No. 20-3526

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

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.

OPPOSITION TO APPELLANTS' MOTION FOR STAY OF PROPOSED INTERVENORS-APPELLEES' OHIOANS FOR SECURE AND FAIR ELECTIONS, ET AL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for 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 (hereinafter, "OSFE") certifies that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation, and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. OSFE consists of nine individual registered voters in Ohio and the ballot issue committee.

By: /s/ T. Alora Thomas
Attorney for OSFE-Appellees

TABLE OF CONTENTS

INTRODUCTION

No factor used by courts to determine whether to grant a stay favor Appellants. Most glaringly Appellants have failed to demonstrate that they would be harmed absent an injunction. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). The only immediate action that the challenged ruling requires of Appellants as to OSFE- is to meet and confer on "technical or security issues [as to] the on-line signature collection plans," and report back to the district court. R. 44 at PAGEID #: 676. Appellants cannot claim to be irreparably harmed discussions with Plaintiff-Appellees and Intervenor-Appellees.

In contrast, OSFE would be irreparably harmed if a stay were issued. OSFE must take immediate action to facilitate electronic signature collection: retaining an online vendor, setting up an online signature collection system, and beginning online signature gathering. The ongoing discussions with Appellants are a critical component of ensuring that all of the technical and security components of the electronic signature system are correct.

Appellants also fail to demonstratethat they are likely to succeed on the merits of their appeal. Sixth Circuit precedent is clear. "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).

Allowing the injunction to proceed during the pendency of this appeal would preserve the possibility that OSFE may effectively petition for its ballot initiative, thus preserving OSFEs' constitutional rights during the pendency of the appeal. "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) (citations omitted). Accordingly, the balance of equities weighs heavily in favor of denying the stay. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). This Court should, therefore, deny Appellants' Motion for an Administrative Stay and Stay Pending Appeal.

STATEMENT OF THE CASE

OSFE is the proponent of an amendment to Ohio's Constitution. OSFE intervened in the case below because absent court injunction, Ohio's ballot initiative requirements would violate its constitutional rights under the First and Fourteenth Amendments.

Ohio law sets forth a number of formal requirements for the petition signature-gathering. A number of the requirements are premised on the gathering of signatures in person, including the requirement of a wet signature and that the signature be witnessed. Further, proponents must submit the signatures of at least

442,958 qualified Ohio electors to the Secretary of State by the July 1, 2020 deadline. After the Secretary of State has verified and rejected signatures, supplemental signatures can be filed with the Secretary of State. The Secretary of State is to determine the sufficiency of those additional signatures no later than 65 days before the election, or August 30, 2020 for the November 3, 2020 general election.

Prior to the coronavirus pandemic, OSFE- had worked diligently to place its Proposed Amendment on the November 2020 ballot. However, the coronavirus pandemic made it impossible for OSFE to meet the State's requirements for in-person petition circulation.. COVID-19 is spread from person to person. R. 15-7 at PAGEID#: 198-PAGEID#: 199. Merely talking to someone closer than six feet can lead to COVID-19 infection. *Id*. 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." *Id*. The interpersonal contact inherent to petition drives, in addition to the common surfaces of paper petitions, clipboards, and pens, are all vectors for transmission. *See id*. Even if some restrictions may become lessened, social distancing measures will endure far into 2020. Community transmission will continue until vaccine or herd immunity is established, which is unlikely to occur

for at least a year. *Id*. Appellants DeWine and Acton have mandated that facilities may reopen as long as "social distancing and other health precautions are observed." R. 40 at PAGEID#: 529. Under such circumstances, it is impossible for OSFE to conduct in-person petition circulation.

