Case No. 20-3526

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHAD THOMPSON, ET AL.

Plaintiffs-Appellees

v.

GOVERNOR OF OHIO, MIKE DEWINE, ET AL.

Defendants-Appellants

OHIOANS FOR SECURE AND FAIR ELECTIONS, OHIOANS FOR RAISING THE WAGE, ET AL.

Proposed Intervenors/Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, No. 2:20-cv-2129

REPLY IN SUPPORT OF COMBINED EMERGENCY MOTION FOR AN ADMINISTRATIVE STAY AND A STAY PENDING APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY 1

I. The proposed online system will be an administrative disaster and jeopardize the integrity of Ohio's initiative process..... 1

II. The State is entitled to a stay pending appeal..... 6

A. Circuit precedent establishes that a burden is "severe" for *Anderson-Burdick* purposes only if it completely deprives a plaintiff of the ability to exercise the right at issue..... 7

B. The burden here is not "severe." 9

CONCLUSION..... 13

CERTIFICATE OF COMPLIANCE..... 14

CERTIFICATE OF SERVICE..... 15

TABLE OF AUTHORITIES

Page(s)

Cases

Buckley v. Am. Const. Law Foundation,
525 U.S. 182 (1999) 9

Esshaki v. Whitmer,
2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020) 11, 12

Esshaki v. Witmer,
2020 U.S. Dist. LEXIS 68254 (E.D. Mich. Apr. 20, 2020) 11

Initiative & Referendum Inst., v. Walker,
450 F.3d 1082 (10th Cir. 2006) (*en banc*) 10

Mays v. LaRose,
951 F.3d 775 (6th Cir. 2020) 5, 7, 8

Purcell v. Gonzalez,
549 U.S. 1 (2006) (*per curiam*) 1

Republican Nat'l Comm. v. Democratic Nat'l Comm.,
140 S. Ct. 1205 (2020) 1

Schmitt v. LaRose,
933 F.3d 628 (6th Cir. 2019) 8

Wesberry v. Sanders,
376 U.S. 1 (1964) 8

Statutes

Ohio Rev. Code §149.45(A)(1)(a) 4

Ohio Rev. Code §3503.14(A)(5) 4

REPLY

The Court should enter an administrative stay as quickly as possible, and a stay pending appeal. It should enter the administrative stay if only to maintain the *status quo* while this Court entertains the State's *en banc* petition—a petition to which the Court has already ordered a response. And it should enter a stay pending appeal for two, independent reasons. *First*, the relief ordered by the District Court will sow chaos at best and destroy the integrity of Ohio's initiative process at worse. Neither the chaos nor the damage to the initiative process can be fixed later without a stay now. *Second*, the District Court should not have awarded *any* relief to the appellees, because their First Amendment theories all fail as a matter of law.

I. The proposed online system will be an administrative disaster and jeopardize the integrity of Ohio's initiative process.

The Supreme Court has repeatedly reminded courts not to change election rules as the election nears. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (*per curiam*). The same logic militates against the relief ordered here, which completely overhauls the signature-gathering process and orders the State to instead implement one, two, maybe even three never-before-tried processes for which "technical" and "security" issues remain to be addressed. Op., R.44, PageID#675.

The first problem with the relief ordered is that no one seems to know what it is. The District Court ordered the State "to accept electronically-signed and witnessed petitions collected through the on-line signature collection plans proposed by OFRW [Ohioans for Raising the Wage] Plaintiffs and OSFE [Ohioans for Secure and Fair Elections] Plaintiffs as set forth in their briefing." Op., R.44, PageID#675. But as it turns out, there is *no one plan*. The OFRW plaintiffs did say they would collect signatures for *their* proposed initiative through their own website (with the help of a third-party vendor). But the OSFE plaintiffs want to implement their own signature-collection plan—a yet-to-be-explained plan for which the OSFE plaintiffs must still "retain[] an online vendor" and "set[] up an online signature collection system." OSFE Br. (Doc.25-2) at 1. (In their reply brief below, the OSFE plaintiffs said they had already "developed" a system "parallel" to OFRW's. Reply, R.43, PageID#626 n.11. That is more than a bit inconsistent with what they are saying now.) A third group of plaintiffs—who seek to put *municipal* initiatives on the ballot—do not propose any concrete plan at all. Indeed, they say the District Court actually left the State "with discretion to fashion a remedy." Thompson Br. (Doc.21) at 3. So right off the bat, there is the problem that the District Court ordered relief without explaining what the relief consisted of.

