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,
Proposed Intervenors - Appellees

OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL;
JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,
Proposed Intervenors - Appellees

On Appeal from the United States District Court for the Southern District of Ohio

PLAINTIFFS-APPELLEES' RESPONSE SUPPORTING EN BANC REVIEW

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On May 20, 2020, Appellants noticed their appeal in the above-styled case. On May 21, 2020, they moved for a stay pending appeal, and petitioned for Initial En Banc review by this Court. On May 26, 2020, a Panel of this Court (Sutton, McKeague & Nalbandian, JJ.) stayed pending appeal the District Court's preliminary injunction. Doc. No. 36-2 (copy attached).

Plaintiffs-Appellees support Appellants' petition for Initial En Banc Review. The Panel's stay demonstrates the necessary confusion among the Judges of this Court over the First Amendment's protections for those utilizing popular democratic measures -- especially during times of extreme crisis. The Panel's decision also conflicts with Sixth Circuit and Supreme Court precedent with respect to the standard for determining the severity of burdens on First Amendment rights. Finally, the Panel's ruling that federal courts lack power to grant affirmative relief correcting unconstitutional ballot laws contradicts this Court's and the Supreme Court precedents.

Argument

Federal Rule of Appellate Procedure 35(a) states: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."

I. The Panel's Application of *Anderson-Burdick* to the Mechanics of Popular Democracy Contradicts Case Law From the Supreme Court, this Court and Other Circuits.

The Panel's application of *Anderson-Burdick* presents a dramatic split from existing precedent. Many Courts, including the Supreme Court and this Court, *see Buckley* v. *American Constitutional Law Foundation*, 525 U.S. 182 (1999); *Meyer* v. *Grant*, 486 U.S. 414, 22 (1988); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993); *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), *cert. denied*, No. 19-974 (U.S., May 26, 2020), have concluded that the First Amendment applies equally to the mechanics of ballot access for both candidates and initiatives. Circulators of initiative petitions are afforded the same First Amendment protection as circulators of candidate petitions. *See Buckley*, 525 U.S. 182 (1999).

For this reason, burdens placed on the efforts of circulators of candidate petitions and initiative petitions must be judged under *Anderson-Burdick* equally. If a burden -- such as the State's enforcement of the challenged provisions during a pandemic -- is severe for circulators of candidate petitions, it must also be severe for circulators of initiatives. The relief required might differ, but the analysis is the same. There is no principled constitutional basis for conducting it differently.

Professor Hasen in his thoughtful critique of the Panel's disparate application of *Anderson-Burdick* calls it "deeply problematic." Richard L. Hasen, *Direct*

Democracy Denied: The Right to Initiative in a Pandemic, 2020 U. CHIC. L. REV. ONLINE 1, 6 (May 27, 2020) (copy attached) (cited with permission).[1] He describes the Panel's decision as being "very dismissive of the rights of direct democracy … that portends bad things to come." *Id*. at 2 (footnote omitted). While the District Court below "did a good job trying to put the plaintiffs in the position they would have been in if there had been no pandemic," *id*. at 8, the Panel "[d]ismissed the realities of how the pandemic had essentially ended successful petitioning activity," *id*. at 9, and "suggest[ed] without evidence that petition circulators would have an easier time collecting signatures in Ohio than in Michigan as the pandemic spread in both states." *Id*. at 10.

"The decision of the Sixth Circuit is unfortunate," *id*. at 11, Professor Hasen laments. The Panel "has put a thumb on the scale favoring the state, denigrating the right to petition along the way, and minimizing the real costs that the pandemic has placed on democratic petitioning activity." *Id*. " Most importantly, the Sixth Circuit decision sends a disturbing signal about how some courts may approach burdens on fundamental voting rights questions during the pandemic." *Id*.

As Professor Hasen explains, failing to accord equal First Amendment consideration to circulators of initiatives is "unsupported by any reasoning." *Id*. at

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608472.

6. Indeed, the Panel's disparate approach to restrictions on the mechanics of initiatives here is particularly troubling. It cannot be squared with decisions of the Supreme Court, prior decisions of this Court, or the many decisions handed down in other Circuits. This Circuit and every other Circuit agrees that the First Amendment applies to the signature collection process used for initiatives, just as it applies to the same kind of process used for candidates. The effects of COVID-19 on both are the same. The constitutional analysis must be the same.

