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

**Chad Thompson, William Schmitt, and Don Keeney,**

**Plaintiffs,**

**Ohioans for Secure and Fair Elections, et al.,**

**Intervenor-Plaintiffs,**

**and**

**Ohioans for Raising the Wage, et al.,**

**Intevenor-Plaintiffs,**

**v.**

**Case No. 20-2129**
**Judge Sargus**

**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.**

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE, R. 40,**
**TO PLAINTIFFS' MOTION FOR EMERGENCY RELIEF, R. 4**

*All true living is face to face*. – Albert Schweitzer

## I. The Emergency Orders Issued Before April 30 Made No Reference to Nor Exception for Petition Circulators, Soliciting Signatures, Going Door to Door, or Approaching People in Public.

Defendants' emergency order issued on March 22, 2020 was courageous and correct. It saved lives. Plaintiffs applaud Defendants' efforts in this regard. But now, notwithstanding their life-saving orders, Defendants remarkably claim that Ohioans could have -- and should have -- ignored these life-saving measures all along. People should have been out and about, mixing and mingling, exchanging pens and clip boards, going door to door, approaching pedestrians, engaging in face to face conversations, soliciting and witnessing signatures. The claim is beyond ironic; it is insulting. It not only minimizes the hardships all Ohioans have experienced, it insults the sacrifices they have made. Ohioans have given up what Albert Schweitzer called "true living" to comply with Defendants' orders. They are now being rewarded with Defendants' mocking claims that "they could have ignored these life-and-death warnings" and they "should have studied the First Amendment."

The exigencies in this case speak for themselves. Ohio's Department of Health and Governor issued a series of orders, described in Plaintiffs' Verified Complaint, R.1, and the Stipulated Facts, R.35, shuttering the vast majority of businesses and offices, requiring that Ohioans stay inside their homes, banning most gatherings and mandating physical separations (outside close family members) of at least six feet (both inside and outside) when small gatherings are even permissible.

Along with the orders' legalese detailing and describing what gatherings, what movement, and what physical contact is permitted, Dr. Acton explained in plain language to Ohioans what all this meant: "This order," she stated, "prohibits holding gatherings of any size

and closes all nonessential businesses." Ohio Department of Health: Stay at Home Order Frequently Asked Questions, April 2, 2020 (emphasis added) (Attached as Exhibit 1) (emphasis added). "This order is mandatory," she continued. *Id*. (emphasis added). "To help prevent the further spread of COVID-19 in Ohio and protect our friends, neighbors, and vulnerable populations, please stay home." *Id*. (emphasis added). "For your safety, as well as the safety of those in your community, you should remain at home to help fight the spread of COVID-19." *Id*. (emphasis added).

Dr. Acton explained that some physically separated outside activity would be allowed; but like the orders themselves, she said nothing about gathering signatures: "Families will still be able to go outside, …but should continue to practice social distancing by remaining 6 feet away from other people. " *Id*. (emphasis added). "Adhering to the order will save lives and it is the responsibility of every Ohioan to do their part. We are in this together." *Id*. (emphasis added).

Defendants' orders were not advisory. Governor DeWine repeatedly emphasized this to the public: "'We would not have issued this if it was not a matter of life and death,'" Ian Cross, *Gov. DeWine clarifies enforcement, reporting of stay-at-home order violations*, News5Cleveland.com, March 23, 2020 (quoting DeWine and emphasis added).[1] The Governor encouraged Ohioans to report violations: "residents should contact the business' human resources department or their local health department to report violations of the stay-at-home order." *Id*. Emphasizing how serious these closures and prohibitions were, Governor DeWine stated that he and local authorities were prepared to prosecute: "DeWine noted this is an order, not a suggestion, and he expects all people to comply and that all health departments and local law enforcement can enforce this order. " Laura Mazade, *What does the stay-at-home order*

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

*mean for Ohio*, Cincinnati Enquirer, March 22, 2020 (emphasis added).[2] Governor DeWine emphasized that violating the orders constituted a "second-degree misdemeanor and can be enforced by the state's 113 public health departments and local police." *Id.*

Plaintiffs and all Ohioans were left to struggle under these orders. They relied on the Governor's and Dr. Acton's life and death warnings. Neither the Governor's official orders, his many press announcements, nor Dr. Acton's explanations ever said anything about being able to collect signatures. Indeed, had they done so, Plaintiffs would have risked prosecution. Defendants' contention that Plaintiffs should have engaged in potentially criminal conduct speaks for itself: it is a legally untenable position.