Certain plaintiffs say this uncertainty is no big deal. After all, the Secretary need not start counting signatures until July 31, and need not "create" the system being foisted upon it. OSFE Br. 19; OFRW Br.18. This ignores the fact that the Secretary and local boards must prepare for counting and validating signatures using an entirely new system, which may actually be three systems, and they cannot begin doing so until they know what that system is.

The next problem arises from the OFRW plan that the State understood the District Court as ordering it to implement. OFRW wants to oversee the online signature-gathering system, which will direct voters to a third-party vendor using a link on OFRW's own website. *See* OFRW Br. (Doc.23) at 15. That is rather like creating an absentee-ballot system that entitles one candidate to collect all the absentee ballots. This arrangement creates equal-protection problems by giving one interested party (initiative proponents) an almost-unreviewable advantage over other such parties (initiative opponents). And it undoubtedly calls into question the integrity of Ohio's initiative process by reducing the degree of government oversight. How can the State credibly assure its citizens that this system—managed by a third party over which the State has no authority—is reliable?

Next, the OFRW system purports to verify signatures using the last four digits of social security numbers. This creates multiple problems. *First*, neither the

Secretary of State nor the county boards of elections have the social security numbers of all registered voters. The OFRW brief says otherwise, OFRW Br.18, even though no evidence supports that claim, and even though the State *specifically identified* this problem during the May 22 meet-and-confer (before OFRW's counsel signed a brief asserting the contrary to be true). The fact that election officials do not have a social security number for every voter is hardly surprising—Ohio does not require voters to give their social security numbers when they register to vote. *See* Ohio Rev. Code §3503.14(A)(5). *Second*, everyone agrees that the last four digits of a social security number, in contrast to the signatures on file with election officials, are not public records. See Ohio Rev. Code §149.45(A)(1)(a). That creates a problem for anyone hoping to challenge the validity of submitted signatures, as they will be unable to view the four digits linked to each "signature." And even if would-be challengers could see those numbers, they would have no way of knowing whether the social security number matches the name of the voter to which it is linked on the petition.

Would-be challengers face more hurdles still. Under the District Court's order, the deadline for submitting signatures is July 31. But July 31 is *also* the date, under state law, by which challenges to the validity of signatures must be filed in Ohio's Supreme Court. Grandjean Aff., R.40-1, PageID#560. The revised plan

thus prevents aggrieved parties from challenging an initiative's validity. And that has a cascade effect, because several other deadlines flow from the Supreme Court's decisions in such challenges. *Id.* To fix this, perhaps the District Court will knock down still more state laws, including those laws setting the deadlines for filing challenges. Each change further increases uncertainty and undermines the State's significant interest in "orderly election administration." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020).

The State's stay motion explained that bad actors could exploit the use of social security numbers to trick people into handing over personal information. The OFRW plaintiffs say there is no evidence this would happen. It is unclear how the State would develop evidence regarding how fraudsters would exploit three never-before-tried and still-to-be-defined systems. Regardless, the State does not need evidence for the obvious point that identity thieves will use whatever tools are available to confuse people into turning over sensitive information. And there is one other lurking danger with the use of social security numbers for which the Court needs no evidence: including the last four digits of these numbers on signature petitions (which are public records) comes with the obvious risk that those digits might be inadvertently exposed, perhaps through an error in the redaction process.

