

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

CHAD THOMPSON, et al.,

Plaintiffs, and

OHIOANS FOR SECURE AND FAIR
ELECTIONS, et al.,

Plaintiff-Intervenors,

v.

RICHARD DEWINE, ET AL.,

Defendants.

Case No. 20 CV 02129

Judge Edmund A. Sargus Jr.

Magistrate Judge Chelsey M. Vascura

**REPLY BRIEF OF INTERVENING PLAINTIFFS OHIOANS FOR SECURE
AND FAIR ELECTIONS ET AL. IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER/PRELIMINARY INJUNCTION**

Intervenors Ohioans for Secure and Fair Elections, Darlene L. English, Laura A. Gold, Hasan Kwame Jeffries, Isabel C. Robertson, Ebony Speakes-Hall, Paul Moke, Andre Washington, Scott A. Campbell, and Susan G. Ziegler (together, “OSFE”) submit the following Reply Memorandum in support of their Motion for a Temporary Restraining Order and/or Preliminary Injunction.

INTRODUCTION

Plaintiffs, Intervenors, and Defendants in this case have stipulated to the operative facts. Moreover there really can be no doubt about the primary operative facts concerning the novel coronavirus and the measures required to keep the Ohio public safe. The facts are that COVID-19 is the respiratory disease caused by the novel coronavirus and is highly contagious and can result in serious illness and death. It is “spread mainly from person to person, mainly respiratory droplets produced when an infected person coughs or sneezes, [and] [s]pread is more likely when people are in close contact with one another (within about 6 feet).”¹ Further, “[t]he virus is also known to be spread through the touching of contaminated surfaces, for example, when an infected person touches a surface with a hand they have coughed into and then another person touches that same surface before it has been disinfected and then touches their face.” ECF No. 15-7 (“Reingold Decl.”) ¶ 8. Which is why Dr. Fauci, director of the National Institutes of Allergy and Infectious Diseases, in his Senate testimony just days ago urged states to follow the Center for Disease Control guidelines and not open up too quickly.² In line with such

¹ Coronavirus Disease 2019 (COVID-19), *Frequently Asked Questions, “How Does the Virus Spread?”*, Center for Disease Control and Prevention (May 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>.

² “‘If some areas, cities, states or what-have-you, jump over those various checkpoints and prematurely open up without having the capability of being able to respond effectively and efficiently, my concern is that we will start to see little spikes that might turn into outbreaks,’ said Fauci, director of the National Institutes of Allergy and Infectious Diseases. ‘I have been very clear in my message — to try, to

recommendations, Defendants DeWine and Acton have mandated that places may reopen as long as “social distancing and other health precautions are observed.”³ ECF No. 40 (“Defs’. Br.”) 6. Under such circumstances, it is impossible for OSFE to engage with potential petition circulars and witness in-person wet ink signatures on its proposed initiative. *See* Defs.’ Br. 5.

Defendants have a strange notion that OSFE is not challenging any state action. True, it is people’s legitimate fear of contracting COVID-19 that is preventing petition circulation, but OSFE is not suing the coronavirus. It is challenging Ohio’s strict enforcement of its ballot access provisions - in the face of this pandemic. And the law is clear in this circuit that a state’s strict application of its ballot-access provisions is unconstitutional in this context. *See Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020). Under clear Sixth Circuit precedent, the State must be enjoined from strict enforcement of the current ballot-access regime and provide “some reasonable accommodations” in light of the coronavirus pandemic. *Id.*

OSFE has pled two claims: one for violation of their First Amendment expressive rights, and the other for violation of their ballot access rights. OSFE is entitled to relief on both.

the best extent possible, to go by the guidelines, which have been very well thought-out and very well-delineated.” John Wagner et al., *Fauci warns Senate that reopening U.S. too quickly could lead to avoidable ‘suffering and death*, Washington Post (May 12, 2020), <https://www.washingtonpost.com/politics/2020/05/12/fauci-testimony-senate-coronavirus/>; *see also* Sheryl Gay Stolberg, *At Senate Hearing, Government Experts Paint Bleak Picture of the Pandemic*, NYTimes (May 12, 2020) <https://www.nytimes.com/2020/05/12/us/politics/coronavirus-dr-fauci-robert-redfield.html>.