The Panel's analysis under *Anderson-Burdick* was not only improperly "dismiss[ive] [of] the realities of how the pandemic had essentially ended successful petitioning activity" in Ohio, Hasen, *supra*, at 9, it was detached from the reality that this Court itself acknowledged just weeks ago when it affirmed a district court order granting relief from petitioning requirements. *See Esshaki v. Whitmer*, __ Fed. App'x __, 2020 WL 2185553, *1 (6th Cir., May 5, 2020). In *Esshaki*, under a nearly identical time-frame and indistinguishable facts, this Court ruled that "[t]he 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 …" (Emphasis added).

Michigan officials there, like Ohio officials here, had assured citizens that they were free to engage in First Amendment activities during the State's

lockdown. Still, as the District Court observed, Michigan (like 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." *Esshaki v. Whitmer*, __ F. Supp. 3d __, 2020 WL 1910154, * 1 (E.D. Mich., Apr. 20, 2020). This Court rejected that claim and made clear that regardless of Michigan's First Amendment exception its restrictions on candidate access were severe.[2] *See Esshaki*, 2020 WL 2185553, at *1.

Equal application of *Esshaki* to the present case can leads to only one result: Ohio's strict in-person signatures requirements during the COVID-19 crisis, like Michigan's, place a severe burden on the rights of circulators. Plaintiffs-Appellees lost time to the COVID-19 crisis and Ohio's emergency shut-down. The Panel's conclusion contradicts *Esshaki*. En Banc review is needed.

Appellants remain incorrect in asserting there exists a broad Circuit split over the First Amendment's application to initiatives. Circuits are only split over the First Amendment's application to subject matter restrictions placed on initiatives. This Court has joined the First, *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), Ninth, *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), and (arguably)

[2] In *Miller v. Thurston*, 2020 WL 2617312 (W.D. Ark., May 25, 2020), in contrast to the Panel's conclusion, the Court enjoined Arkansas's in-person witnessing requirement for initiative petitions and concluded that the State's ballot access limitations were severe, "[e]specially in light of a pandemic that necessitates social distancing between people to prevent its spread …."

Eleventh Circuits, *Biddulph v. Morham*, 89 F.3d 1491 (11th Cir. 1996), to hold that *Anderson-Burdick* applies to all restrictions on initiatives. *See Austin*, 994 F.2d 291; *Schmitt*, 933 F.3d 628.

A minority view consisting of the Tenth, *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), and D.C. Circuits, *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002), holds that the First Amendment does not apply at all to subject-matter restrictions and that *Anderson-Burdick* is irrelevant. As Professor Hasen explains, "neither [*Walker* nor *Marijuana Policy*] involved claims as in *Thompson* [*v. DeWine*] that the mechanics of the ballot measure process imposed a severe burden on ballot measure proponents in violation of the First Amendment." Hasen, *supra*, at 6.

Consequently, as Professor Hasen states, no Circuit split exists (as Defendants incorrectly claim) over the First Amendment's application to "the mechanics of the ballot measure process." This is confirmed by the Supreme Court's holdings in *Buckley* and *Meyer*, both of which applied the First Amendment to the mechanics of the ballot process, specifically signature collection. The Panel's nominal application of *Anderson-Burdick* therefore did not put it in conflict with holdings of the Supreme Court or other Circuits, and En Banc Review is not justified on this basis. It is justified because of the Panel's improper application of *Esshaki* and *Anderson-Burdick*.

II. The Panel's "Total Exclusion" Standard Contradicts *Anderson-Burdick* and this Court's Precedents.

En Banc review is further warranted because of the Panel's erroneous imposition of a "total" exclusion standard under *Anderson-Burdick*. The Panel concluded that it "cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe." *Thompson v. DeWine*, No. 20-3526, slip op., at 8. The Panel found Ohio's purported First Amendment exception "vitally important" to its conclusion, *id*. at 6, in stark contrast to this Court's failure to afford Michigan's identical exception any relevance in *Esshaki*, and erroneously stated that "none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions." *Id*.

According to the Panel, Ohioans' individual failures to exercise their fundamental rights in the midst of a pandemic were their own fault – notwithstanding the undisputed fact that engaging in such activity would violate the express terms of every executive order that Ohio officials issued in this case requiring social distancing and physical separation of at least six feet.

