

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

<b>Chad Thompson, et al.,</b>	:
	: CASE NO. 2:20-cv-2129
Plaintiffs,	: JUDGE EDMUND SARGUS, JR
	: Magistrate Judge Chelsea M. Vascura
v.	:
	:
<b>Mike DeWine, et al.,</b>	:
	:
Defendants.	:

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**OFRW INTERVENORS' REPLY BRIEF IN SUPPORT OF MOTION FOR A  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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## INTRODUCTION

The State's two principal arguments in opposition to the requested relief are that: (1) the Health Director's orders have an exemption for First Amendment activity and therefore petitioners are not being stopped from circulating, which is a position detached from functional reality, and (2) citizens seeking ballot access for proposed legislation are entitled to less First Amendment protection than citizens seeking ballot access for candidates, which is both illogical and not supported by case law. The reality is that the State's insistence upon strictly enforcing its ballot access requirements for initiative petitions in combination with the COVID-19 pandemic and the State's response to it have foreclosed the ability of Intervenor-Plaintiffs Ohioans for Raising the Wage ("OFRW Intervenors") to exercise their right to put forward their proposed amendment to the Ohio Constitution at the November 3, 2020 general election.

## ARGUMENTS IN RESPONSE

### **I. OFRW Intervenors have demonstrated a strong likelihood of success on the merits.**

OFRW Intervenors have demonstrated that, under the *Anderson-Burdick* framework, the State's insistence on strictly enforcing the ballot access requirements severely burdens OFRW Intervenors' First Amendment rights and is not narrowly tailored to the present circumstances of the COVID-19 pandemic. In response, Defendants confuse the *Anderson-Burdick* analysis with irrelevant points, ask the Court to ignore relevant case law, and ignore the unrebutted evidence.

#### **A. The Sixth Circuit's May 5, 2020 decision in *Esshaki v. Whitmer* confirms that OFRW Intervenors have a strong likelihood of success on the merits.**

The merits of OFRW Intervenors' arguments have been effectively confirmed by the Sixth Circuit's recent decision in *Esshaki v. Whitmer*, No. 20-1336, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020). In *Esshaski*, the Sixth Circuit affirmed the district court's determination that, under *Anderson-Burdick*, the combination of the State's strict enforcement of its ballot-access

provisions for candidates and its COVID-19-related orders imposed a severe burden on candidates' ballot access, resulting in strict scrutiny applying, and that even if the State's interest in ensuring that each candidate has a reasonable amount of support is compelling, the provisions were not narrowly tailored to the present circumstances of the COVID-19 pandemic. *Id* at \*3. As a result, the Sixth Circuit affirmed the district court's holding that the State's strict application of the ballot access provisions is unconstitutional and declined to stay the portion of the district court's injunction prohibiting the State from enforcing its ballot access requirements unless the State provided some reasonable accommodations to aggrieved candidates. *Id.* at \*3-4. The Sixth Circuit, however, stayed the aspect of the district court's decision that reduced the number of signatures needed and required the state to accept electronic signatures, and instead ordered the State to develop an accommodation for candidates. *Id* at \*4-6. The State subsequently adopted the extended filing deadline and reduced signature requirement that the district court had initially ordered.<sup>1</sup>

OFRW Intervenors' argument is virtually identical to argument made by the candidates seeking ballot access in *Esshaki*. OFRW Intervenors contend that the State's insistence on strictly enforcing its ballot access requirements for initiative petitions in light of the COVID-19 pandemic and the State's response to it results in strict scrutiny applying to Ohio's ballot access requirements. *See* OFRW Intervenors' Memo, Doc. #17-2, PageID # 254-256.

Defendants attempt to distinguish *Esshaki* but fail. Defendants first argue that *Esshaki* is inapposite by contending that ballot access for candidates is worthy of greater protection under the First Amendment than ballot access for initiative proponents. Def. Response, Doc. #40 at PageID # 532. But as explained in Section I.B.1. of this Reply's Arguments in Response, *infra*, the

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<sup>1</sup> *See* Craig Mauger, *Michigan lowers signature threshold for making ballot to 50%*, The Detroit News, May 8, 2020 available at <https://www.detroitnews.com/story/news/politics/2020/05/08/michigan-lowers-signature-threshold-make-ballot-50-percent-5-pm-friday/3095038001/>.

Constitution makes no such distinction, and the First Amendment protects the ballot access rights of candidates and ballot initiative proponents alike. In short, this argument amounts to making a distinction without a difference.

