No. 21-

IN THE

Supreme Court of the United States

CHAD THOMPSON, WILLIAM T. SCHMITT, AND DON KEENEY,

Petitioners,

v.

RICHARD MICHAEL DEWINE, GOVERNOR OF OHIO; BRUCE VANDERHOFF, DIRECTOR OF OHIO DEP'T OF HEALTH; AND FRANK LAROSE, OHIO SECRETARY OF STATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether ever-changing and ongoing government-issued COVID-19 restrictions moot First Amendment challenges to ballot access restrictions.

2. Whether and how the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Chad Thompson, William Schmitt, and Don Keeney, Appellants below. Respondents are Richard "Mike" DeWine, Governor of Ohio, Bruce Vanderhoff, Director of Ohio Department of Health, and Frank LaRose, Ohio Secretary of State, Appellees below. No parties are a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court:

Thompson v. *DeWine*, No. 21-3514 (6th Cir. Aug. 6, 2021)

Thompson v. *DeWine*, No. 21-3514 (6th Cir. July 28, 2021)

Thompson v. *DeWine*, No. 2:20-cv-02129 (S.D. Ohio June 3, 2021)

Thompson v. *DeWine*, No. 20-1072 (U.S. Apr. 19, 2021)

Thompson v. *DeWine*, No. 20-3526 (6th Cir. Sept. 16, 2020)

Thompson v. *DeWine*, No. 19A1054 (U.S. June 25, 2020)

Thompson v. *DeWine*, No. 20-3526 (6th Cir. May 26, 2020)

Thompson v. *DeWine*, No. 2:20-cv-02129-EAS-CMV (S.D. Ohio April 27, 2020)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Chad Thompson, William T. Schmitt, and Don Keeney, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Sixth Circuit instructing the district court to dismiss plaintiffs' case as moot is reported at 7 F.4th 521 (Aug. 6, 2021) and is reproduced in the appendix to this petition at Pet. App. 1a. The order of the United States Court of Appeals for the Sixth Circuit granting in part and denying in part appellants' motion to amend the Court's July 28, 2021 opinion is reproduced at Pet. App. 13a. The unamended opinion of the United States Court of Appeals for the Sixth Circuit is available at 2021 WL 3183692, No. 21-3514 (July 28, 2021) and is reproduced at Pet. App. 14a. The opinion issued by the district court below granting defendants' motion to dismiss is available at 2021 WL 2264449, No. 2:20-cv-2129 (June 3, 2021) and is reproduced at Pet. App. 25a. This Court's denial of petitioners' first petition for writ of certiorari is available at 141 S.Ct. 2512 (April 19, 2021). The order of the United States Court of Appeals for the Sixth Circuit reversing the district court's grant of preliminary injunction is reported at 976 F.3d 610 (Sept. 16, 2020) and is reproduced at Pet. App. 47a. The denial of appellees' application to vacate stay issued by this Court is available at 2020 WL 3456705, No. 19A1054 (June 25, 2020) and is reproduced at Pet. App. 64a. The order granting appellants' motion for a stay pending appeal by the United States Court of Appeals for the Sixth Circuit is reported at 959 F.3d 804 (May 26, 2020) and is repro-

duced at Pet. App. 65a. The preliminary injunction issued by the district court below is reported at 461 F. Supp. 3d 712 (2020) and is reproduced at Pet. App. 82a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on August 6, 2021, Pet. App. 13a. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

Section 1 of the Fourteenth Amendment makes the provisions of the First Amendment applicable to the states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

Petitioners seek resolution of two deepening circuit splits with significant and immediate effect on state ballot initiatives.

First, the lower courts are intractably split on how mootness exceptions apply to First Amendment cases arising from COVID-19 regulations.

The Third, Sixth and Eighth Circuits have held that cases challenging COVID-19 restrictions are moot if the policy has been rescinded or changed. The First and Second Circuits have also implicitly adopted this view. On the other side, the Seventh and Ninth Circuits have said that these cases are not moot because the ever-changing nature of the pandemic makes the harm likely to recur. This split persists despite guidance from this Court. See *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam order) (reasoning that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case"); *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam order) (stating that it "is clear that this matter is not moot . . . because the applicants remain under a constant threat that" regulations will be reimposed). The Court should grant the petition to ensure that COVID-19 restrictions cannot continue to evade judicial scrutiny. See *S. Bay Pentecostal Church* v. *Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.) ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner").

Second, this petition presents a circuit split as to whether and how the First Amendment applies to

regulations, like Ohio's In-Person Collection Laws, that impede ballot initiatives. This Court has specifically identified this issue as requiring resolution. See *Little* v. *Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring) ("[T]he Court is reasonably likely to grant certiorari to resolve [this split] on an important issue of election administration.").

Six Circuits do not apply the First Amendment to ballot initiatives; five Circuits and two state supreme courts do. What is more, the Circuits that do apply the First Amendment employ disparate tests and levels of scrutiny. See *Reclaim Idaho*, 140 S. Ct. at 2616–17 ("Since the onset of the pandemic, the Circuits have applied their conflicting frameworks to reach predictably contrary conclusions as to whether and to what extent States must adapt the initiative process to account for new obstacles to collecting signatures.") The result is uneven constitutional protection for core political speech in an arena where "the States depend on clear and administrable guidelines from the courts." *Id.* at 2616; *Meyer* v. *Grant*, 486 U.S. 414, 421 (1988) (Ballot initiatives implicate "core political speech").

STATEMENT OF THE CASE

A. Ohio's In-Person Collection Laws

Ohio's Constitution reserves to the people the right to legislate by initiative. Ohio Const. art. II, § 1f. To qualify for access to the ballot, ballot initiative petitioners are required to garner signatures reflecting 10% of the municipality's gubernatorial votes. Ohio Rev. Code Ann. § 731.28.

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. There is no formal restriction on when signatures can be used. Signatures collected in 2020 can still be used for ballot initiatives in 2022. Ohio Rev. Code Ann. § 3501.38.[1]

B. Background

Petitioners Chad Thompson, William Schmitt, and Don Keeney are Ohio residents who attempted to circulate petitions throughout their state to get an initiative on the ballot for the November 3, 2020 general election. Appellee Br. at 3–4, *Thompson* v. *DeWine*, Case No. 20-3526 (6th Cir. Aug. 26, 2020), ECF No. 94.

On February 27, 2020—before the COVID-19 crisis fully hit Ohio—petitioners diligently filed their proposed initiatives with several Ohio cities to begin collecting signatures. *Id.* at 4. Just eleven days later, Ohio's governor declared a state of emergency as the global pandemic reached Ohio. *Id.*

Ohio was one of the first states in the nation to declare a state of emergency and issue an order prohibiting mass gatherings. *Id*. The orders started a series of events that severely burdened Thompson's signature collection efforts. The orders banned, with limited exceptions, all gatherings of 50 or more persons, which are exactly the kind of events that circulators rely on to gather signatures. *Id*. at 5. Later orders al-

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[1]This petition refers to the Ohio's statutory scheme at issue collectively as the "In-Person Collection Laws." *See also* Appellee Br. at 2 n.1, *Thompson* v. *DeWine*, Case No. 20-3526 (6th Cir. Aug. 26, 2020), ECF No. 94.

so included criminal penalties and directed all Ohioans to "stay at home or at their place of residence," to maintain at least a six-foot social distance between themselves and others, and to avoid altogether gatherings of ten or more people. *Id*. at 5–6. The initial orders did not exempt circulators. *Id*. at 6.

On April 30, 2020, after this litigation commenced, respondents updated the shutdown order, creating a purported exception for "petition or referendum circulators." *Id*. at 8. Even though circulators after April 30, 2020 could attempt to gather signatures without risk of criminal prosecution, they and those they could legally approach still needed to maintain six-foot separation and other extraordinary precautions to stay safe. *Id*. at 8–9.

As a result of these limitations, petitioners were only able to qualify petitions in four small villages for the November 3, 2020 ballot. The qualifying petitions each required only a few dozen signatures because the population of each village was small, while a successful petition in larger cities like Akron would require about 10,000 signatures—a virtually impossible task amid Ohio's shutdown orders. *Id*. at 39.

Nearly two years have passed since petitioners were first denied the ability to collect signatures, and there is still no end in sight to this global pandemic. petitioners have continued to circulate petitions in an effort to have their initiatives placed on local election ballots but new variants threaten any sense of predictability. Ohio has lifted or modified several of its COVID-19 restrictions but the risk of new restrictions remains constant.

C. Proceedings Below

On April 27, 2020, petitioners filed their action in the Southern District of Ohio, requesting a temporary

restraining order and preliminary injunction against strict enforcement of Ohio's In-Person Collection Laws. *Id.* at 8.

On May 19, 2020, the District Court, applying the First Amendment and the *Anderson-Burdick* framework and the then-recent Sixth Circuit decision in *Esshaki* v. *Whitmer*, 813 F. App'x 170 (6th Cir. 2020), found that the combination of Ohio's strict enforcement of its signature collection laws and the pandemic "severely burden [petitioners'] First Amendment rights as applied here. . . ." Pet. App. 98a. Accordingly, the District Court "entered a preliminary injunction in [petitioners'] 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) direct[ing] 'Defendants to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements.'" Appellee Br. at 9, *Thompson* v. *DeWine*, Case No. 20-3526 (6th Cir. Aug. 26, 2020), ECF No. 94 .

On May 26, 2020, the Sixth Circuit stayed the injunction and applied the *Anderson-Burdick* framework to develop a novel litmus test only warranting strict scrutiny if Ohio's laws amounted to "virtual exclusion" from the ballot. Pet. App. at 71a. It held that Ohio's In-Person Collection Laws did not amount to virtual exclusion of the initiative constituting a severe burden warranting strict scrutiny and concluded that the laws were likely constitutional as applied under an intermediate scrutiny framework. *Id.* The panel relied on the new test and a vague First Amendment exception in Ohio's shutdown orders to distinguish between the severe burden found in *Esshaki* and the intermediate burden it found in this case. *Id.* at 76a–78a.

On September 16, 2020, in its order on the merits, the Sixth Circuit fully embraced the logic of its stay and once again found that while the First Amendment applied, the burden was not severe. *Id.* at 52a–53a. To begin, the panel questioned its own circuit precedent requiring application of the First Amendment to ballot initiatives. *Id.* Then, the panel concluded that it saw "no reason to depart from [its] previous holding that Ohio's ballot-access restrictions impose, at most, only an intermediate burden on [Petitioners'] First Amendment rights, even during COVID-19." *Id.* at 54a.

On February 2, 2021, petitioners petitioned for a writ of certiorari, requesting that this Court decide whether and how the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot. *Thompson* v. *DeWine*, (2020), (No. 20-3526), *cert. denied*. This Court denied the interlocutory petition on April 19, 2021. But see *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring) ("the Court is reasonably likely to grant certiorari to resolve [this split] . . . on an important issue of election administration.").

Following this Court's denial of the petition, respondents moved to dismiss petitioners' complaint in the district court. Pet. App. at 25a. The district court granted respondents' motion, after finding that the case was not moot, based on the Sixth Circuit's prior decisions finding that petitioners' claims failed as a matter of law. *Id.* at 32a–36a. Petitioners appealed the decision to the Sixth Circuit, which found that the case was moot and affirmed the decision of the district court. *Id.* at 23a.

Shortly after the Sixth Circuit's decision, petitioners moved the Sixth Circuit to vacate or reverse the district court's judgment consistent with this Court's

precedent in *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950), as well as its prior orders, and remand with a direction to dismiss. Pet. App. at 130a. On August 6, 2021, in an amended opinion, the Sixth Circuit vacated the district court's order dismissing petitioners' complaint and remanded with instructions that the case be dismissed as moot. Pet. App. at 1a. The Sixth Circuit refused, however, to vacate its prior published interlocutory decisions on the merits of the controversy, leaving them in place to serve as continuing persuasive and binding precedent in the Sixth Circuit and beyond. See*, e.g.*, *Hawkins* v. *DeWine*, 968 F.3d 603, 606 (6th Cir. 2020) (stating that *Thompson* answers "this precise question" concerning "how to classify the burden imposed on plaintiffs by Ohio's ballot-access laws").

REASONS FOR GRANTING THE PETITION

I. CIRCUIT COURTS ARE DIVIDED ON WHETHER CASES CHALLENGING COVID-19 REGULATIONS ARE MOOT.

A. Despite this Court's Recent Decisions on Mootness and COVID-19, a 2-5 Circuit Split Persists.

In *Tandon* v. *Newsom*, this Court instructed that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 141 S. Ct. 1294, 1297 (2021) (per curiam order). Instead, "so long as a case is not moot, litigants . . . remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (quoting *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020)). *Tandon* echoed *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020)

(per curiam order), which explained that a case involving COVID-19 restrictions is not necessarily rendered moot when the restrictions are amended. *Id.* (stating that it "is clear that this matter is not moot. And injunctive relief is still called for because the applicants remain under a constant threat that" regulations will be reimposed); see also *High Plains Harvest Church* v. *Polis*, 141 S. Ct. 527 (2020). Yet, despite these clear holdings, the Circuit courts remain split on the issue.

1. On one side of the split, the Third, Sixth, and Eighth Circuits have since held that cases challenging COVID-19 restrictions are moot if the policy has been repealed or altered. The First and Second Circuits have also implicitly adopted this view.

