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

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

v.

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

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

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

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

PLAINTIFFS-APPELLEES' RESPONSE SUPPORTING EN BANC REVIEW

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu
Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Page***

Rules

Miscellaneous

On May 20, 2020, Appellants noticed their appeal in the above-styled case. On May 21, 2020, they moved for a stay pending appeal, and petitioned for Initial En Banc review by this Court. On May 26, 2020, a Panel of this Court (Sutton, McKeague & Nalbandian, JJ.) stayed pending appeal the District Court's preliminary injunction. Doc. No. 36-2 (copy attached).

Plaintiffs-Appellees support Appellants' petition for Initial En Banc Review. The Panel's stay demonstrates the necessary confusion among the Judges of this Court over the First Amendment's protections for those utilizing popular democratic measures -- especially during times of extreme crisis. The Panel's decision also conflicts with Sixth Circuit and Supreme Court precedent with respect to the standard for determining the severity of burdens on First Amendment rights. Finally, the Panel's ruling that federal courts lack power to grant affirmative relief correcting unconstitutional ballot laws contradicts this Court's and the Supreme Court precedents.

Argument

Federal Rule of Appellate Procedure 35(a) states: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."

I. The Panel's Application of *Anderson-Burdick* to the Mechanics of Popular Democracy Contradicts Case Law From the Supreme Court, this Court and Other Circuits.

The Panel's application of *Anderson-Burdick* presents a dramatic split from existing precedent. Many Courts, including the Supreme Court and this Court, *see Buckley* v. *American Constitutional Law Foundation*, 525 U.S. 182 (1999); *Meyer* v. *Grant*, 486 U.S. 414, 22 (1988); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993); *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), *cert. denied*, No. 19-974 (U.S., May 26, 2020), have concluded that the First Amendment applies equally to the mechanics of ballot access for both candidates and initiatives. Circulators of initiative petitions are afforded the same First Amendment protection as circulators of candidate petitions. *See Buckley*, 525 U.S. 182 (1999).

For this reason, burdens placed on the efforts of circulators of candidate petitions and initiative petitions must be judged under *Anderson-Burdick* equally. If a burden -- such as the State's enforcement of the challenged provisions during a pandemic -- is severe for circulators of candidate petitions, it must also be severe for circulators of initiatives. The relief required might differ, but the analysis is the same. There is no principled constitutional basis for conducting it differently.

Professor Hasen in his thoughtful critique of the Panel's disparate application of *Anderson-Burdick* calls it "deeply problematic." Richard L. Hasen, *Direct*

Democracy Denied: The Right to Initiative in a Pandemic, 2020 U. CHIC. L. REV. ONLINE 1, 6 (May 27, 2020) (copy attached) (cited with permission).[1] He describes the Panel's decision as being "very dismissive of the rights of direct democracy … that portends bad things to come." *Id*. at 2 (footnote omitted). While the District Court below "did a good job trying to put the plaintiffs in the position they would have been in if there had been no pandemic," *id*. at 8, the Panel "[d]ismissed the realities of how the pandemic had essentially ended successful petitioning activity," *id*. at 9, 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." *Id*. at 10.

"The decision of the Sixth Circuit is unfortunate," *id*. at 11, Professor Hasen laments. The Panel "has put a thumb on the scale favoring the state, denigrating the right to petition along the way, and minimizing the real costs that the pandemic has placed on democratic petitioning activity." *Id*. " Most importantly, the Sixth Circuit decision sends a disturbing signal about how some courts may approach burdens on fundamental voting rights questions during the pandemic." *Id*.

As Professor Hasen explains, failing to accord equal First Amendment consideration to circulators of initiatives is "unsupported by any reasoning." *Id*. at

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608472.

6. Indeed, the Panel's disparate approach to restrictions on the mechanics of initiatives here is particularly troubling. It cannot be squared with decisions of the Supreme Court, prior decisions of this Court, or the many decisions handed down in other Circuits. This Circuit and every other Circuit agrees that the First Amendment applies to the signature collection process used for initiatives, just as it applies to the same kind of process used for candidates. The effects of COVID-19 on both are the same. The constitutional analysis must be the same.