One last point. Both the plaintiffs and the District Court said that the State is being hypocritical here, as Secretary LaRose has called for "moving Ohio's absentee ballot system to an electronic process." OSFE Br.19; Stay Denial, R.50, PageID#717. Of course, this case has nothing to do with a system for requesting absentee ballots. Regardless, there is no inconsistency: while Secretary LaRose has called for reforms, he has advocated doing so in an orderly fashion, not through a court-ordered experiment that upends Ohio law without any definitive plan.

II. The State is entitled to a stay pending appeal.

The plaintiffs allege that Ohio's ink and witness requirements, along with its early- and mid-July deadlines for signature collection, violate the First Amendment right to legislate by initiative. As Ohio's *en banc* petition explained, the Court should hold that the First Amendment does not apply to laws regulating the mechanics of the initiative process. If the Court does that, then the State will necessarily prevail.

But the State prevails even if the Court, instead of going *en banc*, just applies *Anderson-Burdick*. This is because, as the State's stay motion explained, the moderate burden these requirements impose on the supposed First Amendment right to legislate by initiative are justified by the State's substantial interests in preventing fraud and promoting orderly election administration.

No plaintiff argues that it prevails if the burden here is "moderate" rather than "severe." Instead, each argues *only* that the burden is "severe," triggering strict scrutiny. These arguments all fail.

A. Circuit precedent establishes that a burden is "severe" for *Anderson-Burdick* purposes only if it completely deprives a plaintiff of the ability to exercise the right at issue.

The plaintiffs cannot escape circuit precedent establishing that, for *Anderson-Burdick* purposes, a law imposes a "severe" burden only when it *altogether prevents* the exercise of some voting-related right conferred by the First or Fourteenth Amendment. This Court held just that in *Mays*, 951 F.3d at 787. The *Mays* plaintiffs argued that Ohio violated the First and Fourteenth Amendments by failing to create a mechanism for voters jailed after the deadline for requesting an absentee ballot, but before Election Day, to obtain a ballot. *Id.* at 780–81. The Court rejected that argument, reasoning that, because Ohio allows *all* voters to either vote early or seek an absentee ballot for weeks before the absentee-ballot deadline, *no one* is denied the right to vote by being unexpectedly jailed: every such voter could have averted any trouble by voting earlier. *Id.* at 787. Thus, the State did not totally deny anyone the right to vote by failing to arrange for absentee voting by unexpectedly jailed voters. And "because Plaintiffs [were] not totally denied a chance to vote by Ohio's absentee deadlines, strict scrutiny [was] inappropriate." *Id.*

It follows, as night the day, that because the plaintiffs here were not "totally denied a chance" to qualify their initiatives, "strict scrutiny is inappropriate."

Two groups of plaintiffs do not even attempt to distinguish *Mays*. One does, but fails. It argues that *Mays* is irrelevant because it was an *Anderson-Burdick* case about the right to vote, not about ballot access. Thompson Br.18. Why does that matter? The plaintiffs never say. If anything, the distinction cuts the other way. The right to vote is the most fundamental of rights; all "rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Thus, one would think courts would be *more* inclined to strictly scrutinize voting restrictions than ballot-access restrictions.

Anyway, *Mays* did not invent the rule that only complete deprivations constitute a "severe" burden. The Court has repeatedly applied the same standard in ballot-access cases, explaining: "The hallmark of a severe burden is the *exclusion* or *virtual exclusion* from the ballot." *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019) (emphasis added) (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)).

B. The burden here is not "severe."

1. The plaintiffs insist that they *were* totally denied the right to legislate by initiative, because they were totally denied the chance to gather enough signatures. That is false.

First, under Ohio law, the plaintiffs have until either July 1 or July 16 to gather the necessary signatures. If they can gather signatures by July 31 under the District Court's order, they *can* do so by July 1 and July 16 too, even if it might be harder to do so. They cannot plausibly argue that the need to finish collecting one month or one-half month earlier *totally denies them* the ability to qualify for the ballot.