Several months after *Tandon*, the Third Circuit reasoned that when "the Governor's orders are no longer in effect and that he has been stripped of his power to unilaterally act in connection with this pandemic," then the "case is moot." *Cnty. of Butler* v. *Governor*, 8 F.4th 226, 230 (3d Cir. 2021); see also *Parker* v. *Governor of Pennsylvania*, No. 20-3518, 2021 WL 5492803, at *4 (3d Cir. Nov. 23, 2021) ("Because the statewide mask mandate expired several months ago, there is no relief the Court could grant the plaintiffs regarding that order.").

The Eighth Circuit likewise held that "[w]here it is absolutely clear that the County's disputed conduct could not reasonably be expected to recur, an action challenging a superseded public health order is moot." *Hawse* v. *Page*, 7 F.4th 685, 692 (8th Cir. 2021). It also said, however, that "[r]esolution of the mootness question requires attention to the particular circumstances of the case," *id.*, thus leaving the door open for some challenges to proceed.

The Second Circuit has dismissed cases as moot because it did not believe "the circumstances under which the [challenged] provision might be reinstated are sufficiently likely to reoccur such that plaintiffs 'remain under a constant threat,' of reinstatement." *36 Apartment Assocs., LLC* v. *Cuomo*, 860 F. App'x 215, 217 (2d Cir. 2021) (quoting *Tandon*, 141 S. Ct. at 1297). Similarly, the First Circuit has held that the argument that the Governor could reinstate COVID-19 restrictions is not compelling because the fact that "the Governor has the power to issue executive orders cannot itself be enough to skirt mootness, because then no suit against the government would ever be moot." *Boston Bit Labs, Inc.* v. *Baker*, 11 F.4th 3, 10 (1st Cir. 2021).

And in the case below, the Sixth Circuit held that the "case is moot" because "Plaintiffs request two types of relief, injunctive and declaratory. But unlike many election cases, plaintiffs do not challenge Ohio's ballot-access laws standing alone." Pet. App. 4a; see also *Memphis A. Philip Randolph Inst.* v. *Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) (case was moot when plaintiff's injury and motion for a preliminary injunction were "inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis"); *Pleasant View Baptist Church* v. *Beshear*, No. 20-6399, 838 Fed. App'x. 936, 937–38 (6th Cir. Dec. 21, 2020) (challenge to COVID-19 executive order limiting social gatherings was moot because it recently expired and governor publicly disavowed any intention to renew it).

2. On the other side of the split, the Ninth and Seventh Circuits have held that cases challenging repealed or amended COVID-19 regulations are not moot because it is reasonably likely that the harms will be repeated. The Ninth Circuit recently held that "a challenge to state restrictions is not moot when 'of-

ficials with a track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time.'" *Brach* v. *Newsom*, 6 F.4th 904, 919 (9th Cir. 2021), *vacated for rehearing en banc*, 18 F. 4th 1031 (2021) (quoting *Tandon*, 141 S. Ct. at 1297). There the court relied on the voluntary cessation exception to mootness, as well as the capable of repetition yet evading review doctrine: "To the extent that the State has now removed its prior . . . order, that is a result of the State's voluntary conduct in repeatedly changing the framework of restrictions." *Brach*, 6 F.4th at 918, 921 ("[U]nder both the voluntary cessation doctrine and the rule concerning disputes that are capable of repetition, yet evading review, . . . Plaintiffs' claims are [not] moot.")

Similarly, the Seventh Circuit has reasoned that "[g]iven the uncertainty about the future course of the pandemic, we are not convinced that these developments have definitively rendered it moot." *Cassell* v. *Snyders*, 990 F.3d 539, 546 (7th Cir. 2021). The Seventh Circuit explained that "because the ongoing pandemic makes it reasonably likely that stricter measures could be reinstated, we have thus far declined to treat challenges to superseded COVID-19 orders as moot." *Williams* v. *Pritzker*, No. 20-3231, 2021 WL 4955683, at *1 (7th Cir. Oct. 26, 2021).

B. This Case is Not Moot Because it is Capable of Repetition and the Voluntary Cessation Exception Applies.

1. Petitioners' Harm is Capable of Repetition.

Like other challenges to election procedures, this case raises issues that are "capable of repetition, yet evading review." *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). This exception to mootness "applies where (1) the challenged action is in its duration

too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.*; see also *Meyer*, 486 U.S. at 417 n.2.

The Sixth Circuit admitted the first prong is satisfied here: "We can assume the first prong is met here, as it commonly is in election cases." Pet. App. 8a.

But it rejected petitioners' reasoning on the second prong, even though the COVID-19 pandemic is ongoing and there is no sign that it will be over by the time of the next election. See Br. of Appellees at 38, *Thompson* v. *DeWine*, No. 20-35256 (6th Cir. Aug. 26, 2020).

Election challenges typically are not concluded by the time the election passes, yet this Court has often entertained those suits. See *Davis*, 554 U.S. at 735 (quoting *Fed. Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007)) ("Although the suit was not resolved before the 2004 election, we rejected the FEC's claim of mootness, finding that the case 'fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review.'"). Furthermore, this Court routinely invokes the capable of repetition exception to preserve election challenges, even when there are no moving goalposts. See*, e.g.*, *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974). That Ohio has repeatedly changed its restrictions over the course of two elections only magnifies the problem rather than moots it. Like all other election cases, this case "fit[s] comfortably" into the capable of repetition exception. See *Wisconsin*, 551 U.S. at 462.

2. The Government Failed to Meet Its Burden Required Under Voluntary Cessation.

Ohio has voluntarily changed its COVID-19 regulations but its actions fall far short of making "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). This standard applicable to voluntary cessation of challenged conduct is "stringent," and the "heavy burden" of meeting it falls on "the party asserting mootness." *Id.*; see also *Brach*, 6 F.4th at 918 (the "defendants bear the heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated").

Here, the Ohio legislature has limited the Governor's ability to act unilaterally for longer than 30 days, but the Governor remains free to implement new regulations at any moment. Ohio S.B. 22, 134th General Assembly (2021).[2]

Moreover, this Court has been skeptical of government claims that regulations will not be re-enacted or that new policies will not be implemented that place new burdens on in-person activities. See *S. Bay Pentecostal Church* v. *Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.) ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner"); *Tandon*, 141 S. Ct. at 1297 (emphasizing that although government "officials changed the challenged policy shortly after this application was filed," the Court remained skeptical because officials "retain authority to reinstate those heightened restrictions at any time"). With new spikes in cases and hospitaliza-

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[2]https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb22/EN/05/sb22_05_EN?format=pdfNo

tions in the wake of the Omicron variant, the potential for new restrictions remains high. See Peter Sullivan, *Omicron fuels unprecedented spike in COVID-19 cases*, The Hill (January 8, 2022). The Court should therefore be wary of voluntary cessation arguments based on the claim that COVID-19 is over. See*, e.g.*, Pet. App. 7a (rejecting the argument that "because COVID-19 persists," there is still a "threat that Ohio will again implement" new restrictions). If the volatile and ever-changing circumstances of the past two years have taught us anything, it is that we are not out of the woods yet.

II. CIRCUIT COURTS DISAGREE ON APPLYING THE FIRST AMENDMENT TO REGULATIONS IMPEDING BALLOT INITIATIVES.

This petition raises a second intractable split among the Circuits that has only deepened as the pandemic wears on. As Chief Justice Roberts observed in *Little* v. *Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020):

> [T]he Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here. According to the Sixth and Ninth Circuits, the First Amendment requires scrutiny of the interests of the State whenever a neutral, procedural regulation inhibits a person's ability to place an initiative on the ballot. See *Thompson* v. *DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) (*per curiam*); *Angle* v. *Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). Other Circuits, by contrast, have held that regulations that may make the initiative process more challenging do not implicate the First Amendment 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 and Referendum Institute* v. *Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (en banc); *Dobrovolny* v. *Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997).

Further, as the Chief Justice explained, "the Circuits have applied their conflicting frameworks to reach predictably contrary conclusions as to whether and to what extent States must adapt the initiative process to account for new obstacles to collecting signatures." *Reclaim Idaho*, 140 S. Ct. at 2616–17 (citing *Miller* v. *Thurston*, 967 F.3d 727, 740-41 (8th Cir. 2020); *Morgan* v. *White*, 964 F.3d 649, 652 (7th Cir. 2020); *SawariMedia, LLC* v. *Whitmer*, 963 F.3d 595, 597 (6th Cir. 2020)). The Court's intervention is urgently needed to bring uniformity to this critical area of constitutional law. See *Reclaim Idaho*, 140 S. Ct. at 2616 (describing need for "clear and administrable guidelines from the courts.").

A. The Circuits are Split Over Whether and How the First Amendment Applies to Ballot Initiatives.

1. Five Circuits and two state supreme courts apply the First Amendment to ballot initiatives. In *Reclaim Idaho*, Chief Justice Roberts observed that the Sixth and Ninth Circuits require "scrutiny of the interests of the State whenever a neutral, procedural regulation inhibits a person's ability to place an initiative on the ballot." 140 S. Ct. at 2616 (citing *Thompson* v. *DeWine*, 959 F.3d 804, 808 (6th Cir. 2020)[3] (*per curiam*) and *Angle* v. *Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012)). Other Circuits and two state supreme courts also apply the First Amendment to regulations

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[3] *See also SawariMedia, LLC*, 963 F.3d at 597; *Schmitt* v. *LaRose*, 933 F.3d 628, 639 (6th Cir. 2019).

implicating ballot initiatives. See *Wirzburger* v. *Galvin*, 412 F.3d 271, 276 (1st Cir. 2005) (viewing subject matter restrictions on initiatives as within "the bounds of First Amendment protection.") (citation omitted); *Miller* v. *Thurston*, 967 F.3d 727, 738 (8th Cir. 2020) ("we find no error in subjecting Arkansas's in-person signature requirement to First Amendment scrutiny. As applied to the plaintiffs, that requirement burdens their ability to engage in core political speech."); *Yes on Term Limits, Inc.* v. *Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008) (applying First Amendment and strict scrutiny to analyze ban on non-resident circulators); *League of Women Voters of Michigan* v. *Sec'y of State*, __ N.W. 2d __, 2022 WL 211736, at *15 (Mich. Jan. 24, 2022) (applying First Amendment and exacting scrutiny to checkbox requirement); *Wyman* v. *Sec'y of State*, 625 A.2d 307, 311 (Me. 1993) ("the initiative petition process involves political discourse that is protected by the first amendment of the federal constitution.").

Further, the Circuits that do apply the First Amendment to ballot initiatives employ disparate standards of review. See *Angle*, 673 F.3d at 1133 (applying strict scrutiny "as applied to the initiative process" where "ballot access restrictions place a severe burden on core political speech"); *Yes on Term Limits*, 550 F.3d at 1025 (strict scrutiny); *Miller*, 967 F.3d at 740 (declining to apply strict scrutiny and instead requiring regulation be "reasonable, nondiscriminatory, and further[] an important regulatory interest"); *Thompson*, 959 F.3d at 811 (intermediate scrutiny under *Anderson-Burdick*); *Wirzburger*, 412 F.3d at 278 (intermediate scrutiny under *United States* v. *O'Brien*); See also *League of Women Voters*, 2022 WL 211736, at *15–17 (exacting scrutiny); *Wyman*, 625 A.2d at 311 (same).

2. Six Circuits do not apply the First Amendment to ballot initiatives. See*, e.g.*, *Reclaim Idaho*, at 140 S. Ct. at 2616 ("Other Circuits, by contrast, have held that regulations that make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation.") (citing *Jones* v. *Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018); *Initiative and Referendum Institute* v. *Walker*, 450 F.3d 1082, 1099-1100 (10th Cir. 2006) (en banc); *Dobrovolny* v. *Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997)); See also *Marijuana Pol'y Project* v. *United States*, 304 F.3d 82, 86 (D.C. Cir. 2002); *Morgan* v. *White*, 964 F.3d 649, 652 (7th Cir. 2020); *Biddulph* v. *Morham*, 89 F.3d 1491, 1500–01 (11th Cir. 1996) (per curiam); *Molinari* v. *Bloomberg*, 564 F.3d 587, 600–01 (2d Cir. 2009). Because these Circuits do not apply the First Amendment to ballot initiatives, they review such regulations under a rational basis test. See, *e.g.*, *Jones*, 892 F.3d at 938.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

This Court has already recognized that the second question involves "an important issue of election administration" on which "the Court is reasonably likely to grant certiorari." *Reclaim Idaho*, 140 S. Ct. at 2616. Residents of twenty-six states and the Virgin Islands[4] hoping to sponsor or sign ballot initiatives are impacted by Circuits that "diverge in fundamental respects when presented with challenges to the sort of state laws at issue here." *Id.*

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[4]*See Initiative & Referendum States*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx.

Since this Court's statement in *Reclaim Idaho*, additional courts have weighed in on both sides of the question. Compare *League of Women Voters*, 2022 WL 211736, at *15 (applying exacting scrutiny) with *Beirsdorfer* v. *LaRose*, 2021 WL 3702211 at *17 (6th Cir. 2021) (Readler, J., concurring) (citing *Reclaim Idaho* to assert that "Supreme Court tea leaves suggest we have charted the wrong course [on the First Amendment's applicability to ballot initiatives], both in *Schmitt* and elsewhere."); *People Not Politicians Oregon* v. *Clarno*, 826 F. App'x 581, 584 (9th Cir. 2020) (Nelson, J., dissenting) ("I write separately to highlight our circuit's decision in *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), and its potential incongruity with established First Amendment principles as recently signaled by four justices of the Supreme Court.").