## II. Defendants' April 30 Order Mentioned Circulators for the First Time After This Case was Filed.

Defendants' most recent iteration of their orders, issued on April 30, 2020, extends Ohio's life-and-death restrictions for many businesses, most public places and virtually all gatherings until at least May 29, 2020. *See* Ohio Department of Health, Director's Stay Safe Ohio Order, April 30, 2020.[3] In his most recent announcement on May 8, 2020, Governor DeWine stated "the obvious and [did] not shy away from it: The risk is up. The more contacts we have, the more that we do, the more risk there is." *DeWine warns 'risk is up' as Ohio continues reopening process: 'This is a high-risk operation'*, 10tv.com, May 8, 2020 (emphasis added).[4] "He urged all Ohioans to continue following physical distancing guidelines of staying at least six feet apart and wearing a mask whenever possible." *Id.* (emphasis added). Consequently, the physical circumstances making it practically impossible to gather signatures in Ohio did not change after April 30, 2020.

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

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

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

Defendants to this day offer no explanation for how circulators might approach voters to obtain their hand-written signatures on petitions while simultaneously maintaining a distance of at least six feet from those same voters.

This reality is proved by the April 30, 2020 order; all primary/secondary schools remain closed. Ohio Department of Health, Coronavirus (COVID-19): Continued Business Closures, May 2, 2020.[5] All "places of public amusement, whether indoors or outdoors," *id*., "Auditoriums, stadiums, arenas," *id*., "Movie theatres, performance theatres, and concert and music halls," *id*., "Public recreation centers and indoor sports facilities," *id*., "Parades, fairs, festivals, and carnivals," *id*., "Amusement parks, theme parks, outdoor water parks, children's play centers, playgrounds, and funplexes," *id*., "Aquariums, zoos, museums, historical sites, and similar institutions," *id*., "Country clubs and social clubs," *id*., "Spectator sports, recreational sports tournaments and organized recreational sports leagues," *id*., "Health clubs, fitness centers, workout facilities, gyms, and yoga studios," *id*., "Swimming pools, whether public or private, except swimming pools for single households," *id*., "Residential and day camps," *id*., and "Campgrounds, including recreational camps and recreational vehicle (RV) parks" remain closed. *Id*. Most public places in Ohio remain indefinitely closed. *See* Randy Ludlow, *Coronavirus in Ohio: Gov. Mike DeWine warns virus remains 'a dangerous risk' even as state reopens*, Columbus Dispatch, May 12, 2020.[6]

Meanwhile, Section 4 of the April 30, 2020 order continues to state that "[a]ll public and private gatherings of any number of people occurring outside a single household and connected property, or living unit and connected property are prohibited, except for the limited purposes

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

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

permitted by this Order." April 30 Order, *supra* (emphasis added). "Any gathering of more than ten is prohibited unless exempted by this Order." *Id*. (emphasis added). It was in Section 4 of the April 30, 2020 Order that -- for the first time -- "circulators" were provided an exception.

Putting aside the fact that the April 30 Order's mention of circulators at this late date is obviously a litigation tactic, its purported exception does not really exempt much of anything at all. It only provides an exception from "[t]his Section['s]" ban on public gatherings. *Id*. It says nothing about the application of other prohibitions in the Order. Because of the continuing closures described above and continuing bans found in other Sections of the April 30 Order, circulators will still have virtually no one to solicit, nowhere to go, and no lawful means to collect signatures. For instance, Section 3's continuing stay-at-home and physical distancing requirements extend the shelter, stay-at-home aspect of all prior orders by stating:

> all individuals currently living within the State of Ohio are ordered to stay at home or at their place of residence except as allowed in this Order. To the extent individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible, maintain social distancing of at least six feet from any other person, with the exception of family or household members.