³ Defendants DeWine and Acton’s orders state explicitly that the social distancing measures in their orders “set forth the minimum acts that must be taken and if people do more than the minimum to act safe, it will benefit everyone.” .” Amy Acton, Director’s Stay Safe Ohio Order, Ohio Dep’t of Health ¶ 1 (April 30, 2020), <https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-Safe-Ohio-Order.pdf>, (“April 30 Order”).

ARGUMENT

I. STANDARD OF REVIEW

Preliminary injunctions are warranted when, as here, “[p]laintiff shows that circumstances clearly demand it.” *Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, 2020 WL 1910154, at *3 (E.D. Mich. Apr. 20, 2020). While courts typically balance four factors when determining whether a preliminary injunction should issue, “where ‘a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits will often be the determinative factor.’” *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019) (citations omitted). In a case such as this, where the facts are uncontested and judicially noticeable, whether OSFE will be successful on the merits of its claims is a legal question. Given the overwhelming case law in this Circuit, OSFE is clearly likely to succeed on the merits of its claims and an injunction should issue. As the Supreme Court has found, petition circulation is not a “fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999). This elector is almost always a stranger to the circular. Such in-person encounters with strangers, requiring close personal contact, well within the six feet of socially distance, to share the petition and have it signed, are not occurring. It is thus impossible for OSFE to advocate on behalf of its petition or have any hope of having it signed under the current ballot-access regime. This violates OSFE’s core First and Fourteenth Amendment rights to access the ballot, freedom of speech, and freedom of association.

II. OSFE IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM

A. Ohio's petition requirements severely burden OSFE's freedom of speech rights under *Meyer v. Grant*.

The Sixth Circuit has found “that 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[.]” *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). There can be no question that “core political speech” is expressive conduct protected by the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988); *Schmitt v. LaRose*, 933 F.3d 628, 644 (6th Cir. 2019); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 725 (M.D. Tenn. 2019). The circulation of petitions qualifies as “core political speech” because it involves “both the expression of a desire for political change and a discussion of the merits of the proposed change.”⁴ *Meyer*, 486 U.S. at 421–22; *see also Schmitt*, 933 F.3d at 644 (citing *Meyer*).

Further freedom of association protected by the First Amendment attaches to not only political parties but all groups associating to bring about political change. *See, e.g. Hargett*, 400 F. Supp. 3d at 720. There is no “doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments.” *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973) (internal quotation omitted); *see also City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (“[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”) (citations omitted). The rights of political association and free speech” that are

⁴ Defendants themselves concede that petition circulation is First Amendment protected activity by claiming that the First Amendment exemption includes OSFE petition circulation. Defs.’ Br. 6.

implicated here “occupy a . . . hallowed place in the constitutional pantheon.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)). These rights are at “the core of the protection afforded by the First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995).

The State’s ballot access requirements go beyond prescribing election mechanics. Regulation of election mechanics involves “the composition of a ballot or some other matter of election administration.” *Hargett*, 400 F. Supp. 3d at 725 (alterations in the original). Here, in contrast, there is a “direct regulation of communication and political association, among private parties.” *Id.* The Supreme Court has said although there is no “litmus test,” the ultimate question is whether “the restrictions in question significantly inhibit communication with voters about proposed political change[.]” *Buckley*, 525 U.S. at 192. In the scheme challenged here, the State is strictly limiting OSFE to close in-person communication with voters by mandating that petition circulation be in person and that petitions be signed in ink in person. *Cf. Taxpayers United*, 994 F.2d at 297 (“Our result would be different if, as in *Meyer*, the plaintiffs were challenging a restriction on their ability to communicate with other voters about proposed legislation . . .”). Eliminating an entire manner of political communication, by denying the ability of Intervenors to circulate and have petitions signed electronically, runs directly afoul of First Amendment protections. *See McIntyre*, 514 U.S. at 345 (ban on leaflets “does not control the mechanics of the electoral process,” but rather “is a regulation of pure speech”).

There is ample uncontested evidence in the record that requiring such in-person circulation will both diminish OSFE’s ability to attract petition circulators and its ability to engage with voters around its ballot initiative given the social distancing mandates necessitated

by the coronavirus and enforced by Defendants⁵. Defendants provide no explanation, for example, how a paper petition could possibly be handed from a circulator to a signatory without being within six feet of one another or how a paper petition could be “regularly cleaned.”⁶ Even if these considerations only operated to limit the *number* of willing petition circulators, the Supreme Court has repeatedly found that regulations which “decreases the pool of potential circulators” violate the First Amendment. *Buckley*, 525 U.S. at 194 (striking down a requirement that ballot circulars be residents of the state and registered voters); *see also Meyer*, 486 U.S. at 422–23 (striking down prohibition on paid circulars because it limited the pool of potential circulars). Such restrictions, impinge protect First Amendment speech because it “limits the number of voices who will convey [Intervenors’] message and . . . therefore, limits the size of the audience they can reach.” *Meyer*, 486 U.S. at 422–23.

