IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 20-3526

CHAD THOMPSON; WILLIAM T. SCHMITT;
DON KEENEY

Plaintiffs - Appellees

v.

RICHARD MICHAEL DEWINE,
in his capacity as the Governor of Ohio;

AMY ACTON, in her official capacity as Director of
Ohio Department of Health;

FRANK LAROSE, in his official capacity as Ohio Secretary of State

Defendants - Appellants

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

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

Proposed Intervenors - Appellees

APPELLEES' OPPOSITION TO
APPELLANTS' MOTION FOR STAY

Plaintiffs-Appellees, Thompson, et al., (hereinafter singularly "Appellee-Thompson") **OPPOSE** Appellants' Combined Emergency Motion for an Administrative Stay and Stay Pending Appeal (Corrected), Sixth Cir. Doc. No. 8 (filed May 21, 2020) ("Mot.").

The District Court correctly described the crisis facing the parties in this matter and properly applied Sixth Circuit and Supreme Court precedent. It concluded -- as this Court did two weeks ago in in *Esshaki v. Whitmer*, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *aff'd in part*, 2020 WL 2185553 (6th Cir., May 5, 2020) -- that the pandemic and strict enforcement of election laws combine to place severe burdens on circulators' First Amendment rights. In accordance with *Esshaki*, the District Court properly issued a negative injunction prohibiting strict enforcement of Ohio's signature collection requirements. *See Esshaki*, 2020 WL 218553, at *2. Like this Court, the District Court allowed the State an opportunity "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*.

The District Court's preliminary injunction reflects a measured response to a catastrophic global pandemic. The relief is limited and narrowly tailored to address Ohio's health threat. Notably, the District Court did not grant any relief whatsoever with respect to the *substantive* requirements imposed by the challenged provisions

– *i.e.*, the number of signatures required. It left the appropriate remedies to be fashioned by Appellants. They have not been forced to implement anything.

Appellants' attempt to portray the District Court as a "micromanager" that seeks to "meddle with state election processes," (Mot. at 2), does not comport with reality. The Court negatively enjoined "enforcement of the ink signature requirement in Ohio Revised Code § 3501.38(B) and witness requirement in Ohio Revised Code § 3501.38(E)," as well as "enforcement of the deadline in Ohio Revised Code § 731.28 as to Thompson Plaintiffs for the November 3, 2020 general election." Opinion and Order, R. 44, at PAGEID# 675. Far from micromanaging "the minutiae of state election processes," (Mot. at 2), the District Court left Appellants with discretion to fashion a remedy. It merely instructed Appellants to confer with Appellee-Thompson (as well as the Intervenor-Plaintiffs) -- a meeting that was held on the morning of May 22, 2020 -- and "direct[ed] [Appellants] to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements 'so as to reduce the burden on ballot access.'" Opinion and Order, R. 44, at PAGEID# 675.

On May 22, 2020, the District Court denied Appellants' Rule 62 Motion to Stay. Opinion and Order, R.50, at PAGEID # 722. In doing so, it once again thoroughly explained that its relief was limited. It observed that, as they have repeatedly done in their Motion filed with this Court, "Defendants misstate this

Court's decision." *Id*. at PAGEID # 719. "This Court did not hold that the signature requirements in Ohio's Constitution were facially invalid or order permanent relief. This Court found that those requirements were unconstitutional only as applied to these particular plaintiffs in these extraordinary and unprecedented times …" *Id*.

The District Court also expressed puzzlement over Appellants' cancelation of Ohio's March 2020 in-person primary because of announced safety concerns, while "inexplicably refus[ing] to acknowledge those very same risks are present here." *Id*. at 711. According to Defendants, although it is not safe enough to vote in-person, it is safe enough to go door-to-door, closely approach others in public, exchange paper and pen, and stand by while witnessing their signatures.