Defendants next argue that *Esshaki* is distinguishable from the present case because Michigan's stay-at-home order purportedly does not contain an exception for First Amendment activities like the one in Ohio's stay-at-home order. Def. Response, Doc. #40 at PageID # 23, 28. But this assertion is factually wrong. The State of Michigan has repeatedly told citizens that First Amendment activities *are* excepted from its stay-at-home orders, explaining that “[p]ersons may engage in expressive activities protected by the First Amendment within the State of Michigan,” and that such persons “must adhere to social distancing measures . . . including remaining at least six feet from people outside the person’s household.”<sup>2</sup> Moreover, even if it was the case that Michigan's stay-at-home order contained no exceptions for First Amendment activities, then as explained in in Section I.B.3. of this Reply's Arguments in Response, this would not change the fact that with or without a First Amendment exception in the stay-at-home orders, petitioning activity simply cannot take place amidst the present health pandemic.

Defendants cannot distinguish *Esshaki* from the instant action, and the Court should, therefore, find that under the *Anderson-Burdick* framework the State's insistence on strictly enforcing the ballot access requirements severely burdens OFRW Intervenors' First Amendment rights and is not narrowly tailored to the present circumstances of the COVID-19 pandemic.

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<sup>2</sup> State of Michigan, *Executive Order 2020-21 FAQs*, available at [https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-522631--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-522631--,00.html); State of Michigan, *Executive Order 2020-42 FAQs*, available at [https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-525278--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html); State of Michigan, *Executive Order 2020-59 FAQs*, available at [https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-527027--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-527027--,00.html); State of Michigan, *Executive Order 2020-70 FAQs*, available at [https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-528027--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-528027--,00.html); State of Michigan, *Executive Order 2020-77 FAQs*, available at [https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98455-528528--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-528528--,00.html).

**B. Defendants’ strict enforcement of Ohio’s ballot access requirements in light of the COVID-19 pandemic severely burdens OFRW Intervenors’ First Amendment rights.**

Defendants provide several reasons why the burden on OFRW Intervenors is “slight.” But none is convincing, especially in light of the Sixth Circuit’s decision in *Esshaki*.

**1. This action is about the First Amendment rights of OFRW Intervenors to associate for the advancement of their political beliefs.**

Much of Defendants’ argument is that OFRW Intervenors do not have any fundamental rights that are burdened by the pandemic and the State’s response to it. But this argument ignores the plethora of federal case law recognizing and protecting citizens’ First Amendment rights to associate together for the advancement of their political beliefs through initiative petitions.

It is well-settled that circulating an initiative petition involves political expression and “interactive communications concerning political change,” and, therefore, constitutes “core political speech” for which First Amendment protection is “at its zenith.” *Meyer v. Grant*, 486 U.S. 414, 422 (1988). The State even appeared to acknowledge this when it amended its stay-at-home order on April 30 to, for the first time, specifically include “petition or referendum circulators” in its definition of “First Amendment protected speech” (Sec. 4). Moreover, when it comes to ballot access, the rights at issue include the right of individuals to associate together for the advancement of political beliefs and the rights of qualified voters to cast their votes effectively. *Esshaki v. Whitmer*, Case No. 2:20-cv-10831-TGB, 2020 U.S. Dist. LEXIS 68254, \*10 (E.D. Mich. Apr. 20, 2020). And although a state is not required to extend the right to petition for state constitutional amendments, once that right has been established, the state “may not place restrictions on the exercise of the initiative that unduly burden First Amendment rights.” *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993).

For more than 100 years, Ohio has had a process for petitioners proposing a constitutional amendment to seek ballot access at any general election by filing a qualifying a petition with the Secretary of State by the 125<sup>th</sup> day before the election. *See* OFRW Intervenors’ Memo, Doc. # 17-2, PageID # 247-249. Thus, having created this right, the State cannot place restrictions on it that unduly burden petitioners’ First Amendment rights.

Still, Defendants argue that initiative petitioners “do not have a right to have their issues placed on the ballot” (Def. Response, Doc. #40 at PageID # 543) and that OFRW Intervenors can simply wait for a subsequent election. But the same is also true of candidates—there is no federal constitutional right to run for office at a particular election. *See Esshaki* (district court), Case No. 2:20-cv-10831-TGB at \*10 (“there is no fundamental right to run for elective office”). Here, the state has created rights for individuals proposing a constitutional amendment to seek ballot access at each general election and rights for candidates to seek ballot access each year that an office is up for election. Regardless of the year, the requirements for ballot access are subject to a First Amendment analysis, and the First Amendment protections do not get pushed to a later time in the future. This is why, despite the lack of a federal right to run for office at a particular election, courts, including this Court and the Sixth Circuit, have regularly intervened when states’ ballot access requirements are unduly burdensome.