In many regards, this case is distinguishable from *Schmitt*. In *Schmitt*, the petitioners’ claimed injury was the lack of *de novo* review for the board of elections determination that their proposed initiative was administrative rather than legislative, such that petitioners had to seek mandamus review of the decision. *Schmitt*, 933 F.3d at, 639. In *Schmitt*, the petitioners still had a path to the ballot. They had been refused a place on the ballot because their petition was found to administrative rather than legislative. *Id.* at 634–37. They sought *de novo* review of the ballot board decision, instead of the mandamus review provided for by Ohio law. The Court found that the mandamus review was sufficient. *Id.* at 641. Thus, the State there was not regulating *how* petitioners were able to go out and advocate for their initiative. The Sixth Circuit

⁵ “Social Distancing Requirements” include “maintaining at least six-foot social distancing from other individuals, . . . regularly cleaning high-touch surfaces, and not shaking hands.” April 30 Order at ¶ 16.

⁶ April 30 Order at ¶ 16.

thus found that the case was distinguishable from those (like this one) in which the state hindered the “ability to advocate for” initiative petitions. *Id.* at 644 (citing *Meyer*). Here, the state is regulating OSFE’s core political speech by requiring that all petition circulation, signatures, and the related speech that accompanies those actions, happen face-to-face.

In the context of the coronavirus pandemic, the current regime amounts to a total ban on OSFE’s ability to reach the general Ohio public about its ballot measure. The State’s action, thus, further runs afoul of the First Amendment by “limiting [OSFE’s] ability to make the matter the focus of statewide discussion.” *Meyer*, 486 U.S. at 423. The challenged legal scheme “restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.” *Id.* at 424. Given its restriction on expression, the legal scheme must face exacting scrutiny. *Id.* at 420; cf. *Buckley*, 525 U.S. at 192 (heightened scrutiny applies to regulations that “significantly inhibit communication with voters about proposed political change.”). Under *Meyer*, the State’s interest is only justified if it is “necessary,” meaning there are no other means by which it can be met. *Meyer*, 486 U.S. at 426. The State’s action cannot meet this standard.

B. The Sixth Circuit’s decision in *Esshaki v. Whitmer* is controlling and mandates that Ohio’s current ballot access regime be found unconstitutional

In addition to pleading that Ohio’s election regime burdens OSFE’s First Amendment rights under *Meyer v. Grant*, OSFE has pled that the State’s action would violate its ballot access rights under the *Anderson-Burdick* framework. Other courts in this Circuit have found that election regulations may burden both sets of rights. *See, e.g. Hargett*, 400 F. Supp. 3d at 733 (“[I]n light of the Act’s burdens and the availability of alternative methods for pursuing its objectives, the court concludes not only that the plaintiffs are likely to succeed on their claims under *Meyer*, *Buckley*, . . . but also that they would be likely to succeed under the *Anderson-*

Burdick balancing framework.”). Defendants would have the Court believe that the *Anderson-Burdick* test is different depending on whether the case involves a candidate or an initiative petition, however, that is not the well-established precedent in this Circuit. Under Sixth Circuit precedent once the right to ballot access attaches, the test is the same. Thus, as in *Esshaki v. Whitmer*, the most recent Sixth Circuit case to apply the *Anderson-Burdick* framework in light of the coronavirus pandemic, the State’s action cannot survive *Anderson-Burdick*.

Defendants equivocate about whether the First Amendment or *Anderson-Burdick* has any applicability to a petition initiator’s ballot access rights.⁷ However, the Sixth Circuit has twice used *Anderson-Burdick* in the last two years to examine aspects of Ohio’s initiative petition regime. In *Schmitt*, the Sixth Circuit found that *Anderson-Burdick* applied to a suit challenging an aspect of Ohio’s ballot initiative regime, as discussed *infra*. *Schmitt*, 933 F.3d at 639 (“[W]e generally evaluate First Amendment challenges to state election regulations under the three-step *Anderson-Burdick* framework”). Just one year earlier, the Sixth Circuit applied the *Anderson-Burdick* analysis to determine if Ohio’s single subject rule violated ballot access rights. *Comm. to Impose Term Limits on Ohio Sup. Ct. & to Preclude Special Legal Status for Members & Emps. of Ohio Gen. Assembly v. Ohio Ballot Bd.*, 885 F.3d 443, 448 (6th Cir. 2018) (applying the *Anderson-Burdick* framework). These cases, though involving initiative petitions, readily rely on the candidate cases. *See, e.g., Schmitt*, 933 F.3d at 639–40 (relying on the candidate case *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, (6th Cir. 2016) in determining the severity of the burden);