April 30, 2020 Order, *supra* (emphasis added). Even if circulators may now be able to venture out without violating Section 4's ban on gatherings, they cannot physically approach anyone who is not a family member without violating Section 3. Those being solicited, moreover, are still subject to both the prohibitions found in Sections 3 and 4.

Even assuming that those being solicited are somehow not in violation of Section 4, it remains almost impossible to distribute a clip board with a petition and pen and witness a person's signature from six feet away. Section 3 will always be violated. And even if it can be physically accomplished, it is quite unlikely that those solicited will be willing to even try. Governor DeWine and Dr. Action, after all, have repeatedly told them to maintain six feet of

separation. Knocking on doors of non-family members is out of the question. It will correctly be viewed as a threat to residents' safety.

Demanding that Plaintiffs and supporters attempt to engage in such a close-proximity practice while also telling them to stay home and more than six feet apart defies the very purpose behind the shelter and closure orders. Other than a litigation tactic, it makes no sense. A more sensible solution, of course, is to modify the signature collection requirements, which is what Plaintiffs seek in this case. About all that Defendants' April 30, 2020 Order excepting circulators does is prove that their prior orders included no exception, meaning that Plaintiffs at bare minimum (even if Defendants' arguments are otherwise accepted) lost six weeks of signature collection to Defendants' prior orders. All by itself this loss requires constitutional correction.

## III. Defendants' Exception for "First Amendment Protected Speech" Is Vague and Constitutionally Meaningless.

Petitioning to place popular measures on election ballots is "core political speech," *Meyer* v. *Grant*, 486 U.S. 414, 22 (1988), and is fully protected by the First Amendment. *See Taxpayers United for Assessment Cuts* v. *Austin*, 994 F.2d 291, 296-97 (6th Cir. 1993); *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019). Notwithstanding this controlling Sixth Circuit precedent, Defendants remarkably argue that because Ohio's "challenged constitutional and statutory provisions regulate the mechanics of the initiative process, not protected speech or a political candidate's access to the ballot, … the First Amendment does not apply." Defendants' Memorandum in Opposition, R.40, at PAGEID # 537 (emphasis added). Defendants then even more remarkably contradict themselves by arguing that because all of their orders have "carved out First Amendment activities" as exceptions, *id*. at PAGEID # 532, Plaintiffs have always been "free to choose who they reach out to, how they approach individuals, and which locations they choose to target." *Id*.

So which is it? Are Plaintiffs free to go where they want, gather as they wish, and breach physical distancing requirements with immunity because they are protected by the March 22 Order's supposed First Amendment exception, as Defendants assert at PAGEID # 532, or will Plaintiffs be arrested because they are not engaged in First Amendment speech, as Defendants assert at PAGEID # 537? Defendants cannot have it both ways.

Defendants' purported exception, which first appeared in their March 22, 2020 Order, listed among others a separate heading for "First Amendment protected speech." Unlike the other exceptions, however, it failed to list or describe any activities. *See* Director's Stay at Home Order, March 22, 2020 (merely stating "**g. First Amendment protected speech**").[7] The exception is absolutely blank. Defendants, understandably, could not think of anything that could be included. No mention was ever made in any orders or announcements issued before this litigation commenced on April 27, 2020 that circulators were exempt from anything.

Now, Defendants still cannot figure out what this exception means. In one breath they claim that Plaintiffs fall under it because they are exercising their First Amendment rights. In the next breath, Defendants claim Plaintiffs do not have any First Amendment rights anyway. The argument, just like the vapid exception they created, makes no sense.

No one can make any sense of Defendants' argument. It is vague beyond understanding. It requires that citizens "guess and gamble" about how Defendants' exception might be interpreted, what it allows, and where it applies. Ohioans must guess at what is "protected by the First Amendment" means. They must gamble with their lives.

