, 504 U.S. at 433) (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)). So, the *Anderson-Burdick* test was intended to balance competing constitutional rights—the First Amendment rights of citizens to engage in speech and expressive conduct, and the states' constitutional authority to regulate the times, places, and manner of holding elections. *Burdick*, 504 U.S. at 433; U.S. Const. art. I, § 4, cl. 1.

The *Anderson-Burdick* test is useful in its correct context—but not here. Initiative petitions are state law methods for citizens to go around the state legislatures and directly enact laws. Their essential legislative nature makes it difficult—if not impossible—to apply the *Anderson-Burdick* test in a way that makes any kind of sense. As the D.C. Circuit held, per Judge Tatel, while the "First Amendment protects public debate about legislation, it confers no right to legislate." *Marijuana Policy Project*, 304 F.3d at 85 (internal quotation omitted). Of course, if a state law regulates the ability to advocate or limits the content of discussion about an initiative petition, it may still run afoul of First Amendment principles. That is why the en banc Tenth Circuit, per Judge McConnell, held that only those laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum . . . warrant strict scrutiny." *Walker*, 450 F.3d at 1100. But those are not the laws at issue here.

Rather, where a state law regulates merely the process by which an initiative petition reaches the ballot—in other words, "the process by which legislation is enacted," such as the deadline and signature requirements at issue here—such laws do not warrant First Amendment scrutiny. *Id.* at 1100. That is so because such laws "restrict[] no speech." See *Marijuana Policy Project*, 304 F.3d at 85. See also *Biddulph* v. *Mortham*, 89 F.3d 1491, 1501 n.10 (11th Cir. 1996) (holding that the *Anderson-Burdick* test was not the "appropriate" test where the party did not "raise[] a right-to-vote or freedom-of-association claim" but the claim only involved "an initiative's access to the ballot, not a candidate's").

In short, the *Anderson-Burdick* test should not apply to challenges to initiative procedures, because those procedures do not themselves implicate the First Amendment. After all, the "right to a state initiative process is not a right guaranteed by the United States Constitution but is a right created by state law." *Hoyle* v. *Priest*, 265 F.3d 699, 702 (8th Cir. 2001) (internal quotes omitted). In other words, it is "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *John Doe No. 1* v. *Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring).

That is not to say constitutionally guaranteed rights, including those guaranteed by the First Amendment, have no place or role whatsoever in an initiative process. The First Amendment certainly protects the right to discuss and advocate for a proposal during its circulation.

But the First Amendment does not create a means to thwart the mechanics of an initiative process. The initiative power is legislative in nature. *Marijuana Policy Project*, 304 F.3d at 85. Initiatives are not a forum for debate—they are a means for citizens to directly vote on the adoption of laws. And the First Amendment does not compel the states to allow the use of initiative proposals to simply raise awareness about an issue, or to provoke discussion about a new topic. *Nev. Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 127 (2011) ("This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message.") Initiative proposals enable the electorate to decide whether to adopt a law.

The First Amendment thus distinguishes between laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny," and laws "that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1099–1100. Laws that fall within the latter category limit legislative power, not expression. Therefore, they cannot offend the Free Speech Clause. That is why the en banc Tenth Circuit, in *Walker*, held the First Amendment inapplicable to a provision in the Utah Constitution that required certain initiatives to pass with a supermajority. *Id.* It is why the D.C. Circuit, in *Marijuana Policy Project*, held that "the First Amendment imposes no restriction on the withdrawal of subject matters from the initiative process." 304 F.3d at 86. And it is why the Seventh Circuit, in *Morgan*, found "no federal problem" with any decisions of Illinois regarding whether and how "to put referenda or initiatives on the ballot"; "[t]hat is wholly a matter of state law." 2020 WL 3818059 at *2.

This case would have been dismissed out of hand in any of these circuits, and rightly so. If every regulation of an initiative process triggered First Amendment scrutiny, no state's processes would be immune from close inspection by the federal courts.

Indeed, the restrictions challenged in *Walker* and *Marijuana Policy Project* discriminated against certain initiatives based on their content (hunting and marijuana, respectively). Under the Sixth Circuit's approach, they would have been subjected to strict scrutiny—and would surely have been struck down. This case, in contrast, involves a content-neutral signature requirement that treats all initiatives alike. Yet the Sixth Circuit refused to grant relief in contravention of this Court's admonition that "[s]tates 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. *Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999).

The Sixth Circuit is not alone in attempting to apply the First Amendment to state initiative processes. And it is not alone in struggling to find a sensible way to do so. In *Wirzburger* v. *Galvin*, 412 F.3d 271, 275 (1st Cir. 2005), for instance, the First Circuit held that "a state initiative procedure, although it may involve speech, is also a procedure for generating law, and is thus a process that the state has an interest in regulating, apart from any regulation of the speech involved in the initiative process." 412 F.3d at 275. That sentence succinctly identifies the distinction between expressive content and mechanical processes.