Defendants would have the Court believe that any content neutral-non-discriminatory regulation of initiative petitions passes *Anderson-Burdick*, but that is not how the Sixth Circuit

⁷ *See, e.g.* Defs.’ Br. 6 (stating that the First Amendment exception applies to OSFE’s activities).

applied the *Anderson-Burdick* test in *Schmitt* nor in *Ohio Ballot Board*. In *Schmitt*, the court found that “[t]he first, most critical step [in the *Anderson-Burdick* analysis] is to consider the severity of the restriction.” *Schmitt*, 933 F.3d at 639. “The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.” *Id.* (citing *Grimes*). In *Schmitt*, the requirement that review of ballot board decisions be through mandamus petitions and not de novo review was found not to be a severe burden, because it did not result in virtual exclusion from the ballot. In *Ohio Ballot Board*, the first part of the Sixth Circuit inquiry was to decide whether or not the regulation was content neutral. Once the Sixth Circuit determined that the regulation was in fact content neutral, it then applied the standard *Anderson-Burdick* analysis examining the “character and magnitude” of the injury in light of the state interest involved. *Ohio Ballot Bd.*, 885 F.3d at 448. The clear precedent of this Circuit is that requiring in-person circulation and wet signatures would be a severe burden and cannot withstand exacting scrutiny.

Earlier just this month, the Sixth Circuit again used the *Anderson-Burdick* framework, but for a candidate and not a ballot initiative. In *Esshaki*, the Sixth Circuit found that the district court’s application of the *Anderson-Burdick* framework was appropriate. *Esshaki*, 2020 WL 1910154, at *4 (“When considering the constitutionality of ballot access laws, courts apply 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 used *Anderson-Burdick* to find that Michigan’s signature requirements for candidate petitions violated the federal constitution in light of the coronavirus pandemic. As discussed more fully below, the Sixth Circuit used the *Anderson-Burdick* analysis to find that requiring wet signatures for petitions during the coronavirus pandemic constituted a severe burden. The Court should apply the same test and reach the same result here.

C. Strict scrutiny applies because the burden on OSFE’s rights is severe

Regardless of whether the *Meyer* First Amendment analysis or the *Esshaki* ballot access analysis is applied, Ohio’s ballot access requirements are properly measured against the strict scrutiny test. These provisions cannot withstand this test. Under the *Meyer* analysis since the State’s actions implicate “core political speech” the State’s actions are subject to “exacting scrutiny.” *Meyer*, 486 U.S. at 420. Likewise, under *Esshaki*’s *Anderson-Burdick* framework, “[w]hen 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’” *Esshaki*, 2020 WL 1910154, at *4. “The analysis requiring that a state law be narrowly tailored to accomplish a compelling state interest is known as the “strict scrutiny” test.” *Id.* “The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.” *Schmitt*, 933 F.3d at, 639 (quoting *Grimes*, 835 F.3d at 574.)⁸ In *Esshaki* - the only case in the Sixth Circuit to address ballot access rights during the coronavirus pandemic - the district court held “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[.]” *Esshaki*, 2020 WL 1910154, at *6.

The *Esshaki* district court’s finding that the wet signature requirement was a severe burden was upheld by the Sixth Circuit. *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at

⁸ In *Schmitt*, the Sixth Circuit did not apply strict scrutiny because it found that “Plaintiffs demand and the mandamus review provided by the Ohio Supreme Court, it is hardly significant enough to result in “virtual exclusion” from the ballot.” *Schmitt v. LaRose*, 933 F.3d 628, 640 (6th Cir. 2019). Because, in that instance, the “citizens are able to seek timely redress” the restriction was not “severe.” *Id.* at 641.

*1 (6th Cir. May 5, 2020) (“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.*”) (emphasis in original).