Appellants' complaint is not with the scope of the relief or the burdens it may impose, but is with the fact that the District Court called out their inconsistencies and recognized that strict enforcement of petitioning procedures in the midst of the COVID-19 pandemic is just as problematic under the First Amendment for circulators as anyone else. They blithely assert that initiative proponents have "at all times, been free to solicit signatures throughout the pandemic," (Mot. at 6), which is simply not true. They misrepresent Ohio's orders as always including an exception for circulators. (Mot. at 23.) They omit the fact that no exception for circulators existed until April 30, 2020 -- and that this incomprehensible and unworkable exception was added as a response to this

litigation. The suggestion that initiative proponents were and remain "free" to solicit signatures by hand during a pandemic speaks for itself: it is divorced from reality and shows a callous disregard for the freedoms the First Amendment is meant to protect.

ARGUMENT

Whether to grant a stay under Federal Rule of Appellate Procedure 8 is governed by four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). *See also Michigan State A. Phillip Randolph Inst. v. Johnson*, 883 F.3d 656, 662 (6th Cir. 2016). This Court has observed that because it applies an abuse of discretion standard to preliminary injunctions, "[t]he injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

A stay will not be granted, moreover, unless "there is a likelihood of reversal." *Michigan Coalition of Radioactive Material Users, Inc. v.*

Griepentrog, 945 F.2d 150, 153 (6th Cir.1991). Consequently, stays of preliminary injunctions are rare. One is certainly not warranted here. Not only do the equities favor Appellee-Thompson (who is attempting to exercise his Constitutional rights in a safe and responsible way), and the public (which seeks to remain safe and free from in-person encounters), constitutional law remains firmly ensconced on Appellee-Thompson's side. In particular, there is no Circuit split over whether the First Amendment applies to the mechanics of signature collection; *Anderson-Burdick*'s severity standard is not limited to "total" denials; and *Esshaki* cannot be distinguished.

The District Court made no factual mistakes. Ohio's experience with COVID-19 was stipulated to by the parties. As the District Court explained in its denial of Appellants' stay, Opinion and Order, R.50, at PAGEID# 711 & 720, Appellants were given numerous opportunities to prove their claims with evidence, but they chose not to. The case was submitted to the District Court under the law and on the papers presented. There are no facts in dispute.[1]

[1] Although the Court has authority to grant an administrative stay in order to facilitate consideration of a motion to stay pending appeal, this Court (to Appellee-Thompson's knowledge) has never done so. *See Adams & Boyle v. Slatery*, 956 F.3d 913, 923 (6th Cir. 2020) (denying stay); *Wilson v. Williams*, 2020 WL 2120814, *2 (6th Cir. 2020) (same).

I. Appellants Misrepresent that Ohio Provided An Exception for "Circulators" And "Initiatives" in Its Safety Orders Before April 30.

A. Safety Orders Issued Before April 30, 2020 Did Not Mention "Circulators" or "Initiatives."

The crux of Appellants' case rests on convincing the Court that circulators were always “free” to gather signatures. This case, they claim, is therefore different from all others, including *Esshaki*. Appellants must succeed on this point because if they do not their case collapses.

In an effort to climb this hurdle, Appellants go so far as to misstate the terms of Ohio's orders. Contrary to Appellants' claim, circulators in Ohio were locked down in precisely the same way that circulators were locked down in Michigan. Circulators (like everyone else) in Ohio were ordered to stay home, shelter, and precluded from going door-to-door. They were prohibited from going into public places, restricted from approaching others, and threatened with criminal prosecution (like everyone else) should they not comply.

"Ohio’s stay-at-home order," Appellees' wrongly assert, "expressly exempted 'petition or referendum circulators,' meaning they have never been legally prevented from gathering signatures." (Mot. at 23) (emphasis added). This is false. Ohio did not exempt "circulators" from any of its emergency safety orders until April 30, 2020, three days after this litigation commenced. From March 12, 2020 until April 30, 2020, Ohio's safety orders included no exception for

circulators of any kind, whether circulating initiative petitions, candidate petitions, local petitions, or state-wide petitions. Appellee-Thompson was not only factually precluded from collecting signatures by the pandemic, he was legally prohibited from doing so under threat of criminal prosecution.