On April 30, 2020, OSFE intervened as plaintiff in this case, requesting emergency injunctive relief to enjoin enforcement of Ohio's signature requirements. *See generally* R. 15. On May 19, the district court issued a 41-page opinion that concluded that Ohio's ballot access requirements were unconstitutional as applied to Plaintiff-Appellees and Intervenors-Appellees in light of the coronavirus pandemic. *See generally* R. 44. As to Intervenor-Appellees, the district court ordered the Appellants to accept electronically-signed and witnessed petitions collected through on-line signature collection. *Id*. at PAGEID#: 675-PAGEID#: 676. The district court also ordered the parties to meet and confer regarding "any technical or security issues" as to the on-line signature plan, and to submit their findings to the Court by May 26. *Id*. The district court also enjoined enforcement of the July 1 signature-collection deadline as to Intervenor-Appellees, and ordered the Appellants to accept petitions submitted by July 31, 2020. *Id*.. On May 202, Appellants filed for a stay with the district court. R. 46. On May 21, Appellants appealed and applied to this Court for an

Administrative Stay and Stay Pending Appeal. Earlier today, the district court denied Appellants' stay application. R. 50.

SUMMARY OF THE ARGUMENT

When deciding whether to issue a stay pending appeal, courts consider four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Griepentrog*, 945 F.2d at 153. A " stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (citation omitted). However, the absence of irreparable harm to movant is fatal to an application for a stay. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983); *see also Nken*, 556 U.S. at 438–39 (citing *Ruckelshaus*).

The "'moving party . . . has the burden of showing' that a stay is warranted." *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 662 (6th Cir. 2016) (citations omitted); *see also Nken*, 556 U.S. at 433–34 (citation omitted). This burden is particularly high because a lower court's preliminary injunction "decision is generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal

standard." *Griepentrog*, 945 F.2d at 153; *see also Mich. State A. Philip Randolph Inst*, 833 F.3d at 662 (under the abuse of discretion standard "[t]he injunction will seldom be disturbed.") (citations omitted). "[A]t a minimum," Appellants must demonstrate "serious questions going to the merits." *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 919 (6th Cir. 2018) (citations omitted). Here, Appellants have failed to meet their burden.

ARGUMENT

I. The State is Unlikely to Succeed on the Merits of the Merits

A. The District Court Decision Was Not Erroneous

Instead of arguing that the lower court applied an "erroneous legal standard," Appellants ask this Court to adopt a *new* legal standard. Given the clear binding precedent in the Circuit, Appellants assert a contrived circuit split of their own invention. The law in this Circuit is unequivocal that *Anderson Burdick* applies to initiative petitions. *See, e.g., Schmitt v. LaRose*, 933 F.3d 628, 644 (6th Cir. 2019); *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). "Under the three-step *Anderson-Burdick* framework, in which we 'weigh the character and magnitude of the burden the State's rule imposes on [Plaintiffs' First Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the

State's concerns make the burden necessary.'" *Schmitt*, 933 F.3d at 639 (alterations in original). "The hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Id.* (citing *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)).).

The district court correctly found Ohio's ballot initiative regime—particularly its "ink" signature requirement—, in light of the coronavirus pandemic, constituted a "severe burden" on OSFEs' rights. R. 44 at PAGEID#: 656-PAGEID#: 662. The district court's finding is in line with this Court's most recent *Anderson-Burdick* decision, which considered candidate ballot access rights in light of the pandemic. In *Esshaki*, this Court—considering a stay application like the one presented here—found that the district court's application of the *Anderson-Burdick* framework was appropriate. *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *4 (6th Cir. May 5, 2020). There, the district court applied *Anderson-Burdick* to find that Michigan's signature requirements for candidate petitions violated the federal constitution in light of the pandemic. *Id*.

This Court's holding in *Esshaki* is in line with other federal courts that have found that various election-related signature requirements constitute a severe burden during the pandemic. *See, e.g.*, *Garbett v. Herbert*, No. 20-cv-00245, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020) (finding severe burden on ballot access rights); *Libertarian Party of Ill. 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); *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 526 (2020) (holding that the minimum signature requirement, though modest in "ordinary times," is "severe burden" in light of the pandemic); *see also League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *2 (W.D. Va. May 5, 2020) (finding that Virginia's witness signature requirement for absentee voting was an undue burden on Virginian's fundamental right to vote in light of COVID-19).