Other courts have also found that under these circumstances, plaintiffs face a severe burden. *Goldstein v. Sec’y of Commonwealth*, No. SJC-12931, 2020 WL 1903931, at *6 (Mass. Apr. 17, 2020) (holding that the minimum signature requirement, though modest in “ordinary times,” is [a] “severe burden” in light of the pandemic); *see also Libertarian Party of Illinois v. Pritzker*, No. 20-CV-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) (finding that the ballot access requirements are a “nearly insurmountable hurdle” in light of the pandemic).

D. Ohio’s Strict Enforcement of Its Ballot Access Provisions Fails Strict Scrutiny

The Defendants, attempting to justify their refusal to modify any of Ohio’s ballot access provisions, list the following state interests: (1) simplifying the ballot, Opp’n. at 21, (2) preventing voter confusion, *id.*, (3) maintaining voter confidence, *id.* at 22, (4) ensuring sufficient grass roots support, *id.*, and (5) ensuring the validity of the signatures on petitions, *id.* But Defendants’ articulation of these interests, without demonstrating how they necessitate the current limitations on OSRE’s First Amendment rights, is not sufficient to meet their burden of justifying the restrictions. *Blackwell*, 462 F.3d at 593 (“Reliance on suppositions and speculative interests is not sufficient to justify a severe burden on First Amendment rights.”) Moreover, none of the stated interests necessitate the current limitations on OSFE’s First Amendment rights.

First, regarding the initial two of Defendants' stated interests, OSFE's proposed remedies would not lead to a complicated or confusing ballot. OSFE requests two primary remedies relating to signature-gathering: (1) that the initiative be placed on the ballot without the need of further signatures, given the 1,000 initial signatures already gathered and the certification by the Attorney General, and (2) that signatures submitted by electronic means, rather than in ink by the signer's hand and personally witnessed by the circulator, be accepted. OSFE brings an as-applied challenge only, *see* Compl. 25-26, and even if any relief ordered by this Court extended beyond the Plaintiffs in this case, its application would be sharply limited. With regard to electronic signature gathering, any campaign would still need to expend significant funds and effort to garner the necessary signatures. With regard to either means of relief, since there are only three constitutional amendments that have been certified by the Attorney General for the November 2020 ballot, the number of issues that could appear on the ballot is sharply limited.⁹ Ohio often has three or more issues on the ballot; in fact, this has happened 6 times in the past 20 years.¹⁰ Ohio voters have been able to successfully exercise their right to vote without confusion with multiple issues on the ballot, and the Secretary has presented no evidence for why this year would be any different. It is clearly not necessary that the State prevent OSFE from being on the ballot to facilitate a simple ballot and ease voter confusion. *See Blackwell*, 462 F.3d at 594

⁹ Only three constitutional amendments to date have been certified by the Attorney General. *See* Dave Yost, Ohio Attorney General, List of petitions submitted to the Attorney General's Office, <https://www.ohioattorneygeneral.gov/Legal/Ballot-Initiatives/Petitions-Submitted-to-the-Attorney-General-s-Offi> (accessed May 14, 2020).

¹⁰ Ohio had three issues on the ballot in 2015, 2011, and 2009, and more than four in 2008, 2006, and 2005. In 2009, all three of the issues were constitutional amendments, and in 2008 and 2009, three were constitutional amendments. *See* Frank LaRose, Ohio Secretary of State, Statewide Issue History, <https://www.sos.state.oh.us/elections/election-results-and-data/historical-election-comparisons/statewide-issue-history/> (accessed May 14, 2020).

(holding that the state’s interest to “avoid voter confusion” was not sufficient since the state “put forth no evidence” supporting how the provisions would support this interest).

With regard to the third interest, voter confidence, and the related fifth interest, ensuring the validity of the signatures on petitions, Defendants have failed to demonstrate how a modification of Ohio’s ballot access provisions for the November 2020 election will result in a loss of voter confidence, or in any diminishment in the validity of petitions. Electronic petition signature systems provide for verification of every signer’s identity.¹¹ Personally identifying information would be provided to the Secretary of State for verification, similar to the information that is provided for Ohio’s existing system of electronic voter registration. If the remedy in this case instead is to place OSFE’s proposed amendment on the ballot based on its already collected signatures, those have already been collected in ink and verified.