Defendants attempt to distinguish *Esshaki* and the numerous other recent court decisions easing ballot access requirements in light of the COVID-19 pandemic by contending that ballot access for candidates is worthy of greater protection under the First Amendment than the right of people to circulate and sign petitions. Def. Response, Doc. #40 at PageID # 538-540. But the Constitution makes no such distinction, and no court applying the *Anderson-Burdick* test has ever held that initiative proponents are less deserving of First Amendment protections than candidates.

Indeed, the Supreme Court has even recognized the similarities between the two, stating that “[i]nitiative-petition circulators also resemble candidate-petition signature gathers” as “both seek ballot access.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999). Defendants failed to cite any case law stating otherwise.

**2. State action has burdened OFRW Intervenors’ First Amendment rights.**

Defendants spend several pages arguing that there was no state action that burdened OFRW Intervenors’ First Amendment rights. *See* Def. Response, Doc. #40, at PageID # 532-536, 542-543. But this argument is easily debunked. Just as in *Esshaki*, the issue here is that the combination of the State’s strict enforcement of its ballot access requirements with the COVID-19 pandemic and the State’s response to the pandemic has foreclosed OFRW Intervenors’ ability to collect signatures. *See Esshaki* (6th Cir.), No. 20-1336 at \*3 (“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.”). Thus, the State action causing the burden is twofold: (1) the State’s strict enforcement of its ballot access requirements even in light of the pandemic, and (2) the State’s response to the COVID-19 pandemic, which, among other actions, has included prohibiting gatherings of 10 or more people for nearly two months, and continuing in force, as well as mandating that people stay at least six feet from each other.

**3. The ambiguous First Amendment exceptions in the stay-at-home orders do nothing to alleviate the severe burdens imposed by the pandemic.**

Defendants also contend that OFRW Intervenors are not severely burdened because Ohio’s stay-at-home orders contain exceptions for First Amendment activities that have purportedly allowed Ohioans to circulate petitions throughout the pandemic. *See* Def. Response, Doc. #40, at PageID # 524, 529, 532. But this is a dubious argument for at least four reasons.

First, and as previously discussed, Michigan’s stay-at-home orders at issue in *Esshaki* similarly did not prohibit First Amendment activities. Yet, despite the exception for First Amendment activities, the Sixth Circuit still affirmed the district court’s findings that the State’s stay-at-home orders, in combination with the State’s strict enforcement of its ballot access requirements, severely burdened the candidates’ First Amendment rights.

Second, although the stay-at-home orders contain limited exceptions for First Amendment activities, the orders still require persons engaging in First Amendment activities to adhere to the social distancing requirements, including maintaining six feet of distance from other persons while in public spaces.<sup>3</sup> Given the mechanics of petition circulation—a circulator must physically hand the same petition document and a pen to dozens of people while also keeping a close enough distance to witness the signature—it is, as a practical matter, impossible to circulate a petition while adhering to the State’s mandatory social distancing requirements. *See* Gallaway Dec. ¶ 23, Doc. # 17-2 PageID # 277 (“The social distancing recommendations additionally diminish petition circulator’s ability to interact with residents at their homes or in public places as most potential signers will be apprehensive to engage in close-proximity conversations and to handle items which the petition circulator has touched, including the petition itself”).

Third, although Defendants contend that the April 30, 2020 Order allows people to circulate a petition—an exception that was not added until *after* Plaintiffs filed this lawsuit—the Order is internally inconsistent with respect to the exception. Section 3 of the Order provides that people can leave their homes only for expressly *authorized* purposes: “All persons may leave their homes or place of residence only to participate in activities, businesses or operations as permitted

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<sup>3</sup> The March 22 Stay-at-Home Order includes “First amendment protected speech” in its definition of “Essential Businesses and Operations,” (Sec. 12g), but it also provides that all Essential Businesses and Operations (including First amendment protected speech activities) “shall” comply with the social distancing requirements defined in the order, including maintaining six-foot social distancing “at all times.” (Sec 2).



in this Order.” Section 4 then expressly *prohibits* certain activities, including prohibiting “[a]ll public and private gatherings of any number of people . . . except for the limited purposes excepted by this Order” and prohibiting “[a]ny gathering of more than ten people . . . unless exempted by this Order.” Section 4 goes on to provide that “this section”—but not the entire Order—which prohibits and limits gatherings of people “does not apply to First Amendment protected speech, including petition or referendum circulators. . .” This leave the Order internally inconsistent by prohibiting people from leaving their homes under threat of criminal prosecution, except to participate in activities expressly permitted by the Order, but nowhere expressly permits people to leave their homes to sign or circulate a petition.