The plain text of Ohio's orders, which were catalogued in the Stipulated Facts, R.35, prove this. Beginning on March 12, 2020, Ohio's Governor and Department of Health began shutting Ohio down. By March 22, 2020, this closure was complete. Dr. Acton explained in plain language to Ohioans what Ohio's March 22, 2020 shelter order meant on her official web page: "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), R. 41-1 (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). She never mentioned circulators, nor did any of Ohio's emergency orders before April 30, 2020.

These 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).[2] 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 mean for Ohio*, Cincinnati Enquirer, March 22, 2020 (emphasis added).[3] 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*. He never mentioned circulators, nor did he suggest how they might collect signatures without subjecting themselves to criminal prosecution.

On April 30, 2020, Ohio issued its emergency order extending its shelter restrictions for many businesses, most public places and virtually all gatherings

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

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

until at least May 29, 2020. *See* Ohio Department of Health, Director's Stay Safe Ohio Order, April 30, 2020.[4] In his 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).[5] "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).

Ohio's April 30, 2020 order extended much of what was found in prior orders; many public and private places, such as primary/secondary schools and businesses, remained closed. Ohio Department of Health, Coronavirus (COVID-19): Continued Business Closures, May 2, 2020.[6] "Parades, fairs, festivals, and carnivals" remained on the list of prohibited activities, *id*., as did gatherings at "Country clubs and social clubs." *Id*. *See* Randy Ludlow, *Coronavirus in Ohio:*

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

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

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

Gov. Mike DeWine warns virus remains 'a dangerous risk' even as state reopens, Columbus Dispatch, May 12, 2020.[7]

Meanwhile, the April 30, 2020 order for the first time stated an exception to its ban on public gatherings for "petition or referendum circulators." Thus, for the first time since March 12, 2020 when the orders began, circulators were purportedly allowed to venture into public and "gather" without necessarily violating Ohio's emergency shelter orders. What they can do in public remains unclear, since the April 30, 2020 order continued to impose physical separation requirements on all unrelated individuals. Further, the circulator exception said nothing about potential signers. Thus, those who sign petitions may still be subject to criminal prosecution if they are either not lawfully in public or if they do not remain at least six feet apart from the circulators who approach them.

Even assuming that the April 30, 2020 order created a meaningful exception for petition circulation – and it did not – the fact remains that no such exception existed before then. The exception pointed to by Appellants was issued by Appellants three days after this case was filed. It was a litigation tactic, pure and simple. Before this, circulators like everyone else risked criminal prosecution if they ventured out, knocked on doors, approached people in public (with pen in

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

hand), asked for signatures, and then stood close enough to witness them. And, of course, even after April 30, 2020, whether it is legal or not, circulators will not be able to gather and witness signatures in-person in any meaningful way.

B. Ohio's Purported "First Amendment Protected Speech" Exception Is Vague and Meaningless.

What Ohio did do before April 30, 2020 was attempt to build into its emergency orders an undefined "First Amendment" exception, one that said nothing about petitions, circulators, or anything else. *See, e.g.*, Director's Stay at Home Order, March 22, 2020 (identifying without elaboration and no description "g. First Amendment protected speech" as an exception).[8] Unlike all of the other exceptions in various orders for things like "essential businesses," Appellants' purported First Amendment exception listed nothing; it was absolutely blank. It said nothing about circulators of any sort, nothing about political activities, and nothing about anything else. Indeed, Ohio's many express prohibitions on activities and places fully protected by the First Amendment, such as "parades, fairs, and festivals," *see, e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), "movie theatres," *see, e.g.*, *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976), "social clubs," *see, e.g.*, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987), etcetera,

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

made clear that this purported "First Amendment Protected Speech" exception (as far as Ohio is concerned) means nothing at all.