Last, the state interest of ensuring grassroots support also fails to justify a wholesale obstruction of OSFE’s initiative. *Meyer*, 486 U.S. at 425 (finding that the State’s “interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot” was not sufficient to warrant the burden on the plaintiffs’ right); *see also Blackwell*, 462 F.3d at 594 (holding that State’s interest in determining “bona fide support” was insufficient); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1014 (S.D. Ohio 2008) (same). There is no reason that grassroots support cannot be achieved through the gathering of electronic rather than paper signatures; nor do the Defendants even suggest any reason why it could not. Just as with

¹¹ Intervenor Minimum Wage Campaign has submitted a proposal for an electronic signature system that requires each signer to provide personally identifying information, specifically the last four digits of their social security number. ECF No.17-2 at 26–28. This system uses precisely the same personal identification information that is provided in Ohio’s *existing* system of electronic voter registration. Frank LaRose, REGISTER TO VOTE OR UPDATE YOUR VOTER REGISTRATION INFORMATION, <https://olvr.ohiosos.gov/>, (accessed May 14, 2020). Intervenor OSFE has developed a parallel system, using the same personal identifying information to verify the authenticity of each signer.

Ohio's current system of online voter registration, the electronic petitioner signer's identity can be verified through the provision of personally identifying information to ensure that only Ohio electors sign the petition for the Proposed Amendment. Further, OSFE has already demonstrated a minimum level of grassroots support through the gathering of signatures to send its proposed constitutional amendment to the Attorney General for certification.

Moreover, "even assuming the State generally has a compelling interest in ensuring candidates have a modicum of support before allowing inclusion on the ballot, here the State has not shown it has a compelling interest in enforcing the specific numerical requirements set forth in Section 168.544f in the context of the pandemic conditions and the upcoming August primary." *Esshaki*, 2020 WL 1910154, at *7, *motion for relief from judgment denied*, No. 2:20-CV-10831-TGB, 2020 WL 1979126 (E.D. Mich. Apr. 25, 2020).

The cases cited by Defendants do nothing to justify Ohio's failure to tailor its ballot access rules during this pandemic. The cherry-picked propositions intoned by Defendants are merely statements that these interests in fact exist. *Taxpayers United*, 994 F.2d at 297 actually points out that its "result would be different if, as in *Meyer*, the plaintiffs were challenging a restriction on their ability to communicate with other voters about proposed legislation." *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) likewise fails to support Defendants because the geographic distribution rule at issue there did "not restrict one-on-one communication between petition circulators and voters," and thus did "not impose a severe burden on communication between circulators and voters." *Buckley*, 525 U.S. at 205, as well, acknowledges that "necessary or proper ballot-access controls" need to be distinguished from "restrictions that unjustifiably inhibit the circulation of ballot-initiative petitions." Last, *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St.3d 167, 174, 600 N.E.2d 244,

602 N.E.2d 615 (1992) was not even a First Amendment case. No level of burden, degree of scrutiny, satisfaction of state interest, appropriateness of tailoring, or any other concept relevant here was at issue.

E. The “First Amendment Activity” Exception in Ohio’s Emergency Orders Does Not Mitigate Ohio’s Strict Enforcement of Its Ballot Access Laws

The original Plaintiffs in this action, in their brief filed May 13, ECF No. 41, have done an admirable job of revealing the absurdity of Ohio’s insistence that the so-called “First Amendment activity” exception in Ohio’s emergency orders “frees” petition circulators to gather signatures. OSFE needs not repeat Plaintiffs’ argument, but adds a few points:

The pandemic itself, even absent any such order, is a situation that, as a matter of law and logic, requires the State to relax the application of its ballot access rules. Even if there were no stay at home order *ever in effect*, Ohio’s ballot access requirements, as applied in the context of the current public health crisis, are what unconstitutionally burden the speech rights of petition circulators. The law recognizes that in the context of such an impediment, the unconstitutional burden must yield.

The District Court’s treatment of the Stay-At-Home Order in *Esshaki* is highly instructive in this respect. There, the State claimed that plaintiff could have collected signatures when the order was not in effect - between March 10, when the stay-at-home order was announced, and March 23, when the order went into place. *Esshaki*, 2020 WL 1910154, at *5. But the Court found that “[t]his argument both defies good sense and flies in the face of all other guidance that the State was offering to citizens at the time.” *Id.* The Court noted that, “[t]he Governor's State of Emergency Declaration cautioned citizens that COVID-19 is a respiratory disease that can result in serious illness or death ... and can easily spread from person to person.” *Id.* (citing Mich. Exec. Order 2020-4 (Mar. 10, 2020)). The Court further noted that, “[t]he next day, the State

issued a press release urging citizens to ‘[r]educe in-person gatherings and activities,’ ‘consider tele-work[ing]’ and limit interactions with vulnerable populations.” *Id.* The Court thus found collecting signatures, even when the order was not in effect, would “increase[e] the risk that Plaintiff and his supporters could possibly be exposed to the COVID-19 virus by engaging in repeated close-contact with potential petition signers or unknowingly transmit it to others” and thus “prudence at that time counseled” against collecting signatures. *Id.* The Court thus found that, even when the stay-at-home order was not in effect, it was unreasonable for plaintiffs to go out and collect wet signatures. Based on the facts stipulated in this case, this Court should do the same.