Deciding what is and what is not "First Amendment protected speech" is complicated even for skilled lawyers, as illustrated by this case. Defendants' lawyers here, after all, insist

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

(incorrectly) that signature collection is not protected by the First Amendment. The lay public can hardly be expected to have a better understanding than the government's "top lawyers."

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

Even assuming that Defendants conceded that the First Amendment protects Plaintiffs' signature collection efforts, their argument would still fail because Defendants' First Amendment exception is inherently vague. The Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), summarized the problems with vague laws under the First and Fourteenth Amendments this way:

> First, … [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. … Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'

*Grayned*, 408 U.S. at 108-09 (1972) (citations and footnotes omitted). Defendants' laws and purported exemptions unconstitutionally set a "trap [for] the innocent" who are trying to assert their First Amendment rights. Indeed, the laws have even trapped Defendants into making an irreconcilable contradiction.

Even local law enforcement expressed confusion over Defendants' orders: "Montgomery County Sheriff Rob Streck called the Ohio Department of Health's stay-at-home order 'vague'." Chris Stewart, *Coronavirus: Police will start with warnings under Ohio stay-at-home order*, Dayton Daily News, March 23, 2020.[8] The same goes for the media: "The order is vague as to what constitutes an essential business." Stephanie Haney, *Watch/Here's how to report a business you suspect isn't following Ohio's public health order to close non-essential workplaces*, wkyc.com, March 30, 2020.[9] Plaintiffs understandably did not choose to irresponsibly risk prosecution, as Defendants now insist they should, by flouting the pandemic and Defendants' orders. If there is fault here it is not in Plaintiffs' lawful and responsible conduct, but is in Defendants' unconstitutionally vague exception.

**A. Defendants' Exemption Would Include Much of What is Prohibited.**

If this were not enough, many if not most of the places closed and the activities expressly prohibited throughout March and April of 2020 -- and which continue to be closed and banned to this very day -- involve protected First Amendment activity. Defendants fail to explain how under their exemption these protected places and activities can be banned while others are not. They fail to explain how Ohioans are expected to know the difference, other than to listen to their responsible public officials.

Take door-to-door solicitation, for example. Notwithstanding that commercial speech is protected by the First Amendment, *see*, *e.g.*, *Sorrell v. IMS Health Co*., 564 U.S. 552 (2011), and can be practiced with full protection both in-person at the point of sale, *see*, *e.g.*, *44 Liquormart*,

[8] https://www.daytondailynews.com/news/local/coronavirus-police-will-start-with-warnings-under-ohio-stay-home-order/yvV5iHTowr8FYI7gu7bkEP/.

[9] https://www.wkyc.com/article/entertainment/television/programs/whats-new/heres-how-to-report-a-business-you-suspect-isnt-following-ohios-public-health-order-to-close-non-essential-workplaces/95-fbacb5c1-c6b5-4fdb-b1be-c0fa5b923fe5.

*Inc. v. Rhode Island*, 517 U.S. 484 (1996), as well as door-to-door, *see, e.g., Watchtower Bible & Tract Society v. Stratton*, 536 U.S. 150 (2002), magazine subscription solicitors in Springfield, Ohio were arrested for violating the Governor's orders. *See 6 out-of-state residents arrested in Springfield Township for violating stay-at-home order*, Local12wkrc.com, Apr. 15, 2020.[10]

Everyone in Ohio thought they understood that the Governor's orders banned door to door commercial activities. But how can this be if Defendants' First Amendment exception means what Defendants now claim? The fact is that Defendants' First Amendment exception is so meaningless that it could no more be understood to authorize door-to-door soliciting than it could be understood to allow attending movies, museums, and strip clubs. It could no more be understood as a blank check to collect signatures than it can be understood as an exception to hold parades, festivals, and social events, or even conduct classes in schools. In all of these places and with all of these events, after all, speech is "protected" by the First Amendment. Yet Defendants' orders expressly prohibit citizens from engaging in such activities.