Fourth, the exceptions for First Amendment activities do not actually alleviate the burdens imposed by the State’s strict enforcement of the ballot access requirements in light of the ongoing pandemic. The reality is that the pandemic has foreclosed OFRW Intervenors’ ability to collect signatures. In addition to the fact that people have to get within six feet of each other to sign or circulate a petition, *supra*, the pandemic and the stay-at-home orders have resulted in the cancellation of virtually every community event in the state planned prior to the July 1 filing deadline. Petitioners rely upon venues that attract a large number of individuals in order to engage with a high volume of potential petition signers; these include sporting events, parades, fairs, festivals, concerts, libraries, busy government offices such as courthouses, crowded urban areas outside malls, restaurants, and bars, and other large social and recreational functions.<sup>4</sup> *See* Gallaway Dec. ¶ 7, Doc. # 17-2, PageID # 274. The closure of all these venues “severely limit[s] any Ohio petitioners’ ability to collect the large volume of signatures needed to place an issue on the ballot for the 2020 General Election.” *Id.* at ¶ 21, PageID # 277.

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<sup>4</sup> Going door-to-door to collect signatures is too inefficient to collect the large number of signatures needed for a statewide petition. *See* Gallaway Dec. ¶ 8, Doc. # 17-2, PageID # 275.

This is not mere speculation either. OFRW Intervenors had a well-organized and well-funded campaign in place prior to the pandemic, and they observed first-hand the “diminishing returns” as the pandemic worsened and events were cancelled. Prior the pandemic, OFRW Intervenors had printed 65,000 copies of the Petition, entered into a contract with FieldWorks, LLC, a nationally recognized petition circulation firm that has significant experience with statewide petitions in Ohio, to hire circulators to collect the signatures, and established quality control processes and a volunteer collection effort to supplement the paid circulator program. *See Devore Leonard Dec. ¶ 5, Doc. # 30-1, PageID # 433.* In total, and to date, OFRW has raised and spent over \$1.5 million for expenses related to placing the proposal on the ballot, and another \$150,000 has been spent by other organizations supporting the effort. *Id* at ¶ 3.

For their part, FieldWorks hit the ground running. Pursuant to their contract, and prior to suspending operations due to the COVID-19 pandemic, FieldWorks recruited, vetted, hired, and trained 1,087 professional petition circulators, and employed 3 quality control managers, 35 quality control office staff, and 15 field office directors and deputy directors at six regional field offices throughout Ohio. *Gallaway Dec. ¶ 28-29, Doc. #17-2, PageID # 278.* They began circulating the petition on February 28, 2020, and in the approximately two weeks they circulated before having to shut down operations, they had collected approximately 73,968 signatures on the petition, which is an average of about 5,689 signatures per day. *Id* at ¶ 30.

Prior to suspending operations due to the pandemic and the State’s orders, FieldWorks had additional plans in place to expand their daily collection efforts. For instance, FieldWorks had planned to hire approximately 3,000 more circulators. *Id* at ¶ 28. They had also planned to make a big push outside polling locations on the day of the March 17, 2020 presidential primary election; FieldWorks planned to have 788 shifts of petition circulators collecting signatures on this day, and

they estimated that they would have been able to collect approximately 47,280 signatures on this day alone. *Id.* at ¶ 26. But on March 16, the State closed all the polling locations, thereby cancelling FieldWorks’ plans. *Id.* at ¶ 25.

Based on FieldWorks’ experience qualifying initiatives around the country and especially in Ohio, OFRW Intervenors were, prior to the pandemic, on track to collect a sufficient number of signatures to submit their proposal to the Secretary of State by the July 1 filing deadline to qualify for the November 3, 2020 general election ballot. *Id.* at ¶ 36; *see also* Devore Leonard Dec. ¶ 4, Doc. # 30-1, PageID # 433 (“OFRW also obtained funds and commitments for funds to be able to complete the task before the July 1, 2020 filing deadline”). And although OFRW Intervenors still attempted to circulate their petition during the first few days after the initial orders limiting large gatherings, they experienced “diminishing returns” attributable to the pandemic and the State’s orders. *Id.* at ¶ 34-35, PageID # 279. Thus, with or without the State’s limited and ambiguous First Amendment exception, the circulation of a petition is still foreclosed.