The State's asserted interests, such as a simplified ballot, avoidance of voter confusion, and ensuring grassroots support, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 594 (6th Cir. 2006), as well as its interest in protecting the "integrity and reliability of the initiative process," *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 191 (1999), do not warrant the burden imposed on OSFE's rights. The district court did not order that any initiatives actually be placed on the ballot—it simply required that the state use a system that, in the context of the pandemic, could afford the proponents of the initiatives in question an opportunity to qualify for the ballot *if* they can satisfy the state's requirement of demonstrating sufficient grassroots support. Such grassroots can be demonstrated through the gathering of electronic rather than paper signatures. Just as with Ohio's current

system of online voter registration, the electronic petition signer's identity can be verified through personally identifying information to ensure that only Ohio electors sign the Proposed Amendment. R. 44 at PAGEID#:666.

The district court's order was thus entirely consistent with the state's interest in ensuring grassroots support. But even if it were not, that interest could not 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" was not sufficient to warrant the burden on the plaintiffs' right); *see also Blackwell*, 462 F.3d at 594 (holding insufficient State's interest in determining "bona fide support"); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1014 (S.D. Ohio 2008) (same).

If the proponents of these initiatives are ultimately successful in demonstrating the requisite grassroots support through electronic signatures, the placement of two initiatives on the November ballot will not result in voter confusion or ballot over-crowding. The district limited its order to the parties before the court, and only for the November 2020 election. R. 44 PAGEID#:674–PAGEID#:675. In the case of the state ballot, only two ballot initiatives of are affected. But Ohio voters have been able to vote without confusion with *multiple* issues on the ballot, as Ohio has frequently had *three or more* issues on the ballot

in the past.[1] It is thus unnecessary that Ohio prevent OSFE from being on the ballot to facilitate simplicity or to ease voter confusion. *See Blackwell*, 462 F.3d at 593 (holding state's interest to "avoid voter confusion" insufficient since the state "put forth no evidence" supporting how the provisions would support this interest).

Appellants have also failed to provide any evidence to support their allegation that the current regime is necessary to preserve the integrity of the electoral system. *See Griepentrog*, 945 F.2d at 154. Supreme Court precedent would suggest that such assertions of fraud are unfounded: In *Meyer* the court found that Colorado had sufficient other provisions on its books to prevent the "pad[ding of] their petitions with false signatures." *Meyer*, 486 U.S. at 427. Like in *Meyer*, Ohio has numerous statutes that penalize false signatures in this context. *See* R.C. 3599.13(7) (fine or imprisonment for false signatures on petitions); R.C. 3599.14 (making it illegal to "[c]irculate or cause to be circulated the petition or declaration knowing it to contain false, forged, or fictitious names" or "[m]ake a false certification or statement concerning the petition or declaration"); R.C. 3599.28 (making it illegal for any person, with intent to defraud or deceive, to

[1] For example, in the past 20 years Ohio had three issues on the ballot in 2015, 2011, 2009 and more than four issues on the ballot in 2008, 2006, and 2005. *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 Apr, 16, 2020).

write or sign the name of another person on documents, including petition). Integrity of the electoral system is not necessary and does not warrant the restriction on Intervenors' rights. *See Meyer*, 486 U.S.at 426.

B. There Is No Circuit Split.

Since the law in this Circuit is clear, this Court need not reach the question of whether a circuit split exists when deciding Appellants' stay motion. However, even if this Court were to reach the question of whether there is a circuit split, no such split exists. The decision of the D.C. Circuit and the Tenth Circuit are not in conflict with the decisions of this Court.