Because the global pandemic is likely to affect the next few election cycles, the severe burden placed on petitioners will recur. And with ballot initiatives increasing in popularity,[5] it is no surprise that the Court has been asked to clarify First Amendment protection for ballot initiatives eight times in just four years. See *Thompson* v. *DeWine*, 141 S. Ct. 2512, *cert. denied* (Apr. 19, 2021); *Clarno* v. *People Not Politicians Oregon*, No. 20A21, 2020 WL 4589742 (Aug. 11, 2020) (granting stay); Emergency Application to Stay the Preliminary Injunction Pending a Merits Decision by the Court of Appeals, *Whitmer* v. *Sawar-*

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[5]In 2016, the number of ballot initiatives was already more than double the number in 2014. See Van R. Newkirk II, American Voters Are Turning to Direct Democracy, The Atlantic (Apr. 18, 2018), https://www.theatlantic.com/politics/archive/2018/04/citizen-ballot-initiatives-2018-elections/558098.

iMedia, LLC, No. 20A1 (July 10, 2020) (application withdrawn on July 23, 2020); *Reclaim Idaho*, 140 S. Ct. at 2616 (granting stay); *Thompson* v. *DeWine*, No. 19A1054, 2020 WL 3456705, *cert denied* (June 25, 2020), *Schmitt*, 933 F.3d at 628, *cert. denied*, 140 S. Ct. 2803 (2019); *Glob. Neighborhood* v. *Respect Washington*, 434 P.3d 1024 (Wash. Ct. App. 2019), *rev. denied*, 448 P.3d 69 (Wash. 2019), *cert. denied*, 140 S. Ct. 638 (2019); *Port of Tacoma* v. *Save Tacoma Water*, 422 P.3d 917 (Wash. Ct. App. 2018), *rev. denied*, 435 P.3d 267 (Wash. 2019), *cert. denied*, 140 S. Ct. 106 (2019).

Mootness also presents an important and recurring issue. By permitting mootness in COVID-19 cases, the Government can evade judicial scrutiny at a time when the fervor for regulation is at an apex. See, *e.g.*, *NFIB* v. *OSHA*, 595 U.S. __ (2022), and *Alabama Ass'n of Realtors* v. *HHS*, 594 U.S. __ (2021). Mootness should not be a shield allowing government regulations to go unexamined on the merits.

IV. THIS IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The questions presented are well preserved in published decisions below and the corresponding briefing. See Pet. App. 1a–12a (addressing mootness); Pet. App. 32a–37a(addressing mootness and First Amendment issues); Br. for Appellants at 34, *Thompson* v. *DeWine*, No. 21-3514 ("The Case is Not Moot"); (7/5/2021); Br. for Appellees at 20, *Thompson* v. *DeWine*, No. 20-3526 (6th Cir. Aug. 26, 2020) ("The Sixth Circuit is on the Correct Side of an Emerging Circuit Split").

The petition offers the Court the opportunity to clarify important and recurring areas of both moot-

ness and First Amendment law in a single petition. Not only does this case give the Court the opportunity to settle confusion over the issue of mootness, but it also implicates a multi-level circuit split over the applicability of the First Amendment to ballot initiatives and the proper standard of review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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PETITION APPENDIX

APPENDIX A

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

File Name: 21a0176p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT;
DON KEENEY,

Plaintiffs-Appellants,

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; STEPHANIE B. MCCLOUD, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE in his official capacity as Ohio Secretary of State,

Defendants-Appellees.

No. 21-3514

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: August 6, 2021

Before: SUTTON, Chief Judge; McKEAGUE, and NALBANDIAN, Circuit Judges

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COUNSEL

ON BRIEF: Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellants. Benjamin

M. Flowers, ZACHERY P. KELLER, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

AMENDED OPINION

PER CURIAM. This is the third time we have seen this case. Plaintiffs are three Ohioans who, during the 2020 election, tried to get initiatives to decriminalize marijuana on local ballots. To do so, they had to comply with Ohio's ballot-access laws. Those laws impose. various requirements on an initiative's proponents, including submitting a petition with a minimum number of ink signatures witnessed by the petition's circulator.

Plaintiffs say the laws, as applied during the COVID-19 pandemic, made it too difficult for them to get any of their initiatives on 2020 ballots. So they sued for declaratory and injunctive relief. But plaintiffs tied their requests for relief exclusively to the November 2020 election. That election has come and gone—and with it the prospect that plaintiffs can get any of the relief they asked for. This case is thus moot. We **VACATE** the district court's order dismissing plaintiffs' complaint and **REMAND** with instructions to dismiss the case as moot.

I.

We need not restate the facts at length. *See Thompson v. DeWine*, 461 F. Supp. 3d 712 (S.D. Ohio), *stayed*, 959 F.3d 804 (6th Cir.) (*Thompson I*), *rev'd*, 976 F.3d 610 (6th Cir. 2020) (*Thompson II*). The short of it is this: Plaintiffs are three Ohio voters. They regularly circulate petitions to get initiatives on local and statewide ballots. For the 2020 election cycle, plaintiffs hoped to place initiatives on municipal ballots to decriminalize marijuana.

Before an initiative finds its way onto a local ballot, its proponents must circulate a petition. Ohio Rev. Code Ann. § 731.28. The petition must get signatures from at least ten percent of the number of electors who voted for governor in the municipality's previous election. *Id.* And those signatures must be original and in ink, and the petition's circulator must witness them. *Id.* § 3501.38. Once a petition has enough qualifying signatures, the circulator must submit it to the Secretary of State at least 110 days before the election. *Id.* § 731.28.

Soon after plaintiffs filed proposed initiatives for November 2020 ballots, Ohio declared a state of emergency because of COVID-19 and ordered Ohioans to stay at home. As a result, plaintiffs found it harder than usual to gather signatures for their initiative petitions. So they sued Governor Mike DeWine and other state officials for declaratory and injunctive relief. They allege that, because the pandemic and emergency orders made signature gathering difficult, "Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election violate" the First and Fourteenth Amendments. (R. 1, Compl. at 16–17, PID 16–17.) And they asked the district court to "immediately place" their initiatives "on local November 3, 2020 election ballots without the need for supporting signatures." (*Id.* at 18, PID 18.) If that failed, they also asked the court to reduce the number of signatures they needed to qualify for the ballot, extend the deadline for submitting petitions, and order the state to develop a way for voters to sign petitions electronically.

The district court enjoined the ink and witness requirements, extended the deadline for submitting petitions, and ordered the state to accept electronic signatures. *Thompson*, 461 F. Supp. 3d at 739–40. We

stayed that injunction, *Thompson I*, 959 F.3d at 804, and then reversed it, *Thompson II*, 976 F.3d at 614. After plaintiffs unsuccessfully sought review in the Supreme Court, defendants moved to dismiss plaintiffs' complaint, claiming it was moot and barred by the Eleventh Amendment. The district court, relying on our opinions in *Thompson I* and *II*, dismissed the case on its merits after holding that it was not moot. Plaintiffs appeal, and we review the decision de novo. *See, e.g.*, *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

II.

Under Article III of the Federal Constitution, we can only decide "Cases" or "Controversies." U.S. Const. art. III, § 2. So we adjudicate "only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). Thus, "[i]f 'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,' then the case is moot and the court has no jurisdiction." *Id.* (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)).

A.

This case is moot. Plaintiffs request two types of relief, injunctive and declaratory. But unlike many election cases, plaintiffs do not challenge Ohio's ballot-access laws standing alone. *See Common Sense Party v. Padilla*, 834 F. App'x 335, 336 (9th Cir. 2021) (COVID-related challenge to a ballot-access law was moot because plaintiff did not challenge "the constitutionality of the provision itself or its constitutionality as applied to [plaintiff] outside this context"); *cf. Storer v. Brown*, 415 U.S. 724, 727 (1974).

Instead, plaintiffs tie all their requested relief to the November 2020 election, COVID-19, and Ohio's stay-at-home orders. *See Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) (case was moot when plaintiff's injury and motion for a preliminary injunction were "inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis"). Plaintiffs' complaint was one to "declare unconstitutional, enjoin and/or modify" Ohio's ballot access laws so that their initiatives could be included "on Ohio's November 3, 2020 general election ballot." (R. 1, Compl. at 1, PID 1.) Why? Because "the current public health emergency caused by COVID-19 and defendant DeWine's and defendant Acton's emergency orders effectively shutting down the State" made it hard for them to gather signatures. (*Id.*) So they asked the court to "immediately place" their initiatives "on local November 3, 2020 election ballots." (*Id.* at 18, PID 18.) And in case they didn't get that relief, plaintiffs also asked the court to enjoin enforcement of Ohio's ballot-access laws and to unilaterally modify them—but again, only "for Ohio's November 3, 2020 general election," and only because COVID-19 and Ohio's stay-at-home orders made signature gathering too difficult. (*Id.* at 14, PID 14, 18–19, PID 18–19.)

Without a time machine, we cannot go back and place plaintiffs' initiatives on the 2020 ballot. So plaintiffs' first request for injunctive relief is moot. *See Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) ("The 2014 election has come and gone, so we cannot devise a remedy that will put the Green Party on the ballot for that election cycle."). And plaintiffs' alternative requests for an injunction, which they tied *specifically* to the 2020 election, also became moot when the election passed. *Memphis A. Philip*

Randolph Inst. v. Hargett, 2 F.4th at 560; *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007); *Padilla*, 834 F. App'x at 336 (noting in a COVID-19 election case that "the occurrence of an election moots relief sought with respect to that election cycle").

Plaintiffs' request for declaratory relief is likewise moot. To determine whether a request for declaratory relief is moot, we ask "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Preiser v. Newkirk,* 422 U.S. 395, 402 (1975) (emphasis altered) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273 (1941)).

No such controversy exists for plaintiffs' declaratory relief claim. Like their demands for injunctive relief, plaintiffs tie their declaratory relief request specifically to the 2020 election. They ask the court to declare that Ohio's ballot-access laws—as applied to "measures proposed for local November 3, 2020 elections in Ohio"—violate the Constitution "in light of the current public health emergency caused by the COVID-19 pandemic and the executive orders requiring that Ohio citizens stay at home and shelter in place." (R. 1, Compl. at 19, PID 19.) But those orders are no longer in place, and the election is over. (*See Rescinded Public Health Orders*, OHIO DEP'T OF HEALTH, https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/publichealth-orders/public-health-orders-rescinded (last accessed July 23, 2021, 9:45 AM)). So no "substantial controversy" of "immediacy and reality" exists. *See Preiser*, 422 U.S. at 402; *see also* 28 U.S.C. § 2201 (requiring "a case of actual

controversy" before a court can issue declaratory relief).

Plaintiffs sought specific relief. They challenged Ohio's ballot-access laws as applied to the unique circumstances existing during the 2020 election. But because of intervening events—the passing of the election and the rescission of Ohio's stay-at-home orders and emergency declaration—we cannot give plaintiffs what they ask for. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (noting that a case is moot when the court cannot "grant any effectual relief"); *Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 564 (6th Cir. 2020). Thus, "in view of the limited nature of the relief sought, we think the case is moot because the . . . election is over." *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969).

B.

The capable-of-repetition-yet-evading-review exception to mootness does not apply here. *See Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Plaintiffs point out that they are trying to get initiatives on the ballot for local 2021 elections. And because COVID-19 persists, the threat that Ohio will again implement stay-at-home orders keeps this case alive.

The capable-of-repetition exception features regularly in election disputes. *See In re 2016 Primary Election*, 836 F.3d 584, 588 (6th Cir. 2016). To be capable of repetition but evading review, a dispute must satisfy a two-pronged test. First, the challenged action must be too short in duration for the parties to fully litigate it before it becomes moot. And second, there must be "a reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life*, 551 U.S. at 462 (quoting

Spencer v. Kemna, 523 U.S. 1, 17 (1998)). We can assume the first prong is met here, as it commonly is in election cases. *See Lawrence*, 430 F.3d at 371.

But plaintiffs falter on the second prong. To be sure, we relax our inquiry at this step for election cases. *See Memphis A. Philip Randolph Inst.*, 2 F.4th at 560. So plaintiffs need not show that the same controversy will recur "down to the last detail." *Wis. Right to Life*, 551 U.S. at 463. In other words, "[t]o be capable of repetition, 'the chain of potential events does not have to be air-tight or even probable.'" *Memphis A. Philip Randolph Inst.*, 2 F.4th at 560 (quoting *Barry v. Lyon*, 834 F.3d 706, 716 (6th Cir. 2016)). Still, "a mere physical or theoretical possibility" that the events prompting the suit will come back is not enough. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). So a case "is not capable of repetition if it is based on a unique factual situation." *Memphis A. Philip Randolph Inst.*, 2 F.4th at 560; *see also Libertarian Party of Ohio*, 462 F.3d at 584.