**4. Defendants’ contention that Ohio is in the process of “reopening” ignores the facts that Ohio was “closed” for two months, continues to be closed in every way that matters to the exercise of petitioners’ rights, and that irrespective of the State’s order, the pandemic is still ongoing.**

Defendants also make much of Ohio being “in the process of reopening its doors.” *See* Def. Response, Doc. #40, at PageID # 543-544. But this argument ignores the fact that Ohio has been “closed” by State-order for the past two months, continues to be closed in every way that matters to the exercise of petitioners’ rights, and that irrespective of the State’s Order, the pandemic is still ongoing. As set forth above, OFRW Intervenors have been unable to collect signatures for approximately two months due to a combination of the pandemic and the State’s response to it. And even if some businesses are now reopening, the April 30 Order “reopening businesses” still mandates social distancing requirements (Sec. 2, 16), requires Ohioans to stay in their homes

except for limited purposes (Sec. 3), prohibits virtually all public and private gatherings of any number of people (Sec. 4), strictly limits the number of people who can go inside businesses (Sec. 12), and restricts travel (Sec. 15), all while continuing to make violations of the order punishable by criminal offense (Sec. 18). Moreover, these reopening provisions only address businesses on private property. Circulators cannot trespass to collect signatures, and these orders are silent regarding public property. As a result, the types of large gatherings that are essential to a statewide petition effort are not coming back anytime soon, and Ohioans will continue to be apprehensive to approach a circulator and sign a petition. Indeed, the State has spent the past two months warning people, rightfully so, that it is unsafe to go outside or have person-to-person contact, and that position, which the public has embraced, remains the State's position even today.<sup>5</sup> Thus, the fact that some Ohio businesses are now reopening does little to alleviate the burdens upon OFRW Intervenors' First Amendment rights.

For these reasons, the State's strict enforcement of Ohio's ballot access requirements in combination with the COVID-19 pandemic and the State's response to it have created a severe burden on OFRW Intervenors' exercise of their free speech and association rights under the First Amendment, and a strict scrutiny analysis is appropriate here.

**C. Defendants' interests in strictly enforcing Ohio's ballot access requirements are not narrowly drawn to the present circumstances of the COVID-19 pandemic.**

Because the State's ballot access requirements, operating in conjunction with the COVID-19 pandemic and the State's response to it, have imposed a severe burden on OFRW Intervenors' rights, such requirements can be constitutionally justified only if they are narrowly drawn "to the present circumstances." *Esshaki* (6th Cir.), No. 20-1336 at 3. Here, Defendants utterly failed to

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<sup>5</sup> See Dan Balz and Scott Clement, *Americans' expectations for safe public gatherings slip to July at the earliest, Post-U. Md. poll finds*, Washington Post, May 13, 2020, available at <https://wapo.st/2Z4QTV8> (finding that about 2/3 of Americans do not believe that it will be safe for gatherings of 10 or more people to occur until July or later)

argue that any of its ballot access requirements are narrowly drawn to advance the State’s interests in light of the current pandemic.

**1. The State’s numerical and geographical signature requirements are not narrowly drawn to the present circumstances.**

OFRW Intervenor challenge the State’s strict enforcement of its numerical and geographical signature requirements. *See* OFRW Intervenor’s Memo, Doc. #17-2, PageID # 256-257. In response, Defendants assert—as OFRW Intervenor also did in their Memo in Support (*see id*)—that the State has an interest in ensuring that ballot initiatives have a modicum of support before placing them on the ballot. Def. Response, Doc. #40, at PageID # 544-545. Indeed, the Supreme Court has recognized, in the context of candidates, that this interest helps avoid voter confusion, ballot overcrowding, and frivolous candidacies. *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 577 (6th Cir. 2016) (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). But that does not end the analysis. The requirements must still be “narrowly drawn” to advance the compelling interest. And, here, Defendants failed to make any argument whatsoever that its ballot access requirements are “narrowly drawn” to the present circumstances. Therefore, they have conceded the point.

Even if Defendants had attempted to argue that its requirements are narrowly drawn, they would have found their argument rejected by *Esshaki*. In *Esshaki*, the district court noted that although states generally have a compelling interest in ensuring that candidates have a modicum of support before allowing inclusion on the ballot, the pandemic and the State’s response to it effectively reduced the available time prescribed by Michigan law to gather the required number of signatures. *Esshaki* (district court), Case No. 2:20-cv-10831-TGB at \*22-23. The district court then explained that in light of the reduced amount of time, “a state action narrowly tailored to accomplish the same compelling state interest would correspondingly reduce the signature

requirement to account for the lost [time].” *Id* at \*23-24 (emphasis added). But because the State still insisted on strictly enforcing the specific numerical requirements in Michigan law despite the pandemic, the district court found that the State’s strict enforcement of the ballot access requirements failed to pass a strict scrutiny analysis. *Id*.