But instead of holding that the First Amendment does not apply, the First Circuit held that laws governing the initiative process are assessed under the *O'Brien* test, which normally applies to facially neutral laws that regulate conduct with an expressive element, such as laws that ban the burning of draft cards. Under this test, "conduct combining 'speech' and 'non-speech' elements can be regulated if four requirements are met: (1) the regulation 'is within the constitutional power of the Government;' (2) 'it furthers an important or substantial governmental interest;' (3) 'the governmental interest is unrelated to the suppression of free expression;' and (4) 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Id.* at 279 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)).

The First Circuit's selection of this test is hard to understand. As *Wirzburger* recognized, *O'Brien* applies to laws that restrict expressive conduct. See *O'Brien*, 391 U.S. at 376–77. Yet, laws establishing the initiative process do not involve expressive conduct; they set limits on how and when the people may override the legislative branch and directly engage in legislative activity. Thus, without any expressive conduct at stake, the *O'Brien* test is a poor fit.

As noted, the Sixth Circuit applies the *Anderson-Burdick* test. But that test is also poorly suited to analyze initiative regulations when speech or conduct are not being restricted. When there is no restriction of speech or expressive conduct, how are courts supposed to "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?' " *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Without an identifiable First Amendment right involved in state initiative processes, the use of *Anderson-Burdick* in such cases means either balancing the state's interests against nothing—which should result in upholding the challenged law—or assuming that the First Amendment protects whatever initiative-based activity is involved, despite the absence of any expressive component and contrary to the warnings of this Court. See, *e.g.*, *John Doe No. 1*, 561 U.S. at 212 (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."). In either circumstance, the court's "analysis" is necessarily strained.

The *Anderson-Burdick* test functions well when applied to cases involving voting regulations and ballot access for candidates. See *Burdick*, 504 U.S. at 430; *Anderson*, 460 U.S. at 782. Such cases generally involve clear and readily articulable First and Fourteenth Amendment rights. But it is not a suitable framework for evaluating the state-created processes by which citizens may initiate laws. The use of *Anderson-Burdick* in that context presupposes a connection between laws setting the process for citizen initiatives and the First Amendment that simply is not there. The Seventh, Tenth, and D.C. Circuits have gotten this right. The Sixth and First Circuits have not. And as a result, Michigan's constitutional and statutory requirements for citizen-initiated lawmaking have been wrongly enjoined. The State Defendants are likely to prevail on their challenge to this injunction.

II. The balance of harms also weighs in favor of a stay.

In comparing the harms to Plaintiffs as against the harms to the State Defendants, it is clear that these considerations support the granting of a stay.

A. The State's interest in its constitutional signature requirement and statutory deadline is substantial.

Michigan has established minimum requirements for those seeking to bypass the state legislature and present laws directly to the people. This Court has recognized that states, like Michigan, have an important interest in requiring some preliminary showing of a "significant modicum of support" before granting access to their ballots. *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971); see also, e.g., *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193 (1986); *American Party of Texas* v. *White*, 415 U.S. 767, 789 (1974). And it is up to the states to determine how significant that modicum of support must be.

Likewise, the Michigan Supreme Court has opined that "[t]here may be an 'overarching right' to the initiative petition, 'but only in accordance with the standards of the constitution; otherwise, there is an "overarching right" to have public policy determined by a majority of the people's democratically elected representatives.' " *Citizens Protecting Michigan's Constitution* v. *Sec'y of State*, 921 N.W.2d 247, 252 (Mich. 2018) (footnote and citations omitted). Process is thus paramount for lawmaking by initiative in Michigan—and Michigan's initiative process was *intended* to be difficult. In *Woodland* v. *Mich. Citizens Lobby*, 378 N.W.2d 337, 350 (Mich. 1985), the Michigan Supreme Court discussed Michigan's constitutional convention, where delegates considered and rejected attempts to lower the number of signatures, arguing

that "it should not be easy" for citizens to write laws instead of going through their legislative representatives. *Id*. The Court also recognized that Michigan's initiative process served as a "gun behind the door," and a "last resort" to be employed only where "the Legislature fails to act on issues which so inflame the citizenry on a grass-roots level," that there is no need to engage disinterested or unknowing citizens. *Id*.

Michigan thus has a substantial interest in enforcing article II, § 9's signature requirement. Doing so ensures that initiative petitioners like Plaintiffs have enough popular support for their proposed initiative to justify going around the legislature and taking the proposal directly to the electorate.