The question of whether *Anderson-Burdick* applies to initiative petitions was not decided by the D.C. Circuit. *See generally Marijuana Policy Project v. United States*, 304 F.3d 82, 86 (D.C. Cir. 2002). Instead, the question answered by the D.C. Circuit was whether the scope of initiative petitions could be limited under the *Meyer v. Grant* line of cases. *Id.* The D.C. Circuit found the *Meyer v. Gant* line of cases unhelpful because "[i]n none of these cases, however, did anyone question whether the ballot initiative at issue addressed a proper subject. The cases thus cast no light on the issue before us—whether a legislature can withdraw a subject from the initiative process altogether." *Id*. Ohio's similar prohibitions on what can and cannot be an initiative petition have been upheld by this Court.

Schmitt v. LaRose, 933 F.3d 628, 635 (6th Cir. 2019) (cannot put administrative matters into initiative petitions).

Similarly, the Tenth Circuit did not determine whether *Anderson-Burdick* applied to initiative petitions. The Tenth Circuit found that the central tenant of *Meyer* holds that "[t]he First Amendment undoubtedly protects the political speech that typically attends an initiative campaign, just as it does speech intended to influence other political decisions." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (citing *Meyer*). But the Tenth Circuit found that *Meyer v. Grant* did not apply to the particular situation before the court. *Id*.

Instead of splitting, a number of circuits have in fact coalesced around *Anderson-Burdick*'s application to initiative petition. *Wilmoth v. Sec'y of N.J.*, 731 F. App'x 97, 102 (3d Cir. 2018) (citing cases in the Fourth, Ninth, and Eighth Circuits to support a finding that the "*Anderson-Burdick* inquiry in the instant case is quite straightforward"). As found by the district court, these circuit courts have applied strict scrutiny when burden on ballot access rights are server. *Id.* No circuit split exists and it is thus not a reason to stay the district court's order.

C. The Concurrence of Judge Bush in *Schmitt* Does Not Militate in Favor of a Stay.

Judge Bush's opinion in *Schmitt* is consistent with the injunction below. Judge Bush affirmed this Court's prior holding in *Taxpayer United* 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." *Schmitt*, 933 F.3d at 645 (6th Cir. 2019) He signed onto the majority's holding in *Schmitt*.

Further, Judge Bush cited this Court's precedent in *Ohio Ballot Board* favorably. *Id.* 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.

Judge Bush did differ from the majority in concluding that statutes that regulate "election mechanics" did not warrant heightened scrutiny. *Schmitt* at 643 (Bush, J. concurring in judgment). Relying on *Taxpayers United*, Judge Bush noted that Michigan "statute [at issue in *Taxpayers United*] did not trigger heightened scrutiny under the First Amendment and survived rational-basis review." *Schmitt* at 645. He reasoned that "[h]ad Michigan's statute been directed toward the challengers' ability to advocate for their initiative, the statute would have failed strict-scrutiny review under the Supreme Court's precedent in *Meyer*." *Id.* at 645.

Even if this court were to hold that the *Meyer v. Gant* framework rather than the *Anderson-Burdick* framework were applied here, the outcome would be the

same. 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." *Meyer*, 486 U.S. at 421–22; *see also Schmitt* at 644 (citing *Meyer*). 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. Ohio's ballot initiative regime imposes such a significant prohibition. Absent court injunction, OSFE is limited to in person communication because petitions must be signed in ink and witnessed. *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 v. Ohio Elections Com'n*, 514 U.S. 334, 345 (1995)(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 their ability to engage with voters around their ballot initiative given the social

distancing mandates necessitated by the coronavirus and enforced by Appellants[2]. Appellants 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."[3] 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; *see also Meyer*, 486 U.S. at 422–23. 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.

Under *Meyer*, the legal scheme must face exacting scrutiny. *Id.* at 420; *cf. Buckley*, 525 U.S. at 192. 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. The district court rightly found that if he had applied *Meyer v. Gant* analysis instead of the *Anderson-Burdick* analysis,

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[2] 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") (defining social distancing requirments).