Just to use a few additional examples, consider theatres and music venues. They, too, are engaged in "First Amendment protected" speech. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (Douglas, J., concurring) (1975) ("A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk; the forms of expression adopted in such a forum may be more expensive and more structured than those typically seen in our parks and streets, but they are surely no less entitled to the shelter of the First Amendment."); *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) ("the First Amendment protects communication in this area [adult movie theatres] from total suppression"); W*ard v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

[10] https://local12.com/news/local/6-out-of-state-residents-arrested-in-springfield-township-for-violating-stay-at-home-order.

The same goes for museums and erotic dance studios. *See, e.g.*, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that fine arts and places where they are shown are protected by First Amendment); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Parades, meanwhile, represent the quintessential form of protected First Amendment speech. *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Primary and secondary schools, both private and public, are protected by the First Amendment: "It can hardly be argued," after all, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

Social clubs, too, are protected by the First Amendment. *See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987). Sports stadiums, have also been recognized as protected First Amendment environments. *See, e.g., Stewart v. District of Columbia Armory Board*, 789 F. Supp. 402 (D.D.C. 1992) (holding that "RFK Stadium is a public forum" subject to the protections of the First Amendment). So have book stores. *See, e.g, Executive Arts Studio v. City of Grand Rapids*, 391 F.3d 783, 796 (6th Cir. 2004) (holding that book store is protected by First Amendment). Does this mean that all of the closure orders and bans that are applied to these places and activities by the March 22, 2020 Order, the April 30, 2020 Order and all those in between are meaningless?

Defendants' First Amendment exception either consumes most of Defendants' closures and prohibitions, or it means nothing at all. The latter can be the only logical conclusion. In either event, Defendants could hardly expect Plaintiffs or anyone else to understand the many details and nuances of Constitutional Law. They certainly could not expect them to bet their lives and risk potential prosecution on it.

**B. Purported First Amendment Safe Harbors and Exceptions Violate the First Amendment.**

Courts have routinely rejected boiler-plate exemptions like that inserted by Defendants as some sort of safe harbor to protect First Amendment rights. Rather than protecting First Amendment rights, exceptions like these threaten First Amendment rights by creating traps and causing confusion.

In *Rubin v. City of Santa Monica*, 823 F. Supp. 709 (C.D. Cal. 1993), for example, the Court rejected the very argument that Defendants make here. *Rubin*, 823 F. Supp. at 710, involved a "First Amendment challenge to a recently-enacted City of Santa Monica ordinance … [that] establishe[d] a scheme whereby groups of 35 or more which seek to congregate in city parks must apply beforehand for permits." The ordinance "exempt[ed] so-called 'First Amendment Activities' from the regulations." *Id*. at 712. In rejecting the City's claim that this exemption somehow saved the ordinance, the Court observed that the exemption itself was so vague that it violated the Constitution: it "does not define the concept of 'First Amendment Activities,' nor, indeed, could it define this concept." *Id*. (emphasis added).

The Court noted in *Rubin*, 823 F. Supp. at 712 n.6, that in *Board of Airport Commissioners v. Jews for Jesus, Inc.*,482 U.S. 569, (1987), the Supreme Court had rejected a similar argument in the context of restrictions placed on speech in airport terminals. *Jews for Jesus*, it stated, "suggests the peril in drafting an ordinance which uses the term 'First Amendment Activities' as if the meaning of such a term were self-evident or easily discernible. More precisely, *Jews for Jesus* suggests that such provisions are inherently vague and unenforceable, and hence unconstitutional." 823 F. Supp. at 712 n.6.