This sort of vapid exception has never been given effect by any Court for the simple reason that it is vague and meaningless. Exceptions like these create unconstitutional traps for their innocent victims. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning"). In *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 (C.D. Cal. 1993), for example, the Court rejected the very thought that such an exception had any meaning: it "does not define the concept of 'First Amendment Activities,' nor, indeed, could it define this concept." (Emphasis added). *Rubin*, 823 F. Supp. at 712 n.6, referred to the Supreme Court's decision in *Board of Airport Commissioners v. Jews for Jesus, Inc.*,482 U.S. 569, (1987), which had rejected a similar argument in the context of restrictions placed on speech in airport terminals. *Jews for Jesus*, the District Court 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. Here, too, Ohio's purported exception is unconstitutional.

II. Supreme Court Precedent Holds That First Amendment Scrutiny Applies to the Collection of Signatures Needed to Support Popular Measures Like Initiatives.

Appellants assert that the Circuits are presently split over the First Amendment's application to popular democracy, including the content-neutral mechanics involved like collecting signatures. That is incorrect. The Circuits are split over the First Amendment's proper application to subject-matter restrictions on initiatives and referenda, and this split is presently before the Supreme Court. *See Schmitt v. Husted*, 933 F.3d 628 (6th Cir. 2019), *cert. pending*, No. 19-974 (U.S., Feb. 4, 2020) (stating Question Presented as "Whether the First Amendment and strict scrutiny apply to subject matter restrictions on ballot initiatives"). Because the current case does not involve subject matter restrictions placed on initiatives, Appellants' Circuit split has no bearing on this case.

Contrary to Appellants' claim, there is no split in the Circuits in terms of applying the First Amendment to restrictions on signature collection efforts needed to support popular measures like initiatives. There is no split because the Supreme Court has itself applied the First Amendment to invalidate restrictions on those attempting to gather signatures to support placing popular measures on ballots.

Ballot initiatives implicate "core political speech." *Meyer* v. *Grant*, 486 U.S. 414, 422 (1988); "First Amendment protections" are accordingly "at [their] zenith" and "exacting scrutiny" is required. *Id.* at 425, 420. For citizens in nearly half the

states in the Union, ballot initiatives are "basic instruments of democratic government." *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003).

In *Buckley* v. *American Constitutional Law Foundation*, 525 U.S. 182 (1999), for instance, the Supreme Court struck down under the First Amendment three separate Colorado laws that regulated how circulators of popular initiatives collected signatures. It specifically ruled that Colorado's requirement that initiative-petition circulators be registered voters violated First Amendment; its requirement that they wear identification badges violated the First Amendment; and that its rule requiring that proponents of initiatives report names and addresses of all paid circulators violated the First Amendment. In *Meyer* v. *Grant*, 486 U.S. 414, meanwhile, the Supreme Court applied the First Amendment to invalidate Colorado's requirement that circulators of initiatives designed to amend the State Constitution do so without pay. These cases leave no doubt about the First Amendment's application to the content-neutral mechanics, including signature collection, that surround placing popular measures on ballots.

Accordingly, this Court has repeatedly and correctly held that once a State chooses to allow citizens to place initiatives on ballots the process is subject to First Amendment scrutiny. In *Taxpayers United for Assessment Cuts v. Austin*, 994

F.2d 291, 296-97 (6th Cir. 1993), this Court stated that although "the right to initiate legislation is a wholly state-created right," the First Amendment still restricts states to placing "nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation." *See also Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F. 3d 443, 446 (6th Cir. 2018).[9]

Appellant makes much of the fact that there is no First Amendment right to utilize initiatives in the first instance. This is correct; States may allow initiatives, but need not. But this hardly distinguishes popular democracy from anything else. After all, there is no fundamental right to run for office, *see Bullock v. Carter*, 405 U.S. 134, 143 & n.19 (1972), and States need not popularly elect the great bulk of the officials they presently do. There is no federal constitutional command that States elect their Governors or heads of departments. Still, once they choose to do so, the First Amendment plainly applies to the mechanisms they employ to regulate the process. Popular democracy is no different.