Michigan's filing deadline, meanwhile, is essential to ensuring the integrity of this signature requirement. And it is not set arbitrarily, or in a manner designed to short-change petition proponents like Plaintiffs. Instead, it is part of a carefully constructed set of election deadlines extending backward from the date of the election.

The Secretary of State, through the Bureau of Elections, must normally canvass initiative petitions between May 27 and July 24, 2020, the date by which the Board of State Canvassers must certify the sufficiency or insufficiency of legislative initiatives. That period of time is necessary for the Secretary of State and her staff to canvass petitions, provide a signature-challenge period, and timely send a sufficient petition to the Michigan Legislature for its constitutionally required 40-session-day review. See Mich. Const. art II, § 9. The process then culminates in a ballot certification deadline, which triggers final preparations for ballot printing by the counties.

The State's interests in these deadlines, which ensure the due validation of a petition's level of public support and the efficient operation of the election process itself, is substantial.

B. The State Defendants will be irreparably harmed absent a stay and the public interest weighs in favor of a stay.

The other 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). So long as the district court's injunction is in force, the State and its citizens will unquestionably be suffering irreparable harm. This Court has recognized that enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature" "would seriously and irreparably harm" the State unless that statute is unconstitutional. *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018). So too when state constitutional requirements are enjoined. The State and the people of Michigan have a strong interest in ensuring that lawmaking through citizen initiative occurs in the manner, and with the level of public support, required by their Constitution and laws.

C. Plaintiffs will not be irreparably harmed should a stay issue.

Plaintiffs, meanwhile, will suffer—at most—minimal injury from a stay. As discussed, Michigan's procedural mechanics for citizen-initiated lawmaking do not implicate, and are not causing harm to, Plaintiffs' First Amendment rights. Nor are those requirements responsible for any injury Plaintiffs may have experienced.

Any difficulty Plaintiffs encountered in gathering signatures was not the result of the filing deadline or the number of signatures required, but rather because of the Covid-19 pandemic and Plaintiffs' apparent understanding of the orders issued by the Governor to mitigate the virus's spread. Yet Plaintiffs never challenged the Governor's orders, instead lodging their complaints against content-neutral constitutional and statutory standards that apply to all initiative petitions. They also did not start collecting signatures after the Governor repeatedly made clear that her orders did not infringe upon conduct protected by the First Amendment.

Indeed, Plaintiffs dallied in launching their petition drive in the first place. They could have begun circulating a petition any time after the November 2018 general election. Plaintiffs, however, admittedly did not file their petition with the Secretary of State—the first step in the process—until January 16, 2020, (R. 1, Cmplt, ¶22, Page ID # 5), and presumably only started gathering signatures on or after that date. If they wished to file on May 27, 2020, however, they could have begun collecting signatures 180 days before that date—November 29, 2019. Instead, they squandered a substantial portion of that period. Then, also by their own admission, Plaintiffs "postponed many of their efforts to collect signatures" after President Trump issued his "slow the spread" initiative on March 15—over a week before the Governor issued the Stay-Home Order. (R. 1, ¶28, Page ID # 6.)

Throughout, Plaintiffs also had the ability to continue collecting signatures by switching to the use of regular mail. Voter address lists may be obtained from local clerks or the Michigan Bureau of Elections. Voters can be mailed a copy of a petition

and asked to sign the petition as a signer and a circulator. The voter can then send the completed petition back to the committee, typically in a self-addressed, stamped envelope.[18] This process does involve a cost, but Plaintiffs are not entitled to free access to the ballot. Cumbersome or not, Plaintiffs had options.

* * *

The bottom line, however, is that Plaintiffs have no First Amendment right to initiate legislation, and suffer no cognizable harm if they fail to qualify for the ballot this November.[19] This Court's intervention is necessary now to prevent the lower federal courts from improperly using the First Amendment to enjoin Michigan's constitutional and statutory requirements governing how the state makes law by initiative.

[18] Plaintiffs' website indicates that they also sought signatures by mail. See https://www.mprca.info/.

[19] Indeed, this election cycle by no means marks Plaintiffs' only opportunity to advance their initiative petition. Under Michigan's initiative process, Plaintiffs and other ballot question committees have the right and opportunity to seek to place initiatives on the ballot at every even-year November election. There is no limit as to how many initiatives can be on the ballot, or how many times a committee may attempt to place the same proposal on the ballot.

CONCLUSION

For these reasons, this Court should grant a stay of the preliminary injunction pending a resolution of the appeal in the Sixth Circuit on the merits and any subsequent petition for certiorari challenging its application of the First Amendment to the procedures governing state initiatives.

Respectfully submitted,

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