If any case is "based on a unique factual situation," this one is. *See Memphis A. Philip Randolph Inst.*, 2 F.4th at 560. As pled, plaintiffs' claims "are inextricably tied to the COVID-19 pandemic." *Id.* A once-in-a-lifetime global pandemic prompted unprecedented stay-at-home orders right as election machinery was gearing up. The pandemic dissuaded the public from going outdoors, interacting with strangers, and gathering in groups—the situations plaintiffs say they rely on to solicit signatures. But the situation today differs markedly from a year ago. "Fortunately, because of advancements in COVID-19 vaccinations and treatment since this case began, the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle." *Id.* And so

"[t]here is not a reasonable expectation" that plaintiffs "will face the same burdens" that they did in 2020. *Id.*

Plaintiffs insist that "[t]here is not only a likelihood of recurrence, there is recurrence here." (Appellant Br. at 38.) They say COVID-19 remains a "full blown crisis" hampering their efforts to gather signatures for 2021 initiatives. (*Id.*) But we recently rejected a similar argument in another election case, citing advancements in the COVID-19 vaccine and treatment. *See Memphis A. Randolph Institute*, 2 F.4th at 560–61; *see also People Not Politicians Or. v. Fagan*, No. 6:20-cv-01053-MC, 2021 WL 2386118, at *3 (D. Or. June 10, 2021). Plaintiffs also insist that Ohio's COVID restrictions not only hampered their ability to gather signatures for the 2020 election but also carried over to the 2021 election. Plaintiffs claim that they could have used "[s]ignatures collected between March and July of 2020 . . . to qualify initiatives for the November 2, 2021 ballot." (Appellant Br. at 40.) Even if that's true, this is the first time plaintiffs are saying so. *See Operation King's Dream*, 501 F.3d at 592 ("Because the Plaintiffs present this argument for the first time on appeal, we decline to address it."). All along, plaintiffs have claimed Ohio violated their constitutional rights as it relates to the November 2020 election and the emergency surrounding it. "Plaintiffs' decision on appeal to alter the relief sought and transform the cause of action further underscores that their appeal is moot." *Id.*

Finally, plaintiffs fall back on their fear that a future pandemic could wreak similar havoc on elections. This speculation does not get the job done. *See Speer v. City of Oregon*, 847 F.2d 310, 311–12 n.3 (6th Cir. 1988) ("Plaintiff cannot avoid mootness by engaging in speculation that at some point in the future she may move and then return and seek to run for City Council

and again be subjected to the residency requirement."); *People Not Politicians*, 2021 WL 2386118, at *3 (rejecting a COVID election challenge as moot in part because plaintiffs' argument "that the circumstances that led to Plaintiffs' as-applied challenge following the 2020 election cycle 'could recur' is highly speculative"). Because of the specific relief sought and the unique harm alleged, this is not a case when "the controversy" prompting the lawsuit "almost invariably will recur with respect to some future" ballot initiatives. *See Lawrence*, 430 F.3d at 372; *see also Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013).

III.

Ohioans had to make sacrifices as the state responded to COVID-19. We appreciate the difficulties the virus posed to plaintiffs' efforts to gather signatures for their initiatives. But the event for which plaintiffs sought relief has passed. So their claims are now moot. We **VACATE** the district court's order dismissing plaintiffs' complaint and **REMAND** with instructions that the case be dismissed as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 21-3514

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellants,

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; STEPHANIE B. MCCLOUD, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE in his official capacity as Ohio Secretary of State,

Defendants-Appellees.

FILED
Aug 06, 2021
DEBORAH S. HUNT, Clerk

Before: SUTTON, Chief Judge; McKEAGUE and NALBANDIAN, Circuit Judges.

AMENDED JUDGEMENT

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 was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's order dismissing plaintiffs' complaint is VACATED and REMANDED with instructions to dismiss the case as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt,

Clerk

APPENDIX B

Case No. 21-3514

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

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

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; STEPHANIE B. MCCLOUD, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE in his official capacity as Ohio Secretary of State,
Defendants-Appellees.

BEFORE: SUTTON, Chief Circuit Judge; MCKEAGUE and NALBANDIAN, Circuit Judges;

The motion to amend is **GRANTED** as to the district court's opinion and order dismissing plaintiffs' complaint. The motion is **DENIED** as to the panel's May 26, 2020 opinion and order staying the district court's injunction pending appeal and as to the panel's September 16, 2020 opinion and order reversing the district court's preliminary injunction.

ENTERED BY ORDER OF THE COURT

Issued: August 06, 2021 Deborah S. Hunt, Clerk

APPENDIX C

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P 32.1(b)
File Name: 21a0170p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellants,

v.

No. 21-3514

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; STEPHANIE B. MCCLOUD, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE in his official capacity as Ohio Secretary of State,

Defendants-Appellees.

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: July 28, 2021

Before: SUTTON, Chief Judge; McKEAGUE, and NALBANDIAN, Circuit Judges

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COUNSEL

ON BRIEF: Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellants. Benjamin M. Flowers, ZACHERY P. KELLER, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

OPINION

PER CURIAM. This is the third time we have seen this case. Plaintiffs are three Ohioans who, during the 2020 election, tried to get initiatives to decriminalize marijuana on local ballots. To do so, they had to comply with Ohio's ballot-access laws. Those laws impose various requirements on an initiative's proponents, including submitting a petition with a minimum number of ink signatures witnessed by the petition's circulator.

Plaintiffs say the laws, as applied during the COVID-19 pandemic, made it too difficult for them to get any of their initiatives on 2020 ballots. So they sued for declaratory and injunctive relief. But plaintiffs tied their requests for relief exclusively to the November 2020 election. That election has come and gone—and with it the prospect that plaintiffs can get any of the relief they asked for. This case is thus moot. We **AFFIRM** the district court's dismissal of plaintiffs' complaint.

I.

We need not restate the facts at length. *See Thompson v. DeWine*, 461 F. Supp. 3d 712 (S.D. Ohio), *stayed*, 959 F.3d 804 (6th Cir.) (*Thompson I*), *rev'd*, 976 F.3d 610 (6th Cir. 2020) (*Thompson II*). The short of it is this: Plaintiffs are three Ohio voters. They regularly circulate petitions to get initiatives on local and

statewide ballots. For the 2020 election cycle, plaintiffs hoped to place initiatives on municipal ballots to decriminalize marijuana.

Before an initiative finds its way onto a local ballot, its proponents must circulate a petition. Ohio Rev. Code Ann. § 731.28. The petition must get signatures from at least ten percent of the number of electors who voted for governor in the municipality's previous election. *Id.* And those signatures must be original and in ink, and the petition's circulator must witness them. *Id.* § 3501.38. Once a petition has enough qualifying signatures, the circulator must submit it to the Secretary of State at least 110 days before the election. *Id.* § 731.28.

Soon after plaintiffs filed proposed initiatives for November 2020 ballots, Ohio declared a state of emergency because of COVID-19 and ordered Ohioans to stay at home. As a result, plaintiffs found it harder than usual to gather signatures for their initiative petitions. So they sued Governor Mike DeWine and other state officials for declaratory and injunctive relief. They allege that, because the pandemic and emergency orders made signature gathering difficult, "Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election violate" the First and Fourteenth Amendments. (R. 1, Compl. at 16–17, PID 16–17.) And they asked the district court to "immediately place" their initiatives "on local November 3, 2020 election ballots without the need for supporting signatures." (*Id.* at 18, PID 18.) If that failed, they also asked the court to reduce the number of signatures they needed to qualify for the ballot, extend the deadline for submitting petitions, and order the state to develop a way for voters to sign petitions electronically.

The district court enjoined the ink and witness requirements, extended the deadline for submitting petitions, and ordered the state to accept electronic signatures. *Thompson*, 461 F. Supp. 3d at 739–40. We stayed that injunction, *Thompson I*, 959 F.3d at 804, and then reversed it, *Thompson II*, 976 F.3d at 614. After plaintiffs unsuccessfully sought review in the Supreme Court, defendants moved to dismiss plaintiffs' complaint, claiming it was moot and barred by the Eleventh Amendment. The district court, relying on our opinions in *Thompson I* and *II*, dismissed the case on its merits after holding that it was not moot. Plaintiffs appeal, and we review the decision de novo. *See, e.g.*, *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

II.

Under Article III of the Federal Constitution, we can only decide "Cases" or "Controversies." U.S. Const. art. III, § 2. So we adjudicate "only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). Thus, "[i]f 'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,' then the case is moot and the court has no jurisdiction." *Id.* (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)).

A.

This case is moot. Plaintiffs request two types of relief, injunctive and declaratory. But unlike many election cases, plaintiffs do not challenge Ohio's ballot-access laws standing alone. *See Common Sense Party v. Padilla*, 834 F. App'x 335, 336 (9th Cir. 2021) (COVID-related challenge to a ballot-access law was

moot because plaintiff did not challenge "the constitutionality of the provision itself or its constitutionality as applied to [plaintiff] outside this context"); *cf. Storer v. Brown*, 415 U.S. 724, 727 (1974).

Instead, plaintiffs tie all their requested relief to the November 2020 election, COVID-19, and Ohio's stay-at-home orders. *See Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) (case was moot when plaintiff's injury and motion for a preliminary injunction were "inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis"). Plaintiffs' complaint was one to "declare unconstitutional, enjoin and/or modify" Ohio's ballot access laws so that their initiatives could be included "on Ohio's November 3, 2020 general election ballot." (R. 1, Compl. at 1, PID 1.) Why? Because "the current public health emergency caused by COVID-19 and defendant DeWine's and defendant Acton's emergency orders effectively shutting down the State" made it hard for them to gather signatures. (*Id.*) So they asked the court to "immediately place" their initiatives "on local November 3, 2020 election ballots." (*Id.* at 18, PID 18.) And in case they didn't get that relief, plaintiffs also asked the court to enjoin enforcement of Ohio's ballot-access laws and to unilaterally modify them—but again, only "for Ohio's November 3, 2020 general election," and only because COVID-19 and Ohio's stay-at-home orders made signature gathering too difficult. (*Id.* at 14, PID 14, 18–19, PID 18–19.)

Without a time machine, we cannot go back and place plaintiffs' initiatives on the 2020 ballot. So plaintiffs' first request for injunctive relief is moot. *See Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) ("The 2014 election has come and gone, so we cannot devise a remedy that will put the Green

Party on the ballot for that election cycle."). And plaintiffs' alternative requests for an injunction, which they tied *specifically* to the 2020 election, also became moot when the election passed. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th at 560; *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007); *Padilla*, 834 F. App'x at 336 (noting in a COVID-19 election case that "the occurrence of an election moots relief sought with respect to that election cycle").

Plaintiffs' request for declaratory relief is likewise moot. To determine whether a request for declaratory relief is moot, we ask "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (emphasis altered) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

No such controversy exists for plaintiffs' declaratory relief claim. Like their demands for injunctive relief, plaintiffs tie their declaratory relief request specifically to the 2020 election. They ask the court to declare that Ohio's ballot-access laws—as applied to "measures proposed for local November 3, 2020 elections in Ohio"—violate the Constitution "in light of the current public health emergency caused by the COVID-19 pandemic and the executive orders requiring that Ohio citizens stay at home and shelter in place." (R. 1, Compl. at 19, PID 19.) But those orders are no longer in place, and the election is over. (*See Rescinded Public Health Orders*, OHIO DEP'T OF HEALTH, https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/publichealth-orders/public-health-orders-rescinded (last accessed July 23, 2021, 9:45

AM)). So no "substantial controversy" of "immediacy and reality" exists. *See Preiser*, 422 U.S. at 402; *see also* 28 U.S.C. § 2201 (requiring "a case of actual controversy" before a court can issue declaratory relief).

Plaintiffs sought specific relief. They challenged Ohio's ballot-access laws as applied to the unique circumstances existing during the 2020 election. But because of intervening events—the passing of the election and the rescission of Ohio's stay-at-home orders and emergency declaration—we cannot give plaintiffs what they ask for. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (noting that a case is moot when the court cannot "grant any effectual relief"); *Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 564 (6th Cir. 2020). Thus, "in view of the limited nature of the relief sought, we think the case is moot because the . . . election is over." *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969).

B.

The capable-of-repetition-yet-evading-review exception to mootness does not apply here. *See Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Plaintiffs point out that they are trying to get initiatives on the ballot for local 2021 elections. And because COVID-19 persists, the threat that Ohio will again implement stay-at-home orders keeps this case alive.

The capable-of-repetition exception features regularly in election disputes. *See In re 2016 Primary Election*, 836 F.3d 584, 588 (6th Cir. 2016). To be capable of repetition but evading review, a dispute must satisfy a two-pronged test. First, the challenged action must be too short in duration for the parties to fully litigate it before it becomes moot. And second,

there must be "a reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life*, 551 U.S. at 462 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). We can assume the first prong is met here, as it commonly is in election cases. *See Lawrence*, 430 F.3d at 371.

But plaintiffs falter on the second prong. To be sure, we relax our inquiry at this step for election cases. *See Memphis A. Philip Randolph Inst.*, 2 F.4th at 560. So plaintiffs need not show that the same controversy will recur "down to the last detail." *Wis. Right to Life*, 551 U.S. at 463. In other words, "[t]o be capable of repetition, 'the chain of potential events does not have to be air-tight or even probable.'" *Memphis A. Philip Randolph Inst.*, 2 F.4th at 560 (quoting *Barry v. Lyon*, 834 F.3d 706, 716 (6th Cir. 2016)). Still, "a mere physical or theoretical possibility" that the events prompting the suit will come back is not enough. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). So a case "is not capable of repetition if it is based on a unique factual situation." *Memphis A. Philip Randolph Inst.*, 2 F.4th at 560; *see also Libertarian Party of Ohio*, 462 F.3d at 584.