Courts have also frequently found that the government’s strict enforcement of election laws in light of unforeseen emergencies violates plaintiffs’ constitutional rights and requires court redress. For example, in *Florida Democratic Party v. Scott*, 215 F.Supp.3d 1250 (N.D. Fla. 2016), the State’s refusal to extend the voter registration deadline in the face of Hurricane Matthew, the natural force of which caused many voters to miss the voter registration deadline, was held to be an unconstitutional burden on the rights of Florida voters. There was no stay at home order in the way; the impediment was strictly “Florida’s statutory framework [which] would categorically deny the right to vote.” The Court required the State to extend the deadline. 215 F. Supp. at 1257. Similarly, in *Georgia Coalition for the Peoples’ Agenda, Inc. v. Deal*, 214 F.Supp.3d 1344 (S.D. Ga. 2016), the Court held that state officials’ failure to extend the voter registration deadline, given the “physical, emotional, and financial strain Chatham County residents faced in the aftermath of Hurricane Matthew,” violated the First and Fourteenth Amendments, and extended the deadline. *Id.* In the same way, courts routinely order election officials to keep polls open late, where closing them on time would violate voters’ First and

Fourteenth Amendment rights when there are late openings, malfunctioning equipment, and long wait times. *Ohio Democratic Party v. Cuyahoga County*, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006); and *Obama for America v Cuyahoga County Board of Elections*, No. No.1:08-cv-562 (N.D. Ohio Mar. 4, 2008); *see also*, *State v. Marcotte* 148 Me. 45 (1952) (Court validated the rescheduling of an election due to a Maine snowstorm of “unusual proportions”), and *Ertel v. Essex County Board of Elections*, N.J. Super. St. Law Div. (Nov. 7, 2012) at 4-5, *available at* https://www.aclunj.org/download_file/view_inline/1002/841 (election officials ordered to accept late requests for absentee ballots in the aftermath of Hurricane Sandy).

III. OSFE Will Suffer Irreparable Harm

When a constitutional violation is alleged, the most important factor is the likelihood of success on the merits. *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019). Once that has been established, “irreparable injury is presumed.” *Obama for Am. v. Husted*, 697 F.3d at 436 (citation omitted); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”) (citation omitted). Further, there is nothing speculative about OSFE’s inability to advocate on behalf of their ballot initiative or ascertain signatures for their petition to be able to access the ballot. According to Defendants, petition signatures must be wet signatures, matching previous wet signatures of petition signer, and witnesses by circular. Defs.’ Br. 5. The only way in order to meet these requirements is for the petition circular and the petition signer to meet in person for the petition to be signed. However, also according to Defendants, and all health and epidemiology experts, social distancing must continue to be observed. Defs.’ Br. 6 (Ohio is gradually reopening “provided social distancing and other health precautions are observed”). These two requirements combined make it impossible

for OSFE to have its petitions signed. *See Esshaki v. Whitmer*, 2020 WL 1910154, at *5 (discussion of the realities of coronavirus pandemic and petition signing).

The question before the Court is not whether or not OSFE will be ultimately successful at its endeavors to be on the November 2020 ballot, but whether the current regime allows for advocacy around ballot initiatives and provides any possibility that even a widely popular initiative could make the ballot. The answer to that question is clearly no. Whether or not OSFE may attempt to get on the ballot again in a later election is immaterial to the inquiry of whether the State is currently violating their constitutional rights.

IV. The Public Interest and the Lack of Harm to Others Favor a Preliminary Injunction. Plaintiffs’ requested relief is necessary and appropriate.

The balance of equities weighs in favor of granting injunctive relief. “It 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). “[E]lection laws [that] burden First Amendment rights” should be enjoined. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 233 (1989). Here, OSFE has proposed a set of remedies that could be ordered that would not cost the State or the public any additional funds, as Defendants erroneously argue, and would ensure the preservation of OSFE’s constitutional rights.