The Panel's analysis under *Anderson-Burdick* was not only improperly "dismiss[ive] [of] the realities of how the pandemic had essentially ended successful petitioning activity" in Ohio, Hasen, *supra*, at 9, it was detached from the reality that this Court itself acknowledged just weeks ago when it affirmed a district court order granting relief from petitioning requirements. *See Esshaki v. Whitmer*, __ Fed. App'x __, 2020 WL 2185553, *1 (6th Cir., May 5, 2020). In *Esshaki*, under a nearly identical time-frame and indistinguishable facts, this Court ruled that "[t]he district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access …" (Emphasis added).

Michigan officials there, like Ohio officials here, had assured citizens that they were free to engage in First Amendment activities during the State's

lockdown. Still, as the District Court observed, 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." *Esshaki v. Whitmer*, __ F. Supp. 3d __, 2020 WL 1910154, * 1 (E.D. Mich., Apr. 20, 2020). This Court rejected that claim and made clear that regardless of Michigan's First Amendment exception its restrictions on candidate access were severe.[2] *See Esshaki*, 2020 WL 2185553, at *1.

Equal application of *Esshaki* to the present case can leads to only one result: Ohio's strict in-person signatures requirements during the COVID-19 crisis, like Michigan's, place a severe burden on the rights of circulators. Plaintiffs-Appellees lost time to the COVID-19 crisis and Ohio's emergency shut-down. The Panel's conclusion contradicts *Esshaki*. En Banc review is needed.

Appellants remain incorrect in asserting there exists a broad Circuit split over the First Amendment's application to initiatives. Circuits are only split over the First Amendment's application to subject matter restrictions placed on initiatives. This Court has joined the First, *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), Ninth, *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), and (arguably)

[2] In *Miller v. Thurston*, 2020 WL 2617312 (W.D. Ark., May 25, 2020), in contrast to the Panel's conclusion, the Court enjoined Arkansas's in-person witnessing requirement for initiative petitions and concluded that the State's ballot access limitations were severe, "[e]specially in light of a pandemic that necessitates social distancing between people to prevent its spread …."

Eleventh Circuits, *Biddulph v. Morham*, 89 F.3d 1491 (11th Cir. 1996), to hold that *Anderson-Burdick* applies to all restrictions on initiatives. *See Austin*, 994 F.2d 291; *Schmitt*, 933 F.3d 628.

A minority view consisting of the Tenth, *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), and D.C. Circuits, *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002), holds that the First Amendment does not apply at all to subject-matter restrictions and that *Anderson-Burdick* is irrelevant. As Professor Hasen explains, "neither [*Walker* nor *Marijuana Policy*] involved claims as in *Thompson* [*v. DeWine*] that the mechanics of the ballot measure process imposed a severe burden on ballot measure proponents in violation of the First Amendment." Hasen, *supra*, at 6.

Consequently, as Professor Hasen states, no Circuit split exists (as Defendants incorrectly claim) over the First Amendment's application to "the mechanics of the ballot measure process." This is confirmed by the Supreme Court's holdings in *Buckley* and *Meyer*, both of which applied the First Amendment to the mechanics of the ballot process, specifically signature collection. The Panel's nominal application of *Anderson-Burdick* therefore did not put it in conflict with holdings of the Supreme Court or other Circuits, and En Banc Review is not justified on this basis. It is justified because of the Panel's improper application of *Esshaki* and *Anderson-Burdick*.

II. The Panel's "Total Exclusion" Standard Contradicts *Anderson-Burdick* and this Court's Precedents.

En Banc review is further warranted because of the Panel's erroneous imposition of a "total" exclusion standard under *Anderson-Burdick*. The Panel concluded that it "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." *Thompson v. DeWine*, No. 20-3526, slip op., at 8. The Panel found Ohio's purported First Amendment exception "vitally important" to its conclusion, *id*. at 6, in stark contrast to this Court's failure to afford Michigan's identical exception any relevance in *Esshaki*, and erroneously stated that "none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions." *Id*.

According to the Panel, Ohioans' individual failures to exercise their fundamental rights in the midst of a pandemic were their own fault – notwithstanding the undisputed fact that engaging in such activity would violate the express terms of every executive order that Ohio officials issued in this case requiring social distancing and physical separation of at least six feet.