If any case is "based on a unique factual situation," this one is. *See Memphis A. Philip Randolph Inst.*, 2 F.4th at 560. As pled, plaintiffs' claims "are inextricably tied to the COVID-19 pandemic." *Id.* A once-in-a-lifetime global pandemic prompted unprecedented stay-at-home orders right as election machinery was gearing up. The pandemic dissuaded the public from going outdoors, interacting with strangers, and gathering in groups—the situations plaintiffs say they rely on to solicit signatures. But the situation today differs markedly from a year ago. "Fortunately, because of advancements in COVID-19 vaccinations and treatment since this case began, the

COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle." *Id.* And so "[t]here is not a reasonable expectation" that plaintiffs "will face the same burdens" that they did in 2020. *Id.*

Plaintiffs insist that "[t]here is not only a likelihood of recurrence, there is recurrence here." (Appellant Br. at 38.) They say COVID-19 remains a "full blown crisis" hampering their efforts to gather signatures for 2021 initiatives. (*Id.*) But we recently rejected a similar argument in another election case, citing advancements in the COVID-19 vaccine and treatment. *See Memphis A. Randolph Institute*, 2 F.4th at 560–61; *see also People Not Politicians Or. v. Fagan*, No. 6:20-cv-01053-MC, 2021 WL 2386118, at *3 (D. Or. June 10, 2021).

Plaintiffs also insist that Ohio's COVID restrictions not only hampered their ability to gather signatures for the 2020 election but also carried over to the 2021 election. Plaintiffs claim that they could have used "[s]ignatures collected between March and July of 2020 . . . to qualify initiatives for the November 2, 2021 ballot." (Appellant Br. at 40.) Even if that's true, this is the first time plaintiffs are saying so. *See Operation King's Dream*, 501 F.3d at 592 ("Because the Plaintiffs present this argument for the first time on appeal, we decline to address it."). All along, plaintiffs have claimed Ohio violated their constitutional rights as it relates to the November 2020 election and the emergency surrounding it. "Plaintiffs' decision on appeal to alter the relief sought and transform the cause of action further underscores that their appeal is moot." *Id.*

Finally, plaintiffs fall back on their fear that a future pandemic could wreak similar havoc on elections. This speculation does not get the job done. *See Speer v. City of Oregon*, 847 F.2d 310, 311–12 n.3 (6th Cir. 1988)

("Plaintiff cannot avoid mootness by engaging in speculation that at some point in the future she may move and then return and seek to run for City Council and again be subjected to the residency requirement."); *People Not Politicians*, 2021 WL 2386118, at *3 (rejecting a COVID election challenge as moot in part because plaintiffs' argument "that the circumstances that led to Plaintiffs' as-applied challenge following the 2020 election cycle 'could recur' is highly speculative"). Because of the specific relief sought and the unique harm alleged, this is not a case when "the controversy" prompting the lawsuit "almost invariably will recur with respect to some future" ballot initiatives. *See Lawrence*, 430 F.3d at 372; *see also Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013).

III.

Ohioans had to make sacrifices as the state responded to COVID-19. We appreciate the difficulties the virus posed to plaintiffs' efforts to gather signatures for their initiatives. But the event for which plaintiffs sought relief has passed. So their claims are now moot. We affirm the district court's dismissal of their complaint.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-3514

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellants,

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; STEPHANIE B. MCCLOUD, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE in his official capacity as Ohio Secretary of State,

Defendants-Appellees.

FILED
July 28, 2021
DEBORAH S. HUNT, Clerk

Before: SUTTON, Chief Judge; McKEAGUE and NALBANDIAN, Circuit Judges.

AMENDED JUDGEMENT

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 was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's order dismissing plaintiffs' complaint is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

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

CHAD THOMPSON, ***et al.*****,**	
Plaintiffs,	**Case No. 2:20-cv-2129**
v.	**JUDGE EDMUND A. SARGUS, JR.**
GOVERNOR OF OHIO MICHAEL DEWINE, ***et al.*****,**	**Magistrate Judge Chelsey M. Vascura**
Defendants.	

OPINION AND ORDER

Plaintiffs initiated this action in April of 2020 challenging Ohio's requirements for placing initiatives on the November 2020 general election ballot in light of the COVID-19 pandemic and Ohio's stay-at-home orders. In May of 2020, this Court granted in part Plaintiffs' motion for a preliminary injunction. The Sixth Circuit Court of Appeals stayed the preliminary injunction pending an appeal and eventually reversed the grant of a preliminary injunction in September of 2020. (ECF No. 58.) Plaintiffs petitioned the Supreme Court for a writ of certiorari, which the Supreme Court denied.

Defendants now move to dismiss under Rule 12(b)(1) and (6). (ECF No. 68.) Plaintiffs move for judgment on the pleadings under Rule 12(c). (ECF No. 71.) Defendants contend that this case is moot because Plaintiffs only sought relief related to the November 2020 election. Plaintiffs disagree, arguing that this case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. Plaintiffs contend that they are suffering the same injury in the 2021 election cycle as they suffered in 2020. They argue that enforcement of Ohio's ballot-initiative requirements, combined withealth orders violates the First Amendment as applied to them. They now seek declaratory and injunctive relief for the duration of the pandemic.

Whatever the merits of Plaintiffs' claims, a fair reading of the Sixth Circuit's opinions in this case leaves no room for these allegations. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss.

I. Background

The background of this case is set out at length in this Court's preliminary injunction order and the Sixth Circuit's opinions that came after. *Thompson v. DeWine*, 461 F. Supp. 3d 712 (S.D. Ohio), *stayed*, 959 F.3d 804 (6th Cir. 2020), *rev'd*, 976 F.3d 610 (6th Cir. 2020). But the key facts bear repeating, as do subsequent developments since the November 2020 general election.

Plaintiffs are three registered Ohio voters who "regularly circulate petitions to have initiatives placed on local election ballots throughout Ohio and in adjacent States." (Compl. ¶ 4, ECF No. 1; Stip. Facts ¶ 1, ECF No. 35.) In 2020, Plaintiffs sought to place initiatives to decriminalize marijuana possession on the November 3, 2020 general election ballot in cities

and villages throughout Ohio. (Stip. Facts ¶¶ 3–4.) To place an initiative on a municipal ballot, Ohio law requires a petition to be submitted to the Ohio Secretary of State with the signatures of at least ten percent of the number of electors who voted for governor in the municipality's previous general election. Ohio Rev. Code § 731.28. The signatures must be original, affixed in ink, and witnessed by the petition's circulator. *Id.* § 3501.38. The collected signatures must be submitted to the Ohio Secretary of State at least 110 days before the election. *Id.* § 731.28.

In early March of 2020, less than two weeks after Plaintiffs filed several proposed initiatives to begin collecting signatures, Governor DeWine declared a state of emergency in Ohio due to the outbreak of COVID-19. (Stip. Facts ¶¶ 4, 18.) Over the next few days, the Ohio Department of Health issued several emergency public health orders to limit the spread of COVID-19. (*Id.* ¶¶ 19–29.) On March 22, 2020, the Ohio Department of Health issued the "Director's Order that All Persons Stay at Home Unless Engaged in Essential Work Activity." (*Id.* ¶ 30.)

A month later, in April 2020, Plaintiffs filed this action against Governor DeWine, then-Director of the Ohio Department of Health Dr. Amy Acton, and Ohio Secretary of State Frank LaRose in their official capacities. (Compl. ¶¶ 1–12.) Plaintiffs alleged that they were "prevented from collecting the needed supporting signatures of Ohio voters required by Ohio law to place their initiatives on . . . local November 3, 2020 election ballots by the COVID-19 pandemic" and Governor DeWine and then-Director Acton's emergency public health orders. (*Id.* ¶ 10.) Plaintiffs moved for a preliminary injunction, requesting that the Court either (1) direct "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 (2) modify Ohio's in-person signature requirements, extend the deadlines for submitting signatures, require Defendants to develop procedures for gathering electronic signatures, and reduce the number of needed voter signatures. (Compl. ¶ 79.)

This Court granted Plaintiffs' request for injunctive relief in part in May of 2020. The Court enjoined enforcement of the ink signature and witness requirements for the November 2020 general election as to Plaintiffs and also enjoined enforcement of the deadline in Ohio Revised Code § 731.28 for the November 2020 general election as to Plaintiffs.[1] *Thompson*, 461 F. Supp. 3d at 739. This Court did not enjoin the State from enforcing its signature quantity requirement. *Id.* A week later, the Sixth Circuit granted Defendants' motion for a stay pending appeal. *Thompson*, 959 F.3d at 813.

In September of 2020, the Sixth Circuit reversed this Court's grant of a preliminary injunction. *Thompson*, 976 F.3d at 620. The court held that Plaintiffs were not likely to succeed on the merits of their First Amendment challenge and that all preliminary injunction factors weighed in favor of Ohio. *Id.* at 615–19. Plaintiffs therefore did not obtain relief for the November 2020 general election.

The November 2020 general election came and went. The COVID-19 pandemic remained. In early 2021, Plaintiffs petitioned the United States Supreme Court

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[1] The Court also granted injunctive relief in favor of two Intervenor-Plaintiffs who sought to place proposed constitutional amendments on the ballot in the November 2020 general election. Those Intervenor-Plaintiffs have withdrawn from this litigation.

for a writ of certiorari for interlocutory review of the Sixth Circuit's decision reversing this Court's grant of a preliminary injunction. The Supreme Court denied Plaintiffs' petition in April 2021. *Thompson*, No. 20-1072, 2021 WL 1520804, at *1 (U.S. Apr. 19, 2021). Following the denial of certiorari, Defendants moved to dismiss, arguing that the case is moot and that Defendants are now immune from any retrospective relief under the Eleventh Amendment. (Defs.' Mot. Dismiss, ECF No. 68.)

Plaintiffs move for judgment on the pleadings. They ask the Court to declare strict enforcement of Ohio's ballot-initiative requirements unconstitutional for the duration of the pandemic and to grant a permanent injunction: (1) prohibiting enforcement of Ohio's in-person wet signature and witness requirements; (2) prohibiting enforcement of Ohio's July submission deadline; and (3) prohibiting enforcement of Ohio's signature quantity requirements. (Pls.' Mot. J. on Pleadings and Resp. in Opp'n at 1, ECF No. 71, hereinafter, "Pls.' Resp.")

II. Standard of Review

First up, a matter of procedure. Plaintiffs argue that Defendants' 12(b) motion is improper; Defendants argue that Plaintiffs' (12)(c) motion is improper. Defendants ask the Court to dismiss Plaintiffs' 12(c) motion on procedural grounds, while Plaintiffs ask the Court to construe Defendants' 12(b) motion as a motion under Rule 12(c) or Rule 56 to efficiently resolve this case given the time-sensitive nature of Plaintiffs' claims.

The difference between a Rule 12(b) motion and a Rule 12(c) motion "stems from when in the course of proceedings they can be raised." *Reed Elsevier, Inc. v. TheLaw.net Corp.*, 269 F. Supp. 2d 942, 947 (S.D. Ohio

2003). Motions under 12(b) must be brought before a defendant files an answer to the complaint—except for motions under 12(b)(1), which can be brought at any stage of the litigation. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506; Fed. R. Civ. P. 12(b). Motions under 12(c) can be brought only "[a]fter the pleadings are closed[.]" Fed. R. Civ. P. 12(c). Pleadings are only "closed" within the meaning of Rule 12(c) if an answer has been filed and no counterclaims or crossclaims are still at issue. *Williams v. United States*, 754 F. Supp. 2d 942, 945 (W.D. Tenn. 2010) (citing Fed. R. Civ. P. 7(a) and Wright & Miller, 5C Fed. Prac. & Proc. § 1367 (3d ed.)).

In this case, no answer has been filed. So the pleadings have not "closed" for purposes of Rule 12(c). *See id.* That means Plaintiffs' motion is not technically proper.[2] In any event, all procedural roads lead to the same destination in this case. Plaintiffs argue that, because the time for filing an answer has passed, all factual allegations in the Complaint are deemed admitted. But, in reviewing Defendants' motion to dismiss, the Court must accept all the Complaint's factual allegations as true anyway. *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). And even if Defendants' motion to dismiss was untimely, Courts can review motions raising Rule 12(b)(6) defenses under Rule

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[2] Because a "plaintiff cannot move under Rule 12(c) until after an answer has been filed, the proper course for the plaintiff in a case in which the defendant fails to answer is to move for a default judgment under Rule 55 rather than seek a judgment on the pleadings." Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1367 (3d ed.); *see also, e.g.*, *Poliquin v. Heckler*, 597 F. Supp. 1004, 1006 (D. Me. 1984) (holding the same); *Stands Over Bull v. Bureau of Indian Affs.*, 442 F. Supp. 360, 367 (D. Mont. 1977) (citation omitted) ("When a defendant has failed to file an answer, a motion for judgment on the pleadings is not the correct procedural remedy.").

12(c) using an identical standard of review. *See Gillespie v. City of Battle Creek*, 100 F. Supp. 3d 623, 628 (W.D. Mich. 2015); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008). With those distinctions noted, the Court moves on to the standard of review.

Rule 12(b)(1) challenges the Court's subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). There are two types of subject-matter jurisdiction challenges: facial attacks and factual attacks. *United States v. Richie*, 15 F.3d 592, 598 (6th Cir. 1994). When a motion "attacks the factual basis for jurisdiction," as Defendants' motion does here, "the district court has broad discretion over what evidence to consider and may look outside the pleadings to determine whether subject-matter jurisdiction exists." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015). The plaintiff has the burden of proving subject-matter jurisdiction when jurisdiction is challenged under Rule 12(b)(1). *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 677–78 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id* Furthermore, "[a]lthough for purposes of a motion to dismiss [a court] must take all the factual allegations in the complaint as true, [it][is] not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 677–79 (quoting *Twombly*, 550 U.S. at 55) (internal quotations omitted).