Just like the State of Michigan in *Esshaki*, the State, here, insists upon strictly enforcing the State’s ballot access requirements despite the pandemic conditions and the upcoming election. But Defendants ignore the fact that Ohio’s ballot access requirements for statewide initiatives were written to allow petitioners up until July 1, 2020 to collect the requisite number of signatures to demonstrate that they have the required modicum of support for inclusion on the November 3, 2020 general election ballot. Defendants also ignore the reality that the COVID-19 pandemic and the State’s response to it have halted signature-gathering by traditional means, thereby reducing the available time to gather the requisite number of signatures. Thus, per *Esshaki*, a state action narrowly tailored to accomplish the compelling state of interest in ensuring that ballot initiatives have a modicum of support would correspondingly reduce the signature requirements to account for the lost time. But the State has not reduced its signature requirements. As a result, the requirements fail to pass a strict scrutiny analysis.

**2. The State’s July 1 filing deadline is not narrowly drawn to the present circumstances.**

OFRW Intervenors also challenge the State’s strict enforcement of its July 1 filing deadline in light of the current pandemic. *See* OFRW Intervenors’ Memo, Doc. #17-2, PageID # 257-258. In response, Defendants asserted that the State has *some* interest in providing sufficient time to verify signatures. But Defendants again made no argument whatsoever explaining how their insistence upon strictly enforcing the filing deadline is narrowly tailored to advance the State’s interest in light of the COVID-19 pandemic. *See id* (explaining that strict enforcement of the

deadline in the name of verifying petitions would guarantee that no petitions are filed). Accordingly, Defendants have conceded the point.

**3. The State’s requirements for signatures to be written in ink and personally witnessed by a circulator are not narrowly drawn to the present circumstances.**

OFRW Intervenors also challenge the State’s requirements for signatures to be written in ink and personally witnessed by a circulator in the context of arguing that allowing electronic signatures would provide a more narrowly tailored solution that allows for petition circulation during the pandemic. As set forth more fully in OFRW Intervenors’ Memo in Support, allow electronic signatures (1) would be less time-consuming for the State to verify, (2) would not require staff to make judgment calls about the validity of signatures, (3) would result in far fewer valid signatures being improperly invalidated, and (4) would provide a better protection against fraud. *See* OFRW Intervenors’ Memo, Doc. #17-2, PageID # 258-260. Further, allowing electronic signatures would protect the public health in light of the pandemic. In defense of these requirements, Defendants argue that the State has a substantial interest in “ensuring that submitted signatures are authentic.” Def. Response, Doc. #40, at PageID # 545-546. But once again, however, Defendants entirely failed to explain how these particular requirements—each of which are merely ancillary to enforcing the State’s numerical signature requirement—are narrowly drawn to advance the State’s interests in light of the COVID-19 pandemic. Accordingly, Defendants have conceded the point.

Defendants also baldly contend that OFRW Intervenors have not explained how an electronic signature process would work. But this assertion ignores the detailed proposal that OFRW Intervenors included in their evidence. *See* Devore Leonard Dec. ¶¶ 7-8 and attachment, Doc. # 30-1, PageID # 434-443. Briefly, the process would work by establishing a dedicated website for online signature collection. The landing page would ask for support to place the issue

on the ballot and allow viewers to read the summary and full text of the amendment. To sign, it would require Ohio registered voters to enter the usual required information (name and address), as well as the last four digits of their social security number to provide an additional method to verify the identity of the voter. It will then allow a voter to type in a cursive-version of their signature onto the petition. This would also maintain the “circulator” requirement by having the administrators of the website serve as the circulators, who, in turn would monitor for duplicate names and any suspicious activity. Paper copies of all this information can be printed and filed with the Secretary of State. *See id.*

For all these reasons—and the reasons set forth in OFRW Intervenor’s memo in support—Defendants have failed to explain how the State’s insistence upon strictly enforcing its ballot access requirements is narrowly drawn to advance the State’s interests in light of the COVID-19 pandemic. Accordingly, the requirements fail to pass a strict scrutiny analysis, and OFRW Intervenor has established a strong likelihood of prevailing on the merits of their claim.

## **II. OFRW Intervenor has demonstrated that they will suffer irreparable injury.**

Defendants assert that OFRW Intervenor will not suffer irreparable injury if a TRO or preliminary injunction is not issued. But Defendants, again, ignore the reality of the situation.

### **A. OFRW Intervenor’s loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury.**

First and foremost, Defendants’ argument that OFRW Intervenor will not suffer irreparable injury ignores that it is “well-settled that loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” *Ohioans Against Corporate Bailouts, LLC v. LaRose*, 414 F.Supp.3d 1048, 1061 (S.D. Ohio 2019) (citation omitted). Thus, even if Ohio is *now* “reopening”—an argument that ignores the fact that COVID-19 still presents an enormous risk to Ohioans and that virtually all community events have been



and remain cancelled—the fact is that Ohio was closed for two months, thereby reducing the amount of time OFRW Intervenors had to circulate their petition prior to the July 1 filing deadline.