This reasoning is shocking to say the least. It amounts to nothing less than saying that a State may constitutionally place its polling places in the middle of a

flood-plain during a deluge and tell voters to swim for it. It is the weather that changed the status quo, after all, and if voters cannot swim or choose to "stay home for their own safety" that is their own fault.

What the Panel has done is improperly graft onto *Anderson-Burdick* not only a "total exclusion" requirement, but a "total exclusion caused solely by the State" litmus test. Neither requirement alone finds support in case law; together they are doubly unprecedented. The Supreme Court has made clear there is no single test for severity, let alone a "total exclusion" caused solely by government requirement. "In neither *Norman* [*v. Reed*, 502 U.S. 279 (1992),] nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008). This Court's decision just three weeks ago in *Esshaki*, 2020 WL 2185553, demonstrates that the *combination* of state action and COVID-19 placed a severe burden on circulators.

Nothing has changed since *Crawford* in 2008, 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 v. Celebrezze*, 460 U.S. 780, 789 (1983); *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.

In *Anderson*, 460 U.S. 780, for example, John Anderson was not completely and totally banned from the ballot by Ohio law; his challenge was to Ohio's early-filing deadline. Yet the Supreme Court found it severe and ruled it unconstitutional. This Court in *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 694 (6th Cir. 2015), meanwhile, concluded that a 5% of the total vote signature collection requirement was a severe, unconstitutional restriction on ballot access. In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), this Court concluded an early-filing deadline, coupled with a large signature requirement, was severe and unconstitutional. None of these cases involved the 'total exclusion' that the Panel – alone among all federal courts – finds necessary to a finding of severe burden. And in *Esshaki* itself, of course this Court concluded that the combination of state action and COVID-19 placed a severe burden on circulators, just as here.

Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020), is not to the contrary, since it did not address ballot access. It addressed only the detailed procedures surrounding how one cast a vote. In this regard, it was no different from the problem presented to the Supreme Court in *Crawford*, where the Court said there is no litmus test. One searches in vain for any "total exclusion" litmus test like that employed by the Panel. One searches in vain for any Court stating that a burden must be solely the fault of the State in order to be severe. They do not exist. The Panel's holding is unprecedented. En Banc Review is thus warranted.

III. The Panel's Conclusion that Federal Courts Lack Power to Grant Affirmative Relief Correcting Unconstitutional Ballot Laws Contradicts this Court's and the Supreme Court's Precedents.

The Panel incorrectly concluded that the District Court exceeded its authority by awarding Plaintiffs' affirmative ballot access relief. It erred for the basic reason that the District Court did not award any affirmative relief to Plaintiffs. The District Court issued only a prohibitive injunction against Ohio's *statutory* strict in-person compliance requirements for local initiatives. *See* Opinion and Order, R. 44, at PAGEID # 675. Ohio's Constitution plays no role in the deadlines and mechanics prescribed for local (as opposed to state-wide) initiatives.

More importantly, the Panel's conclusion that affirmative relief is improper strays from a long line of precedents that make clear federal courts have precisely this kind of authority, even with State Constitutions. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Judge Stranch's partial dissent to the Sixth Circuit's decision in *Esshaki*, 2020 WL 218553 at *3, thoroughly explains how the Panel's categorical ban on affirmative relief strays far from established precedent and need not be repeated here. Suffice it to say that the Panel's rush to a factually unsupported and legally erroneous stay during a time of crisis demands immediate En Banc review.

Conclusion

Appellants' Petition for Initial Hearing En Banc should be **GRANTED**.

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF TYPE-SIZE AND PAGE COUNT

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 10 pages as directed by the Clerk of Court.

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

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellees,

v.

RICHARD MICHAEL DEWINE, in his official 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,

Intervenors-Appellees.

No. 20-3526

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:20-cv-02129—Edmund A. Sargus, Jr., District Judge.

Decided and Filed: May 26, 2020

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

COUNSEL

ON MOTION: Benjamin M. Flowers, Michael J. Hendershot, Stephen P. Carney, Shams H. Hirji, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants. **ON RESPONSE:** Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus,

Ohio, for Plaintiffs-Appellees. Donald J. McTigue, Derek Clinger, MCTIGUE & COLOMBO LLC, Columbus, Ohio, for Intervenors-Appellees.