"If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). However, "[i]n ruling on a motion to dismiss, the Court may consider the complaint as well as (1) documents referenced in the pleadings and central to plaintiff's claims, (2) matters of which a court may properly take notice, [and] (3) public documents[.]" *Overall v. Ascension*, 23 F. Supp. 3d 816, 824 (E.D. Mich. 2014) (citing *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997)). In deciding these motions, the Court will look to the pleadings, the stipulated facts in the record, and facts of which the Court will take judicial notice.[3]

III. Analysis

The Court first takes up Defendants' Motion to Dismiss. (Defs.' Mot., ECF No. 68.) The Court must first address Defendants' 12(b)(1) motion because the Court has no power to consider a Rule 12(b)(6) motion if it lacks subject-matter jurisdiction. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A. Plaintiffs' claims are capable of repetition, yet evading review.

Defendants assert that the Court lacks subject-matter jurisdiction because Plaintiffs' claims were rendered moot once the November 3, 2020 election occurred. (Defs.' Mot. at 6.) Plaintiffs disagree. Plaintiffs assert that their claims meet the "capable of repetition, yet evading review" exception to mootness. (Pls. Resp. at 22.)

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[3] Plaintiffs urge the court to take judicial notice of subsequently adopted emergency orders as public records. (Pls.' Resp. at 6–7.)

The judicial power under Article III of the U.S. Constitution only extends to "Cases" and "Controversies". U.S. Const. Art. III, § 2. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). If a case becomes "moot at any point during the proceedings" it falls outside the jurisdiction of a federal court. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537, 200 L. Ed. 2d 792 (2018) (internal quotations and citation omitted).

The Supreme Court has recognized an exception to the mootness doctrine in cases that are "capable of repetition, yet evading review." *Murphy*, 455 U.S. at 482. In the absence of a class action, this exception applies in situations when: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Id. (*citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). This exception applies "only in exceptional situations[.]" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted).

The first prong—whether the action is too short in duration to be fully litigated prior to expiration—is "easily satisfied" in challenges to election laws brought during the election cycle. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). In *Blackwell*, "less than eleven months elapsed between the filing of the lawsuit and the occurrence of the election[.]" *Id.* In this case, less than seven months elapsed between the filing of the lawsuit in April 2020 and the November 3, 2020 general election.

Mootness in this case therefore turns on the second prong—whether there is a "reasonable expectation that" Plaintiffs will "be subjected to the same action again." *Murphy*, 455 U.S. at 482 (citation omitted). To satisfy the second prong, "there must be a 'reasonable expectation' or a 'demonstrated possibility' that the same controversy will recur involving the same complaining party." *Kundrat v. Halloran*, 206 F. Supp. 2d 864, 869 (E.D. Mich. 2002) (citing *Murphy*, 455 U.S. at 482).

Defendants argue this case is moot and that it is not "capable of repetition, yet evading review." They contend that "Plaintiffs have not shown that another pandemic with the severity of COVID-19 is likely to occur again, or that the COVID-19 pandemic will revert back to the conditions as they existed in the spring of 2020, or that Ohio would issue public health orders that would prevent them from obtaining signatures." (Defs.' Reply in Support at 13.) Defendants argue that, because this is an as-applied challenge to Ohio's ballot-initiative requirements during the COVID-19 pandemic, it is "uniquely *incapable* of repetition." (*Id.* at 14 (emphasis in original).) Defendants point out that the Ohio Department of Health rescinded the restrictive orders that Plaintiffs alleged in the Complaint made it impossible for them to collect signatures. (Defs.' Mot. at 8.) They argue that the operative order from the Ohio Department of Health is much less restrictive. (*Id.* at 8.) On May 17, 2021, the Ohio Department of Health issued an order stating that "the vast majority of health orders—except some orders for safety in congregate living and health settings and some

technical matters—will be rescinded on June 2, 2021[.]”[4]

Plaintiffs submit that they are actively attempting to qualify initiatives for local ballots for the November 2021 election subject to the same ballot-initiative laws Plaintiffs originally challenged. (Pls.’ Resp. at 26–27.) And, crucially, the COVID-19 pandemic remains ongoing. (*Id.*) They argue that there “is not only a likelihood of recurrence, there is a recurrence here.” (*Id.* at 27.)

Plaintiffs have shown a “‘demonstrated possibility’ that the same controversy will recur” involving them. *Kundrat*, 206 F. Supp. 2d at 869 (citing *Murphy*, 455 U.S. at 482). Plaintiffs allege in the Complaint that “Ohio law, taken together with the COVID-19 outbreak and Defendants’ orders, directly cause injury-in-fact to Plaintiffs” and that 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.” (Compl. ¶¶ 60–61.) While the “Defendants’ orders described” in the Complaint have changed, the Ohio laws requiring in-person signature collection remain in place. And the COVID-19 pandemic is ongoing.[5]

One year ago, society was optimistic that the worst of the pandemic passed and that emergency public

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[4] Ohio Dep’t of Health, Director’s Second Amended Order for Social Distancing, Facial Covering and Non-Congregating (May 17, 2021).

[5] Ohio Dep’t of Health, COVID-19 Dashboard (accessed May 28, 2021), https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards.

health restrictions would lessen. In this case, the Court of Appeals observed on May 26, 2020, "What's more, Ohio is beginning to lift their stay-at-home restrictions." *Thompson*, 959 F.3d at 810. Instead, the pandemic worsened. In November 2020 amid an acceleration of COVID-19 cases in the State, the Ohio Department of Health imposed a new stay-at-home order.[6] This time does seem different. But the previous year illustrates the difficulty in predicting the high and low tides of a once-in-a-century pandemic. So long as a global pandemic is present, there is a "demonstrated possibility" that Plaintiffs will be again subject to public health orders of the type they challenge in the Complaint.

Defendants contend that even "if pandemic conditions worsen again and the Plaintiffs' claims are capable of repetition, they will still fail as a matter of law." (Defs.' Mot. at 9.) However, that Plaintiffs' claims may fail as a matter of law does not also mean that those claims are moot. Plaintiffs are collecting signatures for the 2021 election; the same state laws challenged during the 2020 election cycle remain in place; the spread of COVID-19 remains a global pandemic. Plaintiffs' claims therefore fall within the "capable of repetition, yet evading review" exception to mootness.

B. Plaintiffs' claims fail as a matter of law under Rule 12(b)(6).

Next, Defendants move for dismissal under Rule 12(b)(6). (Defs.' Mot. at 10.) They argue that the Eleventh Amendment bars Plaintiffs' claims for declaratory relief related to the 2020 election because

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[6] Ohio Dep't of Health, Director's Twenty-One Day Order that All Persons Stay at Home During Specified Hours Unless Engaged in Work or Essential Activity (Nov. 19, 2020).

such relief is retrospective. (*Id.*) Defendants' Eleventh Amendment argument is of a piece with their argument that Plaintiffs' claims for injunctive relief are moot, which the Court addressed above. Plaintiffs respond that the Eleventh Amendment does not bar Plaintiffs' claims for declaratory relief because, although the Complaint was originally designed to obtain relief for the November 3, 2020 election, prospective relief is still available for the 2021 election cycle. (Pls.' Resp. at 28.)

Defendants are entitled to dismissal of Plaintiffs' claims, but for another reason: based on the Sixth Circuit's opinions in this case, Plaintiffs' claims cannot succeed as a matter of law. In the Complaint, Plaintiffs alleged that enforcement of Ohio's ballot-initiative requirements for the 2020 election in conjunction with the COVID-19 pandemic and Ohio's stay-at-home orders violate their First and Fourteenth Amendment rights. (Compl. ¶¶ 64–78.) Plaintiffs requested declaratory relief and preliminary and permanent injunctive relief against Defendants. (*Id.* ¶ 79.)

This Court granted in part Plaintiffs' motion for a preliminary injunction on May 19, 2020. *Thompson*, 461 F. Supp. 3d at 717. One week later, the Sixth Circuit granted Defendants' motion to stay pending appeal, holding that all four preliminary injunction factors favored Defendants. *Thompson*, 959 F.3d at 812. In September of 2020, the Sixth Circuit reversed the grant of a preliminary injunction, indicating that its analysis of the four preliminary injunction factors remained unchanged from its order granting a stay. *Thompson*, 976 F.3d at 615.

Plaintiff's now request declaratory relief and a permanent injunction "(1) prohibiting enforcement of Ohio's in-person supporting signature requirements for candidates for office during the ongoing COVID

crisis, (2) extend[ing] 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 election ballots during the ongoing COVID crisis, and (3) enjoining the required number of signatures required in order to place initiatives on local election ballots during the ongoing COVID crisis." (Pls. Resp. at 43.) Further, Plaintiffs urge the Court "to order Defendants to develop with Plaintiffs a timely, efficient and realistic procedure for gathering supporting signatures from voters and submitting them to local officials." (*Id.*) A fair reading of the Sixth Circuit's opinion forecloses such relief. *See Thompson*, 976 F.3d at 620.

1. The Sixth Circuit's September 16, 2020 opinion guides the analysis here.

As an initial matter, the parties dispute whether the Sixth Circuit's opinion reversing the grant of a preliminary injunction is the "law of the case." (Defs.' Reply in Support and Resp. in Opp'n at 18; Pls.' Reply in Support at 11.)

The law-of-the-case doctrine "provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Daunt v. Benson*, ---F.3d----, 2021 WL 2154769, at *5 (6th Cir. May 27, 2021) (citing *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006) (internal quotations omitted)). "Put another way, '[t]he law-of-the-case doctrine precludes reconsideration of issues decided at an earlier stage of the case.'" *Id.* (citing *Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017)).

Whether a panel's ruling on a preliminary injunction becomes "the law of the case is tricky[.]" *Howe v. City of Akron*, 801 F.3d 718, 739 (6th Cir. 2015). As a

general matter, "decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.'" *William G. Wilcox, D.O., P.C. Employees' Defined Ben. Pension Tr. v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (citations omitted). However, when the "appellate panel considering the preliminary injunction has issued '[a] fully considered appellate ruling on an issue of law,' then that opinion becomes the law of the case." *Howe*, 801 F.3d at 740 (citing Wright & Miller, Fed. Prac. and Proc.: Jurisdiction and Related Matters §4478.5 (4th ed. 2015)).

Here, the Court need not determine whether the Sixth Circuit's opinion reversing the grant of a preliminary injunction is the law of the case. Even assuming that "the Sixth Circuit's rulings in the preliminary-injunction context are not binding on this Court's current task under Rule 12, the Court finds the rulings are persuasive[.]" *Daunt v. Benson*, No. 1:19-CV-614 (LEAD), 2020 WL 8184334, at *11 (W.D. Mich. July 6, 2020), *aff'd*, No. 20-1734, 2021 WL 2154769 (6th Cir. May 27, 2021). The Sixth Circuit's opinion will therefore guide this Court's analysis.

2. Plaintiffs' First Amendment claims fail as a matter of law under the *Anderson-Burdick* framework.

A plaintiff seeking a permanent injunction must show actual success on the merits. *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n. 12 (1987). Courts review "First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework." *Thompson*, 976 F.3d at 615 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Under this framework, "the level of scrutiny" to apply

to "state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* (citing *Burdick*, 504 U.S. at 434). When state law imposes a severe burden, a court evaluates the law under strict scrutiny. *Id.* When the law imposes "reasonable, nondiscriminatory restrictions," a court applies rational-basis review to the state law. *Id.* (citing *Burdick*, 504 U.S. at 434). When the challenged law imposes an intermediate burden, a court weighs the burden against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* (citing *Anderson*, 460 U.S. at 789); *Kishore v. Whitmer*, 972 F.3d 745, 748–49 (6th Cir. 2020). In doing so, a court must "consider 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 616 (quoting *Burdick*, 504 U.S. at 434).

The Sixth Circuit—in both its opinion granting a stay and its opinion reversing this Court—concluded that "Ohio's ballot-access restrictions impose, at most, only an intermediate burden on plaintiffs' First Amendment rights, even during COVID-19." *Thompson*, 976 F.3d at 616; *Thompson*, 959 F.3d at 811. The Court will adhere to the Sixth Circuit's reasoning. In weighing the burdens Ohio's ballot-initiative laws impose on Plaintiffs during the COVID-19 pandemic against Ohio justifications for those laws, Ohio's justifications come out on top. *Id.* at 616–19.

A. Burden

A "severe burden excludes or virtually excludes electors or initiatives from the ballot." *Id.* at 617. Ohio's laws, however, "specifically exempted conduct protected by the First Amendment from its stay-at-home orders"—including gathering signatures for petitions. *Id.* (citing 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)). That much remained true during and after the election cycle following the panel's decision in September. Ohio Dep't of Health, Director's Twenty-One Day Order that All Persons Stay at Home During Specified Hours Unless Engaged in Work or Essential Activity ¶ 2 (Nov. 19, 2020) ("This Order does not apply to . . . First Amendment protected speech[.]") And even though the conditions as a result of COVID-19 may make it harder for Plaintiffs to obtain signatures, that does not mean "that Plaintiffs are *excluded* from the ballot." *Thompson*, 976 F.3d at 618 (citing *Thompson*, 959 F.3d at 810) (emphasis in original). Therefore, Plaintiffs face an intermediate burden.