**B. It is not speculative that OFRW Intervenors were well-positioned to qualify their proposal for placement on the upcoming general election ballot prior to the pandemic.**

Defendants argue that it is “speculative” that OFRW Intervenors would have qualified their proposed amendment for placement upon the ballot had the COVID-19 pandemic not occurred, and that OFRW Intervenors have not actually been injured. Def. Response, Doc. #40 at PageID # 549. But this argument ignores the unrebutted evidence that OFRW Intervenors had a well-organized and well-funded petition circulation effort in place prior to the outbreak that managed to collect nearly 74,000 signatures in just two wintry weeks. *See* Section I.B.3. of this Reply’s Arguments in Response, *supra*. Thus, it is not “speculative” that OFRW Intervenors would have qualified their proposal for placement on the ballot.

**C. If excluded from the upcoming general election ballot, OFRW Intervenors would have to completely start over to qualify their proposal for a subsequent election.**

Defendants also argue that OFRW Intervenors will not suffer irreparable injury if excluded from the November 3, 2020 general election ballot because they can submit their proposal at a subsequent election. Def. Response, Doc. #40, PageID # 547-550. But this ignores the primary injury OFRW Intervenors are asserting—namely, not being able to attempt to qualify their proposal for placement on the November 3, 2020 general election ballot. OFRW Intervenors’ proposal was specifically written to be submitted to the voters at the November 3, 2020 general election; its initial increase in the state minimum wage would take effect on January 1, 2021. *See* Devore Leonard Dec. ¶ 1, 6, Doc. # 30-1, PageID # 433-434. As a result, if the proposal is submitted and adopted at any election other than the November 3, 2020 general election, the timeline set forth in the amendment will become unworkable. Thus, if OFRW Intervenors are

excluded from the November 3, 2020 general election ballot, then they will have to completely start over with a new amendment and all their work, to date, would be “for naught.” *Id.*

**D. OFRW Intervenors’ monetary damages constitute irreparable injury because the expenditures cannot be recouped.**

Defendants also argue that the more than \$1.5 million spent by OFRW Intervenors 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 not constitute irreparable injury. Def. Response, Doc. #40, PageID # 549.<sup>6</sup> Although, ordinarily, the payment of money is not considered irreparable, this is “because money can usually be recovered from the person to whom it is paid.” *Philip Morris USA, Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). But “[i]f expenditures cannot be recouped, the resulting loss may be irreparable.” *Id.* (citing *Mori v. Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers)). Here, OFRW Intervenors’ money spent cannot be recouped from the Defendants for at least two reasons. First, the money spent was not given to the Defendants, so this case is not as simple as the Defendants returning OFRW Intervenors’ money to them. Second, and most importantly, OFRW Intervenors are precluded from recovering monetary damages from the Defendants by sovereign immunity, which bars claims against the State for retrospective monetary damages.<sup>7</sup> Given these circumstances, OFRW Intervenors’ \$1.5

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<sup>6</sup> In support of their argument that monetary damages, and in support of other arguments in their brief, Defendants cite to a lawsuit brought by OFRW Intervenors in the Franklin County, Ohio Common Pleas Court, *Ohioans for Raising the Wage, et al. v. LaRose*, Case No. 20CV002381. However, Defendants failed to tell the Court that OFRW Intervenors’ claims in this state court action were based entirely upon state law. OFRW Intervenors did not have any federal law claims in their state court action, and as a result, the state court’s findings that Defendants rely upon have little-to-no bearing on OFRW Intervenors’ claim in this action which is based entirely upon federal law. Rightly or wrongly, the Common Pleas Court Judge in that case concluded that he did not have the authority under state law to grant relief that altered requirements in the state constitution.

<sup>7</sup> Federal courts have widely held that the inability to recover monetary damages because of sovereign immunity can constitute irreparable injury. *See, e.g., Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (“The threat of unrecoverable economic loss . . . qualif[ies] as irreparable harm.”); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) (“Imposition of monetary damages that cannot later be recovered for reasons such as

million in expenditures cannot be recouped, and, therefore, the loss of these funds constitutes irreparable injury.

For all these reasons, OFRW Intervenor will suffer irreparable injury if the Court does not issue a TRO or preliminary injunction.

### **III. The remaining factors weigh in favor of issuing a TRO and preliminary injunction.**

Defendants make little effort to respond to OFRW Intervenor's arguments concerning the remaining factors of the analysis. Indeed, rather than acknowledge that the COVID-19 pandemic and the State's response to it have foreclosed OFRW Intervenor's ability to exercise their First Amendment rights, and rather than offer any compromise or relief to accommodate petitioners during the pandemic, Defendants cover their eyes and insist that no injury has occurred.