ORDER

PER CURIAM. By all accounts, Ohio's public officials have admirably managed the problems presented by the unprecedented COVID-19 pandemic. This includes restricting Ohioans' daily lives to slow the spread of a highly infectious disease. Nearly every other state and the federal government have done the same. And these are the types of actions and judgments that elected officials are supposed to take and make in times of crisis. But these restrictions have not gone unchallenged. *See, e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020). Our Constitution, of course, governs during both good and challenging times. Unlike those cases, however, the Plaintiffs and Intervenors here do not challenge the State's restrictions per se. Rather, they allege that COVID-19 and the State's stay-at-home orders have made it impossibly difficult for them to meet the State's preexisting requirements for initiatives to secure a place on the November ballot—violating their First Amendment rights. So they challenge Ohio's application of its general election and ballot-initiative laws to them.

Ohio's officials have not been unbending in their administration of the State's election laws. Indeed, they postponed the Ohio primary election, originally scheduled during the height of the pandemic. That exercise of judgment is not before us. Rather, Plaintiffs challenge the Ohio officials' decision not to further modify state election law in the context of this case. The district court agreed with Plaintiffs and granted a preliminary injunction, finding that, as applied, certain provisions of the Ohio Constitution and Ohio Code violate the First Amendment. Defendants now ask for a stay of that injunction to preserve the status quo pending appeal.

The people of Ohio vested their sovereign legislative power in the General Assembly. Ohio Const. art. II, § 1. But they also retained the power to amend the State Constitution, enact laws, and enact municipal ordinances by initiative and referendum. *Id.* art. II, §§ 1a, 1b, 1f. The Ohio Constitution and the Ohio Code establish the process for proposing an initiative to the

State's electors and impose many requirements for ballot access. Relevant here, a petition to put an initiative before Ohio's electors for referendum must include signatures from ten percent of the applicable jurisdiction's electors that voted in the last gubernatorial election, each signature must "be written in ink," and the initiative's circulator must witness each signature. *Id.* art. II, § 1g; *see id*. art. II, § 1a; Ohio Rev. Code Ann. § 731.28. And the initiative's proponents must submit these signatures to the Secretary of State 125 days before the election for a constitutional amendment and 110 days before the election for a municipal ordinance. Ohio Const. art. II, § 1a; Ohio Rev. Code Ann. § 731.28.

Given the COVID-19 pandemic, three individuals and two organizations, who are obtaining signatures in support of initiatives to amend the Ohio Constitution and propose municipal ordinances, challenged these requirements, as-applied to them. They claim Ohio's ballot-initiative requirements violate their First and Fourteenth Amendment rights and moved to enjoin the State from enforcing these requirements against them. The district court granted their motion in part, enjoining enforcement of the ink signature requirement, the witness requirement, and the submission deadlines, and denied their motion in part, upholding the number of signatures requirement. The court also directed Defendants 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" as well as ordered them to "accept electronically-signed and witnessed petitions from [the organizational plaintiffs] collected through the on-line signature collection plans set forth in their briefing" and to "accept petitions from [the organizational plaintiffs] that are submitted to the Secretary of State by July 31, 2020[.]"[1] (R. 44, Op. & Order at PageID # 675–76.) And the court ordered Defendants and the organizational plaintiffs to "meet and confer regarding any technical or security issues to the on-line signature collection plans" and "submit their findings to the Court by 12:00 pm on Tuesday, May 26, 2020." (*Id*.) Defendants now move for an administrative stay and for a stay pending appeal.

[1]The district court chose this date because it is also the deadline for petition proponents to submit additional signatures if the Secretary of State determines that the original submissions were insufficient. (R. 50, Op. & Order at PageID # 718.) The Secretary of State would then have less than a month, until August 30, to determine whether the petitions satisfy the requirements for ballot access, Plaintiffs would need to file any legal challenge to the Secretary of State's determination by September 9, the Secretary of State would have to certify the form of official ballots by September 14, and the Supreme Court would have to rule on any challenge by September 19. (*Id.*)

"[I]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions" are immediately appealable. 28 U.S.C. § 1292(a)(1). And the district court has already denied Defendants' motion for a stay pending appeal in that court. So we have jurisdiction and Defendants' motion is ripe for our review.