B. Ohio's Justifications

"The next step in the *Anderson-Burdick* framework is a flexible analysis in which" the Court weighs "the burden of the restriction against the state's interests and chosen means of pursuing them." *Id.* (citing *Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019), *cert. denied*, --- U.S. ----, 140 S.Ct. 2803, 207 L. Ed. 2d 141 (2020)) (internal quotations omitted).

In this case, Ohio has articulated two interests. "The first relates to the ink and attestation requirements: preventing fraud by ensuring the authenticity of signatures." *Id.* The Sixth Circuit concluded that there is "no question this is a legitimate—indeed compelling—interest." *Id.* Second, Ohio posits 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." *Id.* This interest is also legitimate, as "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

C. Balancing of Burdens and Justifications

At the third and final and final step of *Anderson-Burdick*, the Court must "assess whether the State's restrictions are constitutionally valid given the strength of its proffered interests." *Id.* (citing *Schmitt*, 933 F.3d at 641). 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." *Id.* at 619.

The Sixth Circuit has "held, in multiple cases, that the interests Ohio pursues through its ballot access laws 'outweigh the intermediate burden those regulations place on Plaintiffs.'" *Id.* (citing *Thompson*, 959 F.3d at 811; *Hawkins v. DeWine*, 968 F.3d 603, 607 (6th Cir. 2020)). Furthermore, "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." *Id.* (citing *Little*, --- U.S. at ----, 140 S. Ct. 2616, 2020 WL 4360897, at *2 (Roberts, C.J., concurring in the grant of a stay)).

3. Plaintiffs' efforts to distinguish the panel's analysis are unpersuasive.

The Sixth Circuit issued its decision on this Court's preliminary injunction order in September of 2020. The November 3, 2020 election occurred less than two months later. Since then, the course of the COVID-19 pandemic and Ohio's emergency public health orders have changed. *See supra* Part III.A. Plaintiffs now attempt to distinguish both the facts and the law on which the panel relied.

A. Facts

Plaintiffs contend that this case "stands in stark contrast to the case as it existed when the preliminary proceedings were litigated." (Pls.' Resp. at 31.) The Sixth Circuit's September 2020 opinion noted that the "severe burden" standard under *Anderson-Burdick* requires a showing that the combined effect of ballot-access restrictions amounts to an "exclusion or virtual exclusion" from the ballot. *Thompson*, 976 F.3d at 617–18 (citing *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016)). Plaintiffs argue that facts developed after the panel's decision in September 2020 show "exclusion or virtual exclusion" from the 2020 ballot and thus, strict scrutiny should apply under *Anderson-Burdick*. (Pls.' Resp. at 31–32.)

First, Plaintiffs argue that Ohio's strict enforcement of its in-person petitioning requirements in-fact resulted in the exclusion or virtual exclusion of initiatives on the 2020 ballot. (*Id.* at 32.) No statewide initiatives appeared on Ohio's November 2020 general election ballot, and Plaintiffs "succeeded in placing only 4 out of the 73 initiatives they reasonably anticipated placing on local ballots[.]" (*Id.*) Second, they argue that "science has learned that COVID-19 is airborne and primarily transmitted through aerosol[,]" posing unacceptable risk of community spread to circulators and citizens. (*Id.*) Third, they submit that, contrary to the State's representations to the Sixth Circuit in 2020, the state did not "open up," instead shutting down even further. (*Id.*) Fourth, they point to the fact that COVID-19 has killed over 570,000 Americans and continues to spread. (*Id.* at 33.) Fifth and finally, they claim that Defendants admit that collecting signatures from March 2020 to April 30, 2020 was "both physically impossible and illegal" by virtue of Defendants' failure to file an answer—therefore admitting the Complaint's allegation that

collecting signatures was "literally impossible." (*Id.*; Compl. ¶ 52.)

These arguments do not persuade the Court that Plaintiffs are now entitled to a higher level of scrutiny than the Sixth Circuit applied in its September 16, 2020 opinion. The Sixth Circuit already disposed of Plaintiffs argument that "impossibility" is a factual allegation that can be admitted in a pleading. *Thompson*, 976 F.3d at 616 n.5 (6th Cir. 2020) ("we don't think 'impossibility' here is a factual allegation that can be admitted in pleadings."). And even if that were true, the panel noted that "Ohio made it clear by April 30" that it exempted conducted protected by the First Amendment from its stay-at-home orders. *Id.* at 617. Therefore, according to the Sixth Circuit, "Plaintiffs [had] months to gather signatures" after April 30, 2020. *Id.*

Furthermore, the panel cautioned that 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" because "First Amendment violations require state action." *Id.* (citing *Thompson*, 959 F.3d at 810). There is no telling from the facts Plaintiff cites whether the lack of ballot initiatives on the 2020 general election ballot were the result of Ohio's public health orders or private "prospective signatories [ ] deciding to stay home or avoid strangers" due to the risks of COVID-19. *Id.*

In any event, Plaintiffs now seek prospective relief for the duration of the COVID-19 pandemic, not retrospective relief for the November 2020 election. (Pls.' Resp. at 27.) If "Plaintiffs [ ] faced an uphill battle" under the *Anderson-Burdick* framework in 2020, *Thompson*, 976 F.3d at 617, the hill is even

steeper now. Given the advent of the vaccine,[7] the decrease in COVID-19 cases,[8] and the lifting of most public health orders as of June 2,[9] the conditions as they now exist do not appear to be more burdensome than those alleged in the Complaint and established in the stipulated facts prior to this Court's preliminary injunction order in May of 2020. Therefore, subsequent factual developments do not warrant departing from the Sixth Circuit's prior analysis.

B. Law

Plaintiffs also contend that there "is no valid basis for distinguishing" *Esshaki v. Whitmer,* 813 F. App'x 170 6th Cir. 2020) and *Sawari Media, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020) from this case. In those cases, the Sixth Circuit held that the district court properly applied strict scrutiny under the *Anderson-Burdick* framework in evaluating the plaintiffs' likelihood of success on First Amendment challenges brought in response to Michigan's stay-at-home orders. *Esshaki*, 813 F. App'x at 171 ("The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict

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[7] As of June 2, over 45% of Ohioans have received at least one dose of a COVID-19 vaccine. Ohio Dep't of Health, COVID-19 Vaccination Dashboard (accessed June 2, 2021), https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/covid-19-vaccine/covid-19-vaccinationdashboard.

[8] Ohio Dep't of Health, COVID-19 Dashboard (accessed on June 2, 2021), https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards.

[9] Ohio Dep't of Health, Director's Second Amended Order for Social Distancing, Facial Coverings and Non-Congregating (May 17, 2021).

scrutiny applied[.]"); *SawariMedia, LLC*, 963 F.3d at 597 ("with respect to the burden imposed on Plaintiffs' access to the ballot, the restrictions at issue here are identical to those in *Esshaki*"). Plaintiffs argue that "[n]ot only are *Esshaki* and *SawariMedia* materially indistinguishable from this case, but also, the severity of the burdens imposed in those cases was less onerous than the burdens imposed on Plaintiffs here." (Pls.' Resp. at 42.) The Sixth Circuit considered the same argument in this case and rejected it. *Thompson*, 976 F.3d at 617 ("But the cases Plaintiffs cite don't support their theory.").

In the end, the Sixth Circuit's analysis is fatal to Plaintiffs' claims. *Id.* at 619. Taking all factual allegations in the Complaint, stipulated facts, and undisputed public record as true, Plaintiffs fail to state a claim under the First and Fourteenth Amendments upon which relief can be granted in light of the Sixth Circuit's decisions. Defendants are therefore entitled to dismissal under Rule 12(b)(6). Plaintiffs' Motion for Judgment on the Pleadings is moot.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss (ECF No. 68) and **DENIES AS MOOT** Plaintiffs' Motion for Judgment on the Pleadings (ECF No. 71). Plaintiffs' claims are **DISMISSED**. The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED

6/3/2021 — **/s/Edmund A. Sargus, Jr.**
DATE — **EDMUND A. SARGUS, JR.**
UNITED STATES DISTRICT JUDGE

APPENDIX E

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.

No. 20-3526

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

Defendants-Appellants.

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.

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

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. Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellants. Benjamin M. Flowers, ZACHERY P. KELLER, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

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.

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[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

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

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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.

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 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 (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,"

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[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.*

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

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[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.

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 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

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[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).

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).

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.

[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.").

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 Interim Director of 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.

JUDGEMENT

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 was 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

APPENDIX F

(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.

APPENDIX G

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

File Name: 20a0162p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellees,

v.

No. 20-3526

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; OHIOANS FOR RASING THE WAGE; ANTHONY CALDWELL; JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,

Intervenors-Appellees.

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

Decided and Filed: May 26, 2020

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

COUNSEL

ON MOTION: Benjamin M. Flowers, Michael J. Hendershot, Stephen P. Carney, Shams H. Hirji, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants.

ON RESPONSE: Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Plaintiffs-Appellees. Donald J. McTigue, Derek Clinger, MCTIGUE & COLOMBO LLC, Columbus, Ohio, for Intervenors-Appellees.

ORDER

PER CURIAM. By all accounts, Ohio's public officials have admirably managed the problems presented by the unprecedented COVID-19 pandemic. This includes restricting Ohioans' daily lives to slow the spread of a highly infectious disease. Nearly every other state and the federal government have done the same. And these are the types of actions and judgments that elected officials are supposed to take and make in times of crisis. But these restrictions have not gone unchallenged. *See, e.g.*, *Maryville Baptist*

Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020) (per curiam); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020). Our Constitution, of course, governs during both good and challenging times. Unlike those cases, however, the Plaintiffs and Intervenors here do not challenge the State's restrictions per se. Rather, they allege that COVID-19 and the State's stay-at-home orders have made it impossibly difficult for them to meet the State's preexisting requirements for initiatives to secure a place on the November ballot—violating their First Amendment rights. So they

challenge Ohio's application of its general election and ballot-initiative laws to them.

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

The people of Ohio vested their sovereign legislative power in the General Assembly. Ohio Const. art. II, § 1. But they also retained the power to amend the State Constitution, enact laws, and enact municipal ordinances by initiative and referendum. *Id.* art. II, §§ 1a, 1b, 1f. The Ohio Constitution and the Ohio Code establish the process for proposing an initiative to the State's electors and impose many requirements for ballot access. Relevant here, a petition to put an

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

Given the COVID-19 pandemic, three individuals and two organizations, who are obtaining signatures in support of initiatives to amend the Ohio Constitution and propose municipal ordinances, challenged these requirements, as-applied to them. They claim Ohio's ballot-initiative requirements violate their First and Fourteenth Amendment rights and moved to enjoin the State from enforcing these requirements against them. The district court granted their motion in part, enjoining enforcement of the ink signature requirement, the witness requirement, and the submission deadlines, and denied their motion in part, upholding the number of signatures requirement. The court also directed Defendants to "update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements so as to reduce the burden on ballot access" as well as ordered them to "accept electronically-signed and witnessed petitions from [the organizational plaintiffs] collected through the on-line signature collection plans set forth in their briefing" and to "accept petitions from [the organizational plaintiffs] that are submitted to the Secretary of State

by July 31, 2020[.]"[1] (R. 44, Op. & Order at PageID # 675–76.) And the court ordered Defendants and the organizational plaintiffs to "meet and confer regarding any technical or security issues to the on-line signature collection plans" and "submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020." (*Id.*) Defendants now move for an administrative stay and for a stay pending appeal.

"[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

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[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.)

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,

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[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*, 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

639 (6th Cir. 2019); *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,'

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.

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. 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.[3] *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 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.

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[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.

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

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[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.

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 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,

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APPENDIX H

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

CHAD THOMPSON, et al.,	
Plaintiffs,	**CASE No. 2:20-CV-2129**
v.	**JUDGE EDMUND A. SARGUS, JR.**
GOVERNOR OF OHIO MICHAEL DEWINE, et al.,	**Magistrate Judge Chelsea M. Vascura**
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 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.)

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[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.

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."

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

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[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.

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]

[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

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.)

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

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.

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	**s/Edmund A. Sargus, Jr.**
DATE	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.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Chad Thompson,
William Schmitt, and
Don Keeney,

Plaintiffs-Appellants,

v.

CASE NO. 21-3514

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

Stephanie McCloud, in
her official capacity as
Director of Ohio
Department of Health,

and

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

Defendants-Appellees.

PLAINTIFFS-APELLANTS' CONDITIONAL MOTION TO VACATE JUDGMENT BELOW AND ALL PRIOR PRELIMINARY RULINGS OF THIS COURT

Motion

Plaintiffs-Appellants continue to believe that this case is not moot and accordingly reserve their right to seek further review in this Court and in the Supreme

Court. In view of this Court's July 28, 2021 Opinion affirming dismissal on mootness grounds, however, Plaintiffs-Appellants respectfully and conditionally move the Court to vacate or reverse the judgment below as required by Sixth Circuit and Supreme Court precedent. Plaintiffs further respectfully move the Court to vacate its two prior published decisions staying the District Court's preliminary injunction, *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020), and reversing that preliminary injunction. *Thompson v. DeWine*, 976 F.3d 610 (6th Cir. 2020).

Plaintiffs-Appellants have contacted Defendants-Appellees and report that they object to this Motion.