[9] Indeed, this Court in *Schmitt v. Husted*, 933 F.3d 628 (6th Cir. 2019), *cert. pending*, No. 19-974 (U.S., Feb. 4, 2020), arguably joined a Circuit split by applying the First Amendment to Ohio's subject matter restrictions placed on local initiatives. But the present case has nothing to do with subject matter restrictions.

III. The District Court Correctly Applied *Anderson-Burdick* Balancing.

Appellants assert that the District Court improperly applied *Anderson-Burdick*. In doing so, they not only repeat their false claim that "Ohio has never stopped [Appellees] from soliciting signatures at any point during the pandemic," (Mot. at 20), but claim that burdens can only be deemed "severe" when they "'totally den[y]' plaintiffs their ability to exercise a First (or Fourteenth) Amendment right." *Id*. Neither proposition is true.

First, as explained above, Ohio's law until April 30, 2020 precluded circulators -- along with everyone else -- from going door-to-door, venturing into public places, mingling in close proximity to others, and approaching them to collect signatures. None of the orders issued before April 30, 2020 mentioned any exception for circulators. Quite to the contrary, as explained above, Appellants repeatedly emphasized that those who violated Ohio's emergency orders would be arrested and criminally prosecuted, a reality that was brought home when magazine subscription solicitors going door-to-door 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]

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

Next, a finding of severity under *Anderson-Burdick* does not require, as Appellants argue, a total denial of a First Amendment right. The sole precedent on which Appellants purport to rely makes this clear. *See Mays v. LaRose*, 951 F. 3d 775 (6th Cir. 2020). In *Mays*, the Court stated that under *Anderson-Burdick* "when States impose severe restrictions on the right to vote, such as poll taxes or limiting access to the ballot, strict scrutiny applies." *Id*. at 784 (emphasis added). The Court thus recognized that laws "limiting access to the ballot" as opposed to totally denying it as Appellants would have the Court believe can be "severe." *Id*. *Mays* did not state or rule anything to the contrary.

Nor could it have. *Mays* was not a ballot access case. It involved restrictions on the mechanics of voting. The language that Appellants cherry-pick from *Mays* and quote out of context does not deal with ballot access at all, but with restrictions placed on exactly how an individual can vote. In that regard, the Court stated: "where 'the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote,'" strict scrutiny was required. *Mays*, 951 F.3d at 786 (citation omitted). "Because Plaintiffs are not totally denied a chance to vote by Ohio's absentee ballot deadlines, strict scrutiny is inappropriate." *Id*. at 787.

Restrictions on ballot access need not be total or complete in order to be deemed "severe." In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), itself, for

example, John Anderson was not completely and totally banned from the ballot. His challenge was to an early-filing deadline, a mere "limit" on ballot access – yet the Court struck the deadline down "not only" because it "totally exclude[d]" any candidate who decided to run after the deadline, but also because "it also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline." *Id.* at 792. Thus, this Court and others have routinely concluded that "limits" such as early-filing deadlines and inordinate signature collection commands can be "severe" even though they do not completely, totally deny parties and candidates ballot access.

The Supreme Court made this clear in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008), where it plainly stated that there is no "litmus test for measuring the severity of a burden that a state law imposes." This has not changed, as the Seventh Circuit recently made clear in *Stone v. Board of Elections*, 750 F.3d 678, 681 (7th Cir. 2014): "[t]he Supreme Court has often stated that in this area there is no 'litmus-paper test' to 'separate valid from invalid restrictions.'" (Quoting *Anderson*, 460 U.S. at 789; *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "Rather, a court must make a practical assessment of the challenged scheme's justifications and effects." *Stone*, 750 F.3d at 681.