Second, the plaintiffs have been free to gather signatures at every moment throughout the pandemic. Ohio's stay-at-home orders *always* exempted protected First Amendment activity. The plaintiffs disagree. One group says the exemptions for "First Amendment" activity were so vague that they provided no protection. Thompson Br.13. But these exemptions were not vague as applied to the collection of signatures: as the plaintiffs themselves note, the Supreme Court has held that petition circulation is communicative activity protected by the First Amendment. *See Buckley v. Am. Const. Law Foundation*, 525 U.S. 182 (1999). (This, incidentally, is consistent with the State's *en banc* petition. While the First Amendment applies

to laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum"—for example, laws regulating who may collect signatures or the circumstances in which they may do so—the Amendment does not apply at all to laws that "determine the process by which legislation is enacted." *Initiative & Referendum Inst., v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006) (*en banc*). The ink and witness requirements, along with the deadlines for collecting signatures, regulate the process by which legislation is enacted, not communicative conduct associated with legislating.)

The other plaintiffs apparently concede that the exception for First Amendment activity applies to signature gatherers. But they insist that the State's stay-at-home orders severely burdened their First Amendment rights for other reasons. For example, they argue that, even though they were allowed to solicit signatures, the state-imposed obligation to practice social distancing made signature gathering impossible. *See, e.g.*, OFRW BR. 9–10. That hardly follows, since one can solicit and witness signatures from six feet away. For example, one could set up a table outside a grocery store (or other non-closed store) without coming within six feet of voters. And even a door-to-door solicitor could discuss the petition with an interlocutor, and then put down the clipboard and take a step back, allowing the signer to sign his name from six feet away. Countless delivery drivers employ similar tactics

daily. Regardless, the stay-at-home orders did not prohibit people from moving within six feet of one another where necessary to accomplish a permitted task. While the stay-at-home orders did indeed impose social-distancing requirements, they also required maintaining a six-foot distance only "*as much as reasonably possible.*" March 22 Order ¶1, online at https://tinyurl.com/y8urb7mn (emphasis added) (cited in OFRW Br.9 n.2). If someone practicing a permitted activity (signature gathering or working at a grocery store, for example) had to briefly pierce the six-foot halo (to hand over a pen or give an item to a customer, for example), the piercing was necessary and therefore permitted.

3. The foregoing helps distinguish the main precedent on which the plaintiffs rely: *Esshaki v. Whitmer*, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020). As the State's stay motion explained, *Esshaki* is irrelevant here because that case *did* involve a severe burden: the Michigan stay-at-home order at issue there went into effect on March 23, 2020, *remained* in effect past the deadline for obtaining signatures, and did "*not contain any exception* for campaign workers" tasked with signature gathering. *Esshaki v. Witmer*, 2020 U.S. Dist. LEXIS 68254, *2–3, 5 (E.D. Mich. Apr. 20, 2020) (emphasis added); *see also Esshaki*, 2020 U.S. App. LEXIS 14376, at 2. (One plaintiff says that, in fact, Michigan *did* permit signature collection. OFRW Br.8. That does not appear to be true. Regardless, this Court's

and the District Court's decisions were premised on the conclusion that Michigan's stay-at-home order contained no exception for campaign workers. 2020 U.S. Dist. LEXIS 68254 at *5; *see also Esshaki*, 2020 U.S. App. LEXIS 14376, at 2.) Thus the *Esshaki* plaintiff really was *severely* burdened for *Anderson-Burdick* purposes.

This case is easily distinguishable: Ohio never stopped the plaintiffs from gathering signatures and the plaintiffs still, with Ohio's stay-at-home orders no longer in effect, have more than a month to collect signatures.

CONCLUSION

The Court should grant an administrative stay and a stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this reply complies with the type-volume requirements and contains 2,596 words. *See* Fed. R. App. P. 27(d)(2)(C).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity type.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, the foregoing was filed electronically through the CM/ECF system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
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