[3] April 30Order at ¶ 16.

the result would have been the same as both would require strict scrutiny. R. 44 at PAGE ID #: 663.

D. The District Court Did Not Overstep In Ordering Its Remedy

The district court action is in line with federal court precedent. Courts routinely craft remedies to ameliorate violations of federal constitutional rights, including in the electoral context. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207–08 (2020) (noting that among the menu of relief granted by the district court that it extended the deadline of absentee ballot "to accommodate Wisconsin voters from April 7 to April 13" which was the relief requested by plaintiffs in their preliminary injunction motions). Courts have also frequently ordered changes to electoral practices in light of emergency conditions. *See Florida Democratic Party v. Scott*, 215 F.Supp.3d 1250 (N.D. Fla. 2016) (extending , the voter registration deadline in the face of Hurricane Matthew); *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F.Supp.3d 1344 (S.D. Ga. 2016) (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 voter registration deadline). 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. *See, e.g.*, *Obama for America v Cuyahoga County Board of Elections,* No. No.1:08-cv-562 (N.D. Ohio Mar. 4, 2008); *Ohio Democratic Party v. Cuyahoga County*, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006).

As discussed *supra*, the coronavirus pandemic has made it impossible for anyone to circulate a paper petition. Thus, any remedy of the violation of OSFE's rights would require the use of electronic petition circulation and signature. Further, no separation of powers problem exists, as Appellants have disavowed having any ability to rectify violation of OSFE's constitutional rights. R. 15 at PAGEID#: 174. The only avenue for a vindication of OSFE's constitutional rights is through court intervention. The district court specifically left the precise administration of the remedy to the Appellants and Appellees through the process of meet and confer.

II. The Balance of Equities Favors Denying a Stay

The district court correctly determined that the balance of equities weigh in favor denying a stay. R. 50 at PAGEID#:719-PAGEID# 721. "Before issuing a stay, '[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (alterations in original). Here, since little - if anything - is required of Appellants

and the issuance of a stay would irreparably harm OSFE and the public, a stay should not issue.

A. Appellants Would Not Be Irreparably Harmed if a Stay did Not Issue

In order to meet their burden Appellees must support their application with some evidence" that the harm is certain and immediate rather than speculative or theoretical." *Griepentrog.*, 945 F.2d at 154The lack of irreparable injury is fatal to their motion for a stay. *Ruckelshaus v. Monsanto Co*., 463 U.S. 1315, 1317 (1983) ("An applicant's likelihood of success on the merits need not be considered. if the applicant fails to show irreparable injury from the denial of the stay."); *see also Nken v. Holder*, 556 U.S. 418, 438‑39 (2009) (citing *Ruckelshaus*). Having failed to meet this prong of the test, a stay should not issue.

Courts look at three factors to determine whether a movant will be irreparably harmed: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Griepentrog*, 945 F.2d at 154. "In evaluating the degree of injury, it is important to remember that '[t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.'". *Id.* at154. Appellants have alleged, without support, the kind of mere injuries insufficient to issue a stay.

Other than to meet and conferring and "submit findings" on the meeting to the Court, the relief ordered by this Court does not require the Appellants to do anything to accommodate OSFE until July 31, 2020. R. 44 at PAGEID#:675-PAGEID#:676; *see also* R. 50 at PAGEID#:720. Appellants' emergency appeal will have been resolved by that point, well before any operative deadline. Even once July 31, 2020 arrives, Appellants have failed to meet their burden of demonstrating that the acceptance of electronic signatures on that date would result in harm. Given recent statements by Appellant LaRose in favor of moving Ohio's absentee ballot system to an electronic process, it hard to fathom how online petition process would be a burden. Appellant LaRose is has stated that "[i]t just does not meet expectations in the year 2020 to require people to print a form and to put a wet ink signature on a dead tree piece of paper to fold it up . . [t]hat is from the last century and needs to be replaced with a modern, online absentee request system.'"[4]