A movant must establish four factors to obtain a stay pending appeal: "(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." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When evaluating these factors for an alleged constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) ("In First Amendment cases, however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action." (internal quotation marks and alteration omitted)). So we turn first to that.

I.

"[A]lthough 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); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("[I]nitiatives and referenda . . . are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action."). As Defendants concede, our precedent dictates that we evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework.[2] *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019);

[2]Defendants contend that *Anderson-Burdick* shouldn't apply to ballot initiative requirements because restrictions on the people's legislative powers (rather than political speech or voting) don't implicate the First Amendment. At least two other Courts of Appeals have held as much. *See Initiative & Referendum Inst. v. Walker*,

Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members & Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd., 885 F.3d 443, 448 (6th Cir. 2018). First, we determine the burden the State's regulation imposes on the plaintiffs' First Amendment rights. When States impose "reasonable nondiscriminatory restrictions[,]" courts apply rational basis review and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, (1983)). But when States impose severe restrictions, such as exclusion or virtual exclusion from the ballot, strict scrutiny applies. *Id.* at 434; *Schmitt*, 933 F.3d at 639 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot."). For cases between these extremes, we weigh the burden imposed by the State's regulation against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

We have regularly upheld ballot access regulations like those at issue. *See Schmitt*, 933 F.3d at 641–42 (upholding Ohio's provision of only mandamus review for challenges to a Board of Elections' ruling over compliance with ballot initiative requirements against a First Amendment challenge); *Ohio Ballot Bd.*, 885 F.3d at 448 (upholding Ohio's single-subject requirement for ballot initiatives against a First Amendment challenge); *Taxpayers United*, 994 F.2d at 296–97 (upholding Michigan's number-of-signatures requirement for ballot initiatives against a First Amendment challenge). But these are not normal times. So the question is whether the COVID-19 pandemic and Ohio's stay-at-home orders increased the burden that Ohio's ballot-initiative regulations place on Plaintiffs' First Amendment rights.

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450 F.3d 1082, 1099–100 (10th Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002). And this court has often questioned whether *Anderson-Burdick* applies to anything besides generally applicable restrictions on the right to vote. *Daunt v. Benson*, 956 F.3d 396, 423–24 (6th Cir. 2020) (Readler, J., concurring) (acknowledging that "*Anderson-Burdick* is a poor vehicle" for evaluating First Amendment challenges to public service qualification regulations; *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020) (recognizing that applying *Anderson-Burdick* to Equal Protection claims "takes some legal gymnastics"); *Schmitt*, 933 F.3d at 644 (Bush, J., concurring in part) ("[T]he Court's precedents in *Anderson* and *Burdick*, though concerning election regulation, similarly do not address the key question raised in this case: is the First Amendment impinged upon by statutes regulating the election mechanics concerning initiative petitions?" (citation omitted)). But until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this.

We must answer this question from the perspective of the people and organizations affected by Ohio's ballot initiative restrictions and considering all opportunities these parties had to exercise their rights. *Mays*, 951 F.3d at 785–86.

The district court held that Ohio's strict enforcement of its ballot initiative regulations imposed a severe burden on Plaintiffs' First Amendment rights, given the pandemic. Not so. The district court based its order, in part, on this court's recent order in *Esshaki v. Whitmer*, --- F. App'x ----, 2020 WL 2185553 (6th Cir. May 5, 2020). But there are several key differences between this case and *Esshaki*. At bottom, a severe burden excludes or virtually excludes electors or initiatives from the ballot. *See Mays*, 951 F.3d at 786; *Schmitt*, 933 F.3d at 639. But Ohio law doesn't do that.

In *Esshaki* we held that "the *combination* of [Michigan's] strict enforcement of [its] ballot-access provisions and [its] Stay-at-Home Orders imposed a severe burden on the plaintiff's ballot access[,]" 2020 WL 2185553, at *1 (emphasis added). In other words, Michigan still required candidates seeking ballot access by petition to procure the same number of physical signatures as a non-pandemic year, "without exception for or consideration of the COVID-19 pandemic or the Stay-at-Home Orders." *Id*. What's more, Michigan's stay-at-home orders remained in place through the deadline for petition submission. *Id*. So Michigan abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures that they had gathered to that point.