Introduction

The Court decided that this case is moot. *Thompson v. DeWine*, No. 21-3514, slip op., at 2 (6th Cir., July 28, 2021). The 2020 "election has come and gone," and "plaintiffs' claims 'are inextricably tied to the COVID19 pandemic.'" *Id.* at 6. "If any case is 'based on a unique factual situation,' this one is." *Id.* (citation omitted). "But the situation today differs markedly from a year ago. 'Fortunately, because of advancements in COVID-19 vaccinations and treatment since this case began, the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle.'" *Id.* (citation omitted). "And so '[t]here is not a reasonable expectation' that plaintiffs 'will face the same burdens' that they did in 2020," *id.* (citation omitted), meaning that the case is not capable of repetition yet evading review.

The circumstances giving rise to the Court's conclusion that this case has been rendered moot are all pure happenstance beyond the control of the parties. For this reason, as explained below, binding Supreme Court and Sixth Circuit precedent requires

that the judgment below be vacated (and not affirmed as the panel did here). It also requires that any outstanding preliminary decisions with the potential to "spawn legal consequences" be vacated as well. This means that the panel's preliminary stay and reversal of the preliminary injunction in this case should also be vacated.

Argument

I. The Judgment Below Must Be Reversed or Vacated.

When an appellate case becomes moot "[t]he established practice ... in the federal system ... is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Not only is this the established practice, the Court has made clear that it is virtually mandatory. A district court's final judgment on the merits in favor of one party must be vacated on the motion of the losing party when the judgment is mooted by happenstance.

"Vacatur must be decreed for those judgments whose review is, in the words of *Munsingwear*, 'prevented through happenstance' —that is to say, where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.'" *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994) (quoting *Karcher v. May*, 484 U.S. 72, 82, 83 (1987)). The rationale behind this rule is that "vacatur 'clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.'" *Bonner Mall*, 513 U.S. at 22- 23. More recent cases have followed this logic and reached the same conclusion. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43,

71 (1997) ("When happenstance prevents that review from occurring, the normal rule should apply: Vacatur then rightly 'strips the decision below of its binding effect,' and 'clears the path for future relitigation.'").

The Supreme Court explained this as the "normal rule" in *Camreta v. Greene*, 563 U.S. 692, 713 (2011), since the "[t]he point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." Importantly, the Court noted that the "usual *Munsingwear* order" requires that the Court vacate "the part of the decision that mootness prevents us from reviewing but that has prospective effects on [the losing party]." *Id.* at 714 n.11. The Court follows this rule without exception where happenstance or the unilateral actions of the prevailing party cause mootness. *See, e.g., Trump v. Citizens for Responsibility and Ethics in Washington*, 141 S. Ct. 1262 (2021); *Slatery v. Adams & Boyle, PC*, 141 S. Ct. 1262 (2021).

The practice in this Circuit is no different. In *Stewart v. Blackwell*, 473 F.3d 692, 693 (6th Cir. 2007) (en banc), the Court stated that "[w]hen a civil case becomes moot pending appellate adjudication, 'the established practice ... in the federal system ... is to reverse or vacate the judgment below and remand with a direction to dismiss.'" (Citations omitted). "Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties—or ... the 'unilateral action of the party who prevailed in the lower court.'" *Id.* (citations omitted). "In other words, vacatur is generally appropriate to avoid entrenching a decision rendered unreviewable through no fault of the losing party." *Id.*

Only where the losing party is responsible for the mootness, which was not true in *Stewart*, is vacatur

not required. The State there admitted that "it caused the mootness by abandoning the election machines that Plaintiffs attacked," id., yet attempted to shift the blame to new federal laws. *Id*. Local defendants, meanwhile, claimed mootness was the challengers' fault. The Court would have none of it, stating that "[w]hatever the truth of these contentions, they in no way render the plaintiffs responsible for the current posture of the case." *Id*. Thus, as it has done in scores of cases, the *en banc* Court in *Stewart* ordered that "the judgment of the district court is vacated, and the case is remanded with instructions to dismiss as moot." *Id*. at 694.

Here, Plaintiffs-Appellants are in no way responsible for the circumstances that led to this Court's ruling that their claims are moot. On the contrary, as Plaintiffs-Appellants explained on pages 14-18 of their Reply Brief in response to Defendants-Appellees' claim that Plaintiffs were dilatory, Plaintiffs diligently litigated their claims and sought emergency relief three separate times prior to the 2020 general election. Only after the July 16, 2020 filing deadline passed, when any further request for emergency relief would be futile, did Plaintiffs-Appellants relent in their efforts to obtain it. Consequently, there was nothing more Plaintiffs-Appellants could have done to litigate their claims prior to the passage of the 2020 general election.

Furthermore, in its opinion affirming dismissal of this case, the panel never suggested, much less concluded, that Plaintiffs-Appellants are in any way responsible for the circumstances that led it to conclude their claims are moot. In fact, the opposite is true: the panel denied Plaintiffs-Appellants' claim for injunctive relief on the ground that it lacked "a time machine, and we cannot go back and place plaintiffs'

initiatives on the 2020 ballot." Slip op. at 4. And the panel denied Plaintiffs-Appellants' claim for declaratory relief on the ground that "because of intervening events—the passing of the election and the rescission of Ohio's stay-at-home orders and emergency declaration—we cannot give plaintiffs what they ask for." *Id.* at 5 (citation omitted). Thus, the Court expressly concluded that mootness arose here due to "intervening events" as well as the actions of the Defendants themselves – and not because of any action that Plaintiffs-Appellants took or failed to take. Either way, whether because of intervening events or actions attributable to Defendants, *see Bonner Mall*, 513 U.S. at 23 ("vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court"), vacatur is required.

Accordingly, given the controlling precedent of this Court's *en banc* decision in *Stewart* and the controlling Supreme Court precedent cited herein, the final judgment on the merits in this case must be vacated or reversed with instructions to the District Court to dismiss. It cannot be affirmed as the panel did here. It must be reversed or vacated. *See also* Wright & Miller, 13C Fed. Prac. & Pro. § 3533.10 (3d ed. 2021) ("If a proper request is made … it is the duty of the appellate court to vacate the judgment with directions to dismiss the action as moot. The regularity of present practice is re-enforced by the Court's statement in he *Munsingwear* case that upon proper application, it is the 'duty' of the appellate court to vacate the lower court judgment.).[1]

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[1] In their first and only opportunity to respond to Defendants-Appellees' argument that "[t]he Court should affirm the District Court's judgment," Appellees' Brief at 62, Plaintiffs-Appellants replied that "[i]n the event that the Court concludes this matter

II. This Court's Two Preliminary Decisions Also Should Be Vacated

The panel's stay of the preliminary injunction and later reversal of that preliminary injunction also should be vacated, consistent with this Court's holding in *United States v. City of Detroit*, 401 F.3d 448 (6th Cir. 2005). In *City of Detroit*, a permanent injunction had been entered against the federal government, *see* 25 Fed Appx. 384 (6th Cir. 2002), and an appeal from that final action taken. A panel of this Court stayed the injunction. The *en banc* Court disagreed and ruled that the District Court's injunction might be proper. It accordingly remanded the matter to the District Court which confirmed it had the power to issue the injunction. The federal government again appealed, and during this second appeal the successful City abandoned its case.

The Department of Justice, representing the Army Corps of Engineers, then moved to vacate the Sixth Circuit's prior adverse en banc decision as well as the decision of the District Court that was under immediate review. It "argue[d] that denying vacatur 'is particularly prejudicial to the United States in this case because the ... decisions ... reached issues that are

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is moot, the accepted practice is that the entire case must be dismissed; this includes all prior proceedings and rulings in the case, including not only the District Court's preliminary and final decisions but also this Court's prior stay and reversal of the District Court's preliminary injunction." Appellants' Brief at 13 n.13 (citing *United States v. Taylor*, 8 F.3d 1074, 1077 (6th Cir. 1993); *Trump v. Citizens for Responsibility and Ethics in Washington*, 141 S. Ct. 1262 (2021); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *Slatery v. Adams & Boyle, PC*, 141 S. Ct. 1262 (2021)). Plaintiffs-Appellants therefore preserved the proper disposition of this case as an issue and made the "proper request," both in its initial briefing and here in this Motion.

of broad importance to the United States beyond this litigation ...." *Id.* at 451.

The Court "agree[d] with the Corps and Detroit that as a result of our mootness decision, the district court's injunction and judgment of October 22, 2003 ought to be vacated." *Id.* at 452. However, "under the circumstances of this case," *id.* at 451, the Court concluded that it could not vacate the Court's en banc opinion. "We are precluded ... from reviewing our prior *en banc* decision, and consequently the district court's original decision, not as a result of mootness but as a result of the law-of-the-case doctrine and the rules of our Circuit." *Id.* at 452.

Had the prior opinion, which involved a permanent injunction and thus was plainly the law of that case, not been from an *en banc* Court (which a panel can never change or vacate), the Court's opinion in *City of Detroit* strongly suggests it would have entertained vacatur of these prior decisions as an option.[2]

The question thus turns to whether the Court should order vacatur under the circumstances presented here. The Supreme Court's opinion in *Camreta* holds the answer. There the Supreme Court concluded that the "normal rule" of vactur applied where "an unreviewable decision" may "spawn[] any legal

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[2] The Court also observed that the Corps "could have petitioned the U.S. Supreme Court for a writ of certiorari to review our en banc decision but chose not to do so, even after the grant of an extension of time to consider and prepare a certiorari petition." *Id.* In the present case, of course, there was no en banc opinion and Plaintiffs-Appellants did petition the Supreme Court to review the panel's interlocutory reversal of the preliminary injunction, as well as applying to the Supreme Court to vacate the panel's stay. The Court's denial of the application and later petition, of course, are discretionary, have no binding effect, and do not reflect approval of those decisions.

consequences." *Camreta*, 563 U.S. at 713. When it can, this impermissibly allows "preliminary' adjudication" to harm a party through happenstance. The Court noted that the "the usual *Munsingwear* order" requires that the Court vacate "the part of the decision that mootness prevents [the Court] from reviewing but that has prospective effects on [the losing party]." *Id*. at 714 n.11.

Ohio has continued to claim here that both this Court's stay of the preliminary injunction and its reversal of that preliminary injunction are binding precedent. Regardless of whether they are, this Court in *Hawkins v. DeWine*, 968 F.3d 603 (6th Cir. 2020), relied on them, as the District Court did below. *Thompson v. DeWine*, 2021 WL 2264449 (S.D. Ohio 2021). This Court's published "preliminary adjudications" are therefore harming Plaintiffs and other circulators, not only because Ohio claims they are binding precedent, but because Courts are relying on them as persuasive or controlling.

If Ohio (which litigates frequently in this Court, was a party in Hawkins and has made it plain that it intends to continue requiring in-person circulation outside the major-candidate context) were to disavow any binding or persuasive nature attached to these preliminary proceedings, then vacatur might not be required here. In *Hassoun v. Searls*, 976 F.3d 121, 134 (2d Cir. 2020), for example, the Second Circuit concluded that vacatur of preliminary, interlocutory appellate decisions was not necessary where they are not binding and do not “spawn[] any legal consequences” for the parties. (Quoting *Munsingwear*, 340 U.S. at 41).

Likewise, in *Democratic Executive Committee of Florida v. National Republican Senatorial Committee*, 950 F.3d 790, 795 (11th Cir. 2020), the Eleventh

Circuit stated that "vacatur of a prior stay-panel opinion once a case becomes moot on appeal is inappropriate—precisely because that stay-panel opinion cannot spawn binding legal consequences regarding the merits of the case." (Citation omitted). "[V]acatur of a prior stay-panel opinion [is] not required once a case became moot because orders concerning stays are 'not a final adjudication of the merits of the appeal' and accordingly have no res judicata' effect." *Id*. It added in a footnote, however, "that in a rare case where a party could identify any ruling within a stay-panel opinion that *would* have precedential effect beyond the preliminary decision on the stay, then vacatur may be warranted if the case were to become moot." (Citations omitted).

Because Ohio and Courts within this Circuit continue to rely upon this Court's published, preliminary, interlocutory decisions in this case as binding or persuasive precedent, vacatur is required. If those decisions are not vacated, then happenstance will be allowed to "spawn legal consequences" for Plaintiffs-Appellants and others. This is manifestly unfair and inconsistent with established Supreme Court precedent.

Conclusion

While preserving their rights to seek further review in this Court and the Supreme Court, Plaintiffs-Appellants respectfully and conditionally move the Court to vacate the final judgment and order of the District Court and its own interlocutory orders in this case because of its finding of mootness.

Respectfully submitted,

/s/ Mark R. Brown

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Plaintiffs-Appellants certify that they have prepared this document in 14-point font and that excluding the Caption, Signature Blocks and Certificates, the document includes 2597 words.

s/Mark R. Brown

Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Motion was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding. Further, I certify that this Motion was electronically delivered to Benjamin Flowers, Counsel of Record for Defendants-Appellees, at Benjamin.Flowers@OhioAGO.gov, this 30th day of July 2021.

s/Mark R. Brown

Mark R. Brown

APPENDIX J

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

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

Defendants.

TEMPORARY RESTRAINING ORDER/ PRELIMINARY INJUNCTION REQUESTED

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.

<u>Ohio Circulation and Signature Collection Requirements</u>

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 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

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

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.

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[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]

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

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

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]

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*

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[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/.

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

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:

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

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[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/.

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

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]

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

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[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.

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_M1 HGGIK0N0JO00QO9DDDDM3000-7c8309f8-9f28-4793-9198-05968d01a640-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]

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

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.

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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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

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