Moreover, under the system proposed by intervenors and ordered by the court, signers' personally identifying information would be provided to the Secretary of State to verify the signer's identity. This is the same method of

[4] Darrel Rowland & Rick Rouan, *After a Problem-Plagued Primary, Ohio Leaders Disagree About November Plan*, Columbus Dispatch (April 28, 2020, 7:50 PM), https://www.dispatch.com/news/20200428/after-problem-plagued-primary-ohio-leaders-disagree-about-november-election-plan

verification – the same information - that is provided for Ohio's *existing* system for electronic voter registration. If the system already works for Ohio to register voters electronically, and the Secretary also wants to employ it for electronic absentee ballot application, there is no reason why the system is not acceptable for petition signing.

Appellants float a sweeping proposition that enjoining a statute always necessarily constitutes an irreparable injury. But this argument is easily dispensed with. If Appellants were correct, the state would *always* be entitled to an automatic stay whenever a statute is held unconstitutional. There is simply no support for that broad, and obviously false, proposition.

B. OSFE Would Be Irreparably Harmed by a Stay.

To defeat a motion for a stay the harm to a nonmoving party need not be irreparable—merely "substantial." *Nken*, 556 U.S. at 434. OSFE will be- unable to circulate petitions via personal encounters given the coronavirus pandemic. If the Court's order is stayed, OSFE would lose critical time in which it could be in the field collecting the hundreds of thousand electronic signatures necessary to qualify for the ballot by the July deadline. It would allow for an ongoing violation of OSFE's constitutional rights. The Supreme Court has found that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976)

(citations omitted); *see also Obama for Am.v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed.") (citations omitted). Reducing the number of precious days remaining for signature collection would be an irreparable, to say nothing of substantial, harm to OSFE, because it could operate to prevent it them from accessing the ballot. *See* R. 50 at PAGEID #:721.

C. The Public Interest Would Not Be Served by a Stay

"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 the First Amendment rights" should be enjoined. *Eu v. S.F. Cty. Democratic Central Comm.*, 489 U.S. 214, 233 (1989). Staying the injunction will thus harm the public at large, because a stay will cost OSFE the ability to communicate effectively as well as valuable time in beginning its signature gathering process.

CONCLUSION

For the foregoing reasons, the Court should deny Appellants Motion for an Administrative Stay and Stay Pending Appeal. The balance of equities weigh heavily in favor of denying a stay and there is no basis on which to disturb the district court's rulings.

May 22, 2020

Respectfully submitted,

/s/ T. Alora Thomas

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CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because the brief contains 4,860 words, excluding the parts of the brief exempted by Rule 32(f). *See* Fed. R. App. P. 32(a)(7)(B).

This brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

The undersigned herby certifies that the Brief of OSFE was electronically filed with the Sixth Circuit Court of Appeals on May 22, 2020. The Brief of OSFE was served by ECF on May 20, 2020, on counsel for Appellants. The addresses for counsel for Appellants are:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS
2:20-cv-2129

Document	Description	Page ID #
R.015	Intervenors Motion for Preliminary Injunction	
R.015-2	Exhibit B -- Declaration of Antonia Dippold-Webb	PAGEID #: 174
R.015-7	Exhibit G – Declaration of Dr. Arthur L. Reingold	PAGEID #: 198-PAGEID #: 199
R.040	Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order/Preliminary Injunction	PAGEID # 529
R.044	Opinion and Order	PAGE ID #: 656-PAGEID #: 662; PAGE ID #: 663; PAGEID#: 666; PAGEID #:674-PAGE ID #: 675; PAGEID #: 676,
R.046	Defendants' Motion for Stay	
R.050	Opinion and Order	PAGEID #:719-PAGEID # 721