*Rubin* makes clear that Ohio's exemption for undefined "First Amendment protected speech" is "inherently vague and unenforceable." 823 F. Supp. at 712 n.6. The exemption, all by

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

The majority explained:

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

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

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

Ohio's prohibition on movement outside the home, requirement of physical distancing, and multiple closures of public places, followed by an exception for "First Amendment activity," sets the precise trap that the Court in *Gentile* ruled States cannot constitutionally spring. As in

*Grayned*, *Mansky*, and *Gentile*, Defendants expect citizens to understand legal terms "hav[ing] no settled usage," *Gentile*, 501 U.S. at 1040, and "pose[s] riddles that even the State's top lawyers struggle to solve." *Mansky*, 138 S. Ct. at 1891. Nobody, including Plaintiffs, could have known before April 30, 2020 that circulators were excepted from Ohio's ban on gatherings. No one could have known that circulators could go door to door, move within six feet of another, hand over a clip board and pen, and stand close enough to witness a signature. Even now, after the adoption of the April 30, 2020, anyone who tries to do this risks criminal prosecution. Signers risk arrest. The simple fact is that Ohio remains closed to in-person signature collection. Under Defendants' argument, no one can know what is lawful and what is not. Collecting signatures in person by hand is physically impossible, dangerous, and legally treacherous.

Courts, moreover, have recognized that it is not only that people risk legal penalties if they try to circulate petitions, they simply cannot do so as a factual matter. In *Garbett v. Herbert*, 2020 WL 2064101 (D. Utah, April 29, 2020), in ruling that a pro-rata reduction was required under the First Amendment to Utah's signature collection requirement, the Court rejected the State's claim that candidates technically could have collected signatures given the advisory nature of the State's orders: "it is difficult to imagine a confluence of events that would make it more difficult for a candidate to collect signatures." *Id*. at * 12. "In short, under these specific circumstances, the character and magnitude of the burden on Garbett's First Amendment rights was severe." *Id*. at *13.

For this same reason, New Jersey's Governor on April 29, 2020 specifically ordered that initiative circulators not go door-to-door to collect signatures; instead that they can and should collect signatures electronically. *See* Jonathan D. Salant, *No knocking on doors. Murphy orders*

*political petition signatures be collected electronically*, NJ.COM, April 29, 2020.[11] The Supreme Judicial Court of Massachusetts, meanwhile, on April 30, 2020 approved an agreement that allows initiative circulators to obtain signatures electronically. *See* Chris Lisinski, *Accord clears way for e-signatures on ballot questions*, 22WWLP.COM, April 30, 2020.[12] Connecticut's Governor on May 11, 2020 issued an executive order reducing signature collection numbers by 30% and allowing circulators to electronically collect signatures. *See* Connecticut Ex. Order No. 7LL, May 11, 2020.[13] Governor Inslee in Washington State ruled that in-person signature collection cannot be required because "[g]athering signatures during the COVID-19 pandemic 'runs contrary to recommended public health practices.'" Jim Camden, *Candidates who are broke will get a break when filing to get names on the ballot*, Spokesman Review, May 6, 2020.[14] Everyone, it seems, except for Defendants in this case, recognizes the impossibility of collecting signatures in person during a pandemic.

## IV. Local Government Offices Were Closed During the Effective Dates of the Defendants' Orders.

Defendants' April 30, 2020 order, like their prior orders, includes "governmental entities (other than federal)" as "covered businesses." April 30, 2020 Order, *supra*. Like most of their State- and Federal-office counterparts, *see, e.g., Ohio BMVs to reopen later in May, date for restaurants expected soon*, 10tv.com, May 4, 2020,[15]; United States District Court for the

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

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

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

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

[15] https://www.10tv.com/article/ohio-bmvs-reopen-later-may-date-restaurants-expected-soon-2020-may.

Southern District of Ohio, General Order, April 3, 2020,[16] (closing this Court), local offices across Ohio understood Defendants' closure orders to apply to them. They accordingly closed. *See*, *e.g.*, City of Maumee, Announcement, March 18, 2020.[17]

Local offices in many of the cities where Plaintiffs seek to file, *see* Stipulation, R. 35, at PAGEID # 469, closed their doors because of the pandemic and Defendants' March 22,2020 order. McArthur, Ohio, *see* Facebook, Village of McArthur, March 23, 2020,[18] New Lexington, Ohio, *see* Village of New Lexington, Ohio: Attention Please,[19] Baltimore, Ohio, *see* The Village of Baltimore: COVID-19/Coronavirus Precautions,[20] Syracuse, Ohio, *see* Sarah Hawley, *COVID-19 related office closures: Village of Syracuse Closures*, The Daily Sentinel, March 16, 2020,[21] Cadiz, Ohio, *see* Welcome to the Village of Cadiz,[22] and Chagrin Falls, Ohio, *see* Village of Chagrin Falls COVID-19 Virus Response – Offices Closed, March 17, 2020,[23] have all been closed in the wake of the Governor's orders.