This reasoning is shocking to say the least. It amounts to nothing less than saying that a State may constitutionally place its polling places in the middle of a

flood-plain during a deluge and tell voters to swim for it. It is the weather that changed the status quo, after all, and if voters cannot swim or choose to "stay home for their own safety" that is their own fault.

What the Panel has done is improperly graft onto *Anderson-Burdick* not only a "total exclusion" requirement, but a "total exclusion caused solely by the State" litmus test. Neither requirement alone finds support in case law; together they are doubly unprecedented. The Supreme Court has made clear there is no single test for severity, let alone a "total exclusion" caused solely by government requirement. "In neither *Norman* [*v. Reed*, 502 U.S. 279 (1992),] nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008). This Court's decision just three weeks ago in *Esshaki*, 2020 WL 2185553, demonstrates that the *combination* of state action and COVID-19 placed a severe burden on circulators.

Nothing has changed since *Crawford* in 2008, as the Seventh Circuit recently made clear in *Stone v. Board of Elections*, 750 F.3d 678, 681 (7th Cir. 2014): "[t]he Supreme Court has often stated that in this area there is no 'litmus-paper test' to 'separate valid from invalid restrictions.'" (Quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "Rather, a court must make a practical assessment of the challenged scheme's justifications and effects." *Stone*, 750 F.3d at 681.

In *Anderson*, 460 U.S. 780, for example, John Anderson was not completely and totally banned from the ballot by Ohio law; his challenge was to Ohio's early-filing deadline. Yet the Supreme Court found it severe and ruled it unconstitutional. This Court in *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 694 (6th Cir. 2015), meanwhile, concluded that a 5% of the total vote signature collection requirement was a severe, unconstitutional restriction on ballot access. In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), this Court concluded an early-filing deadline, coupled with a large signature requirement, was severe and unconstitutional. None of these cases involved the 'total exclusion' that the Panel – alone among all federal courts – finds necessary to a finding of severe burden. And in *Esshaki* itself, of course this Court concluded that the combination of state action and COVID-19 placed a severe burden on circulators, just as here.

Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020), is not to the contrary, since it did not address ballot access. It addressed only the detailed procedures surrounding how one cast a vote. In this regard, it was no different from the problem presented to the Supreme Court in *Crawford*, where the Court said there is no litmus test. One searches in vain for any "total exclusion" litmus test like that employed by the Panel. One searches in vain for any Court stating that a burden must be solely the fault of the State in order to be severe. They do not exist. The Panel's holding is unprecedented. En Banc Review is thus warranted.

III. The Panel's Conclusion that Federal Courts Lack Power to Grant Affirmative Relief Correcting Unconstitutional Ballot Laws Contradicts this Court's and the Supreme Court's Precedents.

The Panel incorrectly concluded that the District Court exceeded its authority by awarding Plaintiffs' affirmative ballot access relief. It erred for the basic reason that the District Court did not award any affirmative relief to Plaintiffs. The District Court issued only a prohibitive injunction against Ohio's *statutory* strict in-person compliance requirements for local initiatives. *See* Opinion and Order, R. 44, at PAGEID # 675. Ohio's Constitution plays no role in the deadlines and mechanics prescribed for local (as opposed to state-wide) initiatives.

More importantly, the Panel's conclusion that affirmative relief is improper strays from a long line of precedents that make clear federal courts have precisely this kind of authority, even with State Constitutions. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Judge Stranch's partial dissent to the Sixth Circuit's decision in *Esshaki*, 2020 WL 218553 at *3, thoroughly explains how the Panel's categorical ban on affirmative relief strays far from established precedent and need not be repeated here. Suffice it to say that the Panel's rush to a factually unsupported and legally erroneous stay during a time of crisis demands immediate En Banc review.

Conclusion

Appellants' Petition for Initial Hearing En Banc should be **GRANTED**.

Respectfully submitted,

s/ Mark R. Brown

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF TYPE-SIZE AND PAGE COUNT

Appellees certify that they have prepared this document in 14-point Times New Roman font and that excluding the Caption, Signature Blocks and Certificates, the document includes 10 pages as directed by the Clerk of Court.

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

CERTIFICATE OF SERVICE

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

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