This Court has long taken this "no litmus" approach with ballot access restrictions. In *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 694 (6th Cir.

2015), for example, the Court stated in the context of a ballot access challenge: "Because recognized minor parties must obtain 5% of the total number of votes cast for gubernatorial candidates in the last gubernatorial election to retain ballot access, we conclude that this burden is severe …." Tennessee did not totally deny ballot access, yet its burden on access was still deemed severe under Anderson-Burdick. *See also Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (holding that Ohio's combination of early-filing and number of signatures was severe burden on candidate's ballot access). Indeed, one searches in vain for any statement to the contrary from this Court (or any other).

In terms of the COVID-19 pandemic, this Court in *Esshaki v. Whitmer*, 2020 WL 1910154 (E.D. Mich., Apr. 20, 2020), *aff'd in part*, 2020 WL 2185553 (6th Cir., May 5, 2020), made clear that restrictions on ballot access short of total denials can be severe. There, Michigan's Governor had issued two executive orders, Ex. Order 2020-21 (COVID-19) (March 23, 2020),[11] and Ex. Order 2020-43 (COVID-19) (Apr. 8, 2020),[12] that were virtually identical to those issued in Ohio at the same time. *See Esshaki*, 2020 WL 1910154, at * 6. Michigan, like

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

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

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 Michigan's argument as "both def[ying] good sense and fl[ying] in the face of all other guidance that the State was offering to citizens at the time." *Id*. at *5. "[P]rudence at that time counseled in favor of doing just the opposite." *Id*. Applying "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 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).

This Court 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 (emphasis added). The Court accordingly 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.

Michigan's bans and orders cannot be distinguished from Ohio's. Neither provided exceptions for circulators. Both States' orders interfered with but did not totally deny ballot access. Both States insisted on strict compliance with existing signature collection requirements. The combination of strict compliance and COVID-19 in both states imposed severe burdens on those seeking to access ballots.

As in *Esshaki*, *Anderson*/*Burdick* plainly applies here. The burden is severe. The District Court was correct. Appellants' claims to the contrary are far-fetched. They do not warrant a Stay and do not support Initial En Banc review.

IV. Courts and Officials Across the Country Recognize that Petitioning Cannot Safely Proceed During the COVID-19 Pandemic.

Courts across the country 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. Just to cite a few examples, 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. "[U]nder these specific circumstances, the character and magnitude of the burden on Garbett's First Amendment rights was severe." *Id*. at *13.

Likewise, Chief Judge Pallmeyer in *Libertarian Party of Illinois v. Pritker*, 2020 WL 1951687, *2 (N.D. Ill., Apr. 23, 2020), enjoined Illinois's signature collection requirements because of the "disruption and rapid spread of a contagious and dangerous respiratory illness." 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.[13]

New Jersey's Governor 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.[14] 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.[15] Governor Inslee in Washington State stated 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.[16] Everyone, it seems, recognizes the danger

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

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

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

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

posed by in-person signature collection. In their denial of that manifest truth, Appellants stand alone.

Judge Sargus perhaps put it best in his Order denying Appellants' motion to stay: "Defendants have offered no plan at all. Instead, they propose business as usual in a pandemic and allow violations of First Amendment rights of Ohio citizens to be ignored. Defendants' own actions demonstrate that otherwise neutral election laws are ill-suited to a pandemic and may offend First Amendment rights." Opinion and Order, R. 50, PAGEID# 712.

CONCLUSION

Appellants' Motion for Stay Pending Appeal and Administrative Stay should both be **DENIED**.

Respectfully submitted,

s/ *Mark R. Brown*

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

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

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Appellees certify that they have prepared this document in 14-point Times New Roman font and that excluding the Caption, Signature Blocks and Certificates, the document includes 5194 words.

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

CERTIFICATE OF SERVICE

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

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