Plaintiffs were prevented from filing their initiatives in these places and were thereby prevented from collecting signatures. Without those prior filings, after all, signature collection -- even if it had been physically and legally possible -- would be meaningless. Ohio law requires filing proposed initiatives beforehand. *See* O.R.C. § 731.32. Plaintiffs could not because of the pandemic and the closing of these local governmental offices across Ohio.

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[16] https://www.ohsd.uscourts.gov/sites/ohsd/files//General%20Order%2020-08.pdf.

[17] https://www.maumee.org/docs/Building%20Closed%20Until%20Further%20Notice%20Sign.pdf.

[18] https://www.facebook.com/Village-of-McArthur-Ohio-452072178274827/.

[19] http://www.newlexington.org/.

[20] http://baltimoreohio.org/covid-19-coronavirus-precautions/.

[21] https://www.mydailysentinel.com/news/51616/covid-19-related-office-closures.

[22] http://villageofcadiz.com/.

[23] https://chagrin-falls.org/village-of-chagrin-falls-covid-19-virus-response-offices-closed/.

## V. The Sixth Circuit's Decision in *Esshaki* Controls this Case.

Even if Defendants' confused argument that Ohioans could have and should have been knocking on doors for signatures all along – in violation of Defendants' own orders – were accepted, *Esshaki v. Whitmer*, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *aff'd in part*, 2020 WL 2185553 (6th Cir., May 5, 2020), still controls this case. And in *Esshaki*, the Sixth ruled that the combination of the pandemic, restrictions on the public, and requirement of signature collection (which even included, unlike in Ohio, collection by mail, *see Esshaki*, 2020 WL 1910154, *5), violated the First Amendment.

In *Esshaki*, Michigan's Governor had issued two executive orders, Ex. Order 2020-21 (COVID-19) (March 23, 2020),[24] and Ex. Order 2020-43 (COVID-19) (Apr. 8, 2020),[25] that are virtually identical to those issued in Ohio at the same time. *See Esshaki*, 2020 WL 1910154, at * 6. Michigan, like Ohio, "insist[ed] on enforcing the signature-gathering requirements as if its Stay-at-Home Order … had no impact on the rights of candidates and the people who may wish to vote for them." *Id*. at * 1. Michigan also argued precisely what Ohio argues here, that circulators should have braved the crisis and gathered signatures. The District Court rejected the 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 "the framework established in *Anderson* [*v. Celebrezze*, 460 U.S. 780 (1983),] as later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992)," the District Court found a severe

[24] https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.

[25] https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525182--,00.html.

burden and applied strict scrutiny to invalidate the combined effects of the emergency orders, Michigan's in-person signature collection requirements, and the pandemic: "[T]his Court has little trouble concluding that the unprecedented—though understandably necessary— restrictions imposed on daily life by the Stay-at-Home Order, when combined with the ballot access requirements … have created a severe burden on Plaintiff's exercise of his free speech and free association rights under the First Amendment …." *Id*. at *6 (emphasis added).

The Sixth Circuit affirmed the District Court's judgment:

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

2020 WL 2185553, at *1. The Sixth Circuit sustained "the district court's order enjoin[ing] the State from enforcing the ballot-access provisions at issue unless the State provides some reasonable accommodations to aggrieved candidates." *Id*. It was only in terms of remedy that the Sixth Circuit remanded the matter to the District Court: "we are instructing the State to select its own adjustments so as to reduce the burden on ballot access, narrow the restrictions to align with its interest, and thereby render the application of the ballot access provisions constitutional under the circumstances." *Id*. at *2.