The one argument made by Defendants that is relevant to this prong is their assertion that the State will be deprived of the full and proper enforcement of its election laws. *See* Def. Response, Doc. #40, PageID # 554. Once again, however, *Esshaki* dispenses with Defendants' argument. The district court in *Esshaki* acknowledged that a State does indeed have an interest in seeing its laws effectuated. *Esshaki* (district court), Case No. 2:20-cv-10831-TGB at \*25-26. But the district court found that this harm to the State was outweighed by the deprivation of the plaintiffs' constitutional rights, and other public harms, that enforcement of the State's ballot access requirements would cause. *Id.* at \*26-27. In weighing the competing harms, the district court in *Esshaki* focused on three points that favored enjoining the State's ballot access requirements. First, the court noted that, in the absence of an injunction, the plaintiff and other candidates would be left with "no choice" but to violate the stay-at-home order putting their health

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sovereign immunity constitutes irreparable injury."); *Odebrecht Constr. v. Sec'y Fla. DOT*, 715 F.3d 1268 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable").

and their supporters' health at risk, as well as risking criminal penalties. *Id.* at \*28. Second, the court acknowledged that the State correctly pointed out that voters do not have an absolute right to vote for a candidate of their choice, but noted that the effect of the pandemic to foreclose candidates' ability to obtain ballot access when they otherwise could have made the ballot "would cause injury to the First Amendment rights of an innumerable number of Michigan voters." *Id.* at \*28-29. Third, the court noted that lowering the total number of signatures required would benefit even the candidates who had already filed the requisite number because a lowered requirement would give these candidates a larger margin of signatures to work with should any of them later be deemed invalid. *Id.* at \*29.

As in *Esshaki*, the competing harms here weigh in favor of granting a TRO and preliminary injunction. Absent the requested relief, OFRW Intervenors will be left with the choice of risking their health and the public's health to obtain signatures or to entirely cease circulation until the pandemic ends. Additionally, if OFRW Intervenors are forced to cease their efforts to attempt to submit their proposal at the November 3, 2020 general election, when the unrebutted evidence shows that they were on track to make the ballot, then this would cause injury to the First Amendment rights of the OFRW Intervenors and the innumerable Ohio voters who support the proposed amendment. Finally, granting the requested relief would not result in a "cluttered" ballot, as Defendants contend. To date, no other petitioners have filed a statewide initiative petition with the Secretary of State for submission at the November 3, 2020 general election, and the only other group known to be seriously pursuing submission of a statewide ballot issue in 2020 is an intervenor-plaintiff in this action seeking similar relief. Thus, at most, there would be only two statewide ballot issues on the upcoming general election ballot.<sup>8</sup>

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<sup>8</sup> A historical comparison shows that Ohioans have regularly been presented with more than two statewide ballot issues at a single election. See Ohio Sec. of State, *Statewide Issue History*, available at

For these reasons, the remaining factors of the analysis weigh in favor of issuing a TRO and preliminary injunction.

#### **IV. Remedy**

Finally, Defendants haphazardly argue that *Esshaki* precludes the Court from providing the relief requested by the OFRW Intervenors. *See* Def. Response, Doc. #40, PageID # 551-553. But this misconstrues *Esshaki*. After all, the Sixth Circuit affirmed the district court's injunction prohibiting the state from strictly enforcing its ballot access requirements. What the Sixth Circuit stayed, however, was the "compulsory part" of the district court's injunction, which effectively established new ballot access requirements. Rather than immediately leaving this portion of the remedy up to the district court, the Sixth Circuit ordered the State to propose a remedy (subject to judicial review) that would reduce the burden and render the ballot access provisions constitutional in light of the COVID-19 pandemic. *Esshaki* (6th Cir.), No. 20-1336 at \*5-7. Thus, consistent with *Esshaki*, the district court can (1) enjoin the state from strictly enforcing its ballot access requirements, and (2) order the Parties, with assistance from the Court, to make a good faith effort to reach agreement on conditions for access to the November 3, 2020 general election ballot.

#### **CONCLUSION**

For these reasons, OFRW Intervenors respectfully request that this Court enter a temporary restraining order and/or a preliminary injunction against Defendant Secretary of State, enjoining him from enforcing Ohio's ballot access requirements for statewide initiative petitions, and providing such other equitable relief as this Court deems appropriate.

Respectfully submitted,

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<https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/statewide-issue-history/>.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 14, 2020, I caused a true and correct copy of the foregoing to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

Respectfully submitted,

/s/ Donald J. McTigue  
Donald J. McTigue