Permitting systems of electronic signature gathering has become the norm during this pandemic. *See*, for example, ECF No. 15 at 15–16, listing jurisdictions that now permit electronic signatures. OSFE is in favor of a system that would be hosted by and paid for by OSFE. The data would then be turned to the Defendant LaRose for verification of the signatory information. Such a system is not much different than the current paper regime, where OSFE is responsible for printing and circulating its paper petitions and then sending the paper copies to Defendant LaRose for verification. However, the primary difference of course, is the medium of

circulation. Defendants are wrong to characterize such a system as a subsidy. Defs.’ Br. 11. Not at all. The 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.

In addition to a system of electronic signature gathering, OSFE seeks two other necessary components of relief: an extension of the signature submission deadline from July 1 to August 21¹², and a reduction in the number of signatures required. Alternatively, OSFE seeks to have its Proposed Amendment placed on the ballot based on the Attorney General’s certification and the 1,000 petition signatures that it has already obtained.

OSFE proposes that this court issue an order as to the merits, finding that relief from the strict application of Ohio’s ballot access is required, and then schedule a conference among the Court, the Plaintiffs and Defendants to develop an adjusted set of ballot access requirements that will provide reasonable accommodation for Plaintiffs’ issue campaigns to access the 2020 ballot in light of the coronavirus pandemic.

¹² Defendants have wrongly claimed that OSFE’s claims have been decided adversely by Ohio courts. To set the record straight, OSFE has brought two state court cases: The first, *State ex rel. Ohioans for Secure and Fair Elections et al. v. LaRose et al.*, Case No. 2020-0327, a challenge to the Ohio Ballot Board’s wrongful decision to split its Proposed Amendment into four separate amendments. When the case was filed, on March 5, OSFE asked the Court to give it additional time to collect signatures to make up for the time taken to rectify the Ballot Board decision. The Court ruled that the Proposed Amendment was indeed one subject, but declined to extend the time that signatures would be due. The Court was never asked, nor did it rule on, whether there should be any extension of the signature deadline due to the then-unknown pandemic.

Later, when the pandemic then hit and it became apparent that in-person petition circulation was impossible, OFRW and OSFE sought a preliminary injunction in state court, challenging the strict enforcement of Ohio’s ballot access laws as applied. That court, declined to decide the issue, holding the court lacked “the power to order an exception or remedy that was not contemplated or intended by the plain language of the Ohio Constitution.” *Ohioans for Raising the Wage v. LaRose*, No. 20-CV-2381, at 8 (Ohio Com. Pl., Apr. 28, 2020). But even assuming that the state court had decided this issue, the decision would have been only interlocutory. Since this would not have been a “final judgment”, it would not preclude this court from deciding the issue. *Quality Assocs., Inc. v. The Procter & Gamble Distrib. LLC*, 949 F.3d 283, 289 (6th Cir. 2020) (“[P]reclusion comes into play only when a state court has entered a *final judgment*.” (emphasis in original))

CONCLUSION

For the foregoing reasons, OSFE respectfully requests that this Court issue a preliminary injunction, pursuant to Federal Rule of Civil Procedure 65, to enjoin Defendants from enforcing the above-listed initiative requirements as to OSFE in advance of the November 2020 election, and to further enjoin Defendants to provide OSFE the alternative processes sought in its Complaint, to allow it an opportunity to access the ballot in November 2020.

May 14, 2020

Respectfully submitted,

/s/ Freda J. Levenson

Freda J. Levenson (0045916)

Trial Counsel

Elizabeth Bonham (0093733)

ACLU of Ohio Foundation

4506 Chester Avenue

Cleveland, Ohio 44103

(216) 472-2220

flevenson@acluohio.org

ebonham@acluohio.org

David J. Carey (0088787)

ACLU of Ohio Foundation

1108 City Park Avenue, Suite 203

Columbus, Ohio 43206

(614) 586-1972

dcarey@acluohio.org

T. Alora Thomas-Lundborg*

Dale Ho*

American Civil Liberties Union

125 Broad Street

New York, NY 10004

Tel: 212-519-7866

Tel: 212-549-2693

athomas@aclu.org

dale.ho@aclu.org

**Pro Hac Vice* Forthcoming

Attorneys for Intervening Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2020, I filed a copy of the foregoing Motion and Brief in Support using the Court's Electronic Filing System, and that counsel for all parties received electronic notice through that system.

/s/ Freda J. Levenson
Freda J. Levenson