The Sixth Circuit also advised the State that the simplest way to proceed was for it to implement what the District Court had ordered, *id*., which is exactly what happened in the end. On Friday, May 8, 2020, Michigan agreed to reduce its signature collection requirement by 50%, which is what the District Court had previously required. *See* Richard Winger, *Michigan*

*Secretary of State Now Agrees to 50% Cut in Number of Primary Petition Signatures*, Ballot Access News, May 8, 2020.[26]

As in *Esshaki*, *Anderson*/*Burdick* plainly applies here. The Sixth Circuit, after all, made clear in *Schmitt v. Husted*, 933 F.3d 628 (6th Cir. 2019), that *Anderson*/*Burdick* and the First Amendment govern the whole of the initiative process. Initiatives are no different from candidates in this regard. And as in *Esshaki*, 2020 WL 2185553, at *1, "the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access." *Esshaki* controls here. Its conclusions need not be reinvented and cannot be distinguished. Ohio's laws and orders severely burden Plaintiffs' First Amendment rights here just as Michigan's did in *Esshaki*. Ohio must accordingly fashion acceptable relief, just as Michigan was forced to fashion acceptable relief. Ohio's in-person signature requirements must be enjoined during the pandemic just as they were in *Esshaki*.

Defendants' claim that Plaintiffs' burden is not severe contradicts the Sixth Circuit's conclusion in *Esshaki*. Defendants contest none of the factual allegations in the Verified Complaint. They have stipulated that Plaintiffs "routinely and regularly circulate" their decriminalization initiatives in cities in Ohio, *see* Stipulation, R 35, at PAGEID # 469, have filed at least four in different Ohio cities in order to begin collecting signatures, *id*., and seek to file the same initiatives in at least half a dozen more cities in Ohio, all in time for the November 3, 2020 election. *Id*. Plaintiffs are accordingly severely burdened in precisely the same way that the plaintiffs in *Esshaki* were. No additional proof or argument is necessary.

Defendants' argument that the number of signatures needed for local initiatives is trivial and easily satisfied is simply wrong. True, in smaller villages there are fewer signatures needed,

[26] https://ballot-access.org/2020/05/08/michigan-secretary-of-state-now-agrees-to-50-cut-in-number-of-primary-petitions/.

but there are also fewer people to ask and fewer who might be willing to sign in the midst of a pandemic. It is just as impossible, moreover, in these small villages to go door-to-door as it is anywhere else. Further, Plaintiffs do not limit their activities to small villages. Akron is one of the cities Plaintiffs seek ballot access in, *see* Stipulation, R.35, at PAGEID # 469, and it has almost 200,000 residents. *See* U.S. Census: Quick Facts: City of Akron, Ohio.[27] Ten percent of Akron's vote in the last gubernatorial election translates to thousands of required voters' signatures -- all of which must be collected by July 16, 2020. This kind of effort is hardly trivial, especially given Defendants' orders and the pandemic.

## CONCLUSION

Ohio's ballot access laws and Defendants' orders, when coupled with the pandemic, fail under the First Amendment, Equal Protection and Due Process. As argued in Plaintiffs' Motion for emergency relief (and not challenged in Defendants' Response), Ohio's newly proposed "guess and gamble" process unconstitutionally moves the goalpost in the middle of the game in violation of Due Process. *See Libertarian Party of Ohio v. Husted*, 2014 WL 11515569 (S.D. Ohio 2014). It also creates differing rules for the same election in violation of Equal Protection. *See Obama for America v. Husted*, 888 F. Supp.2d 897, 905-06 (S.D. Ohio 2012) (citing *Bush v. Gore*, 531 U.S. 98 (2000)). Ohio's ballot access laws under the facts presented here also plainly violate the First Amendment. The only question is one of remedy. As in *Esshaki*, Defendants should be instructed to timely confer with Plaintiffs in an effort to construct a workable, constitutional solution, the results of which should be immediately reported to the Court for review.

[27] https://www.census.gov/quickfacts/akroncityohio.

Respectfully submitted,

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