On the other hand, Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders. From the first Department of Health Order issued on March 12, Ohio made clear that its stay-at-home restrictions did not apply to "gatherings for the purpose of the expression of First Amendment protected speech[.]" Ohio Dep't of Health, Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio ¶ 7 (March 12, 2020). And in its April 30 order, the State declared that its stay-at-home restrictions did not apply to "petition or referendum circulators[.]" Ohio Dep't of Health, Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order ¶ 4 (April 30, 2020). So none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions.

Unlike the Ohio orders, the Michigan executive orders in *Esshaki* did not specifically exempt First Amendment protected activity. To be sure, executive officials in Michigan informally indicated that they would not enforce those orders against those engaged in protected activity. *See* Mich. Dep't of Health & Human Servs., Executive Order 2020-42 FAQs (Apr. 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html. Of course, that promise is not the same as putting the restriction in the order itself. *Cf. Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (We "must presume that [the] legislature says in a statute what it means and means in a statute what is says there."); *Sosna v. Iowa*, 419 U.S. 393, 399–400 (1975) (noting, in the context of the capable of repetition yet evading review exception to mootness, that just because a state official says they won't enforce a statute against a party now doesn't mean they won't exercise their discretion to enforce the statute at a later time). But in any event, we did not address the significance of exemptions in *Esshaki* at all. By contrast, we believe that Ohio's express exemption (especially for "petition or referendum circulators" specifically) is vitally important here.

What's more, Ohio is beginning to lift their stay-at-home restrictions. On May 20, the Ohio Department of Health rescinded its stay-at-home order. Ohio Dep't of Health, Director's Order that Rescinds and Modifies Portions of the Stay Safe Ohio Order (May 20, 2020). We found a severe burden in *Esshaki* because Michigan's stay-at-home order remained in effect through the deadline to submit ballot-access petitions. Considering all opportunities Plaintiffs had, and still have, to exercise their rights in our calculation of the burden imposed by the State's regulations, *see Mays*, 951 F.3d at 785–86, Plaintiffs' burden is less than severe. Even if Ohio's stay-at-home order had applied to Plaintiffs, the five-week period from Ohio's rescinding of its order until the deadline to submit an initiative petition undermines Plaintiffs' argument that the State has excluded them from the ballot.

Plaintiffs' claim effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds) as they would without the pandemic. But that's not necessarily true. There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them and bring the petitions to the

electors' homes to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.

Moreover, just because procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot. And we must remember, First Amendment violations require state action. U.S. Const. amend. I ("*Congress* shall make no law . . . ." (emphasis added)); 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, *of any State* . . . ." (emphasis added)). So we cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe. *See Schmitt*, 933 F.3d at 639.

Despite the pandemic, we believe that the more apt comparison is to our burden analysis in *Schmitt*. The plaintiffs there made a First Amendment challenge to Ohio's restriction of judicial review for board of elections ballot decisions to petitions for a writ of mandamus. And we held that the burden was intermediate because there are some costs associated with obtaining legal counsel and seeking mandamus review. *Id*. at 641. So this prevents some proponents from seeking judicial review of the board's exclusion of their initiative and constitutes more than a de minimis limit on access to the ballot. *Id. Schmitt* concluded that a burden is minimal when it "in no way" limits access to the ballot.[3] *Id*. (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 577 (6th Cir. 2016)). Thus, the burden in *Schmitt* had to be intermediate. Same here. Requiring Plaintiffs to secure hundreds of thousands of signatures

[3]To be sure, this statement arguably conflicts with other articulations of what constitutes a minimal burden. *See Burdick*, 504 U.S. at 434–39 (because Hawaii's election laws were reasonable and nondiscriminatory they imposed a minimal burden on the plaintiff's First Amendment rights, even though they prevented the plaintiff from casting a vote for his preferred candidate); *Daunt*, 956 F.3d at 408 (classifying regulations that are "generally applicable [and] nondiscriminatory" as imposing a minimal burden); *Taxpayers United*, 994 F.2d at 297 (finding Michigan's ballot initiative regulations minimally burdensome because they were "content-neutral, nondiscriminatory regulations that [were] reasonably related to the purpose of administering an honest and fair initiative procedure."). Indeed, it's hard not to conclude that the signature requirements in *Taxpayers United* necessarily limited ballot access. And in *Burdick*, the Supreme Court remarked that all "[e]lection laws will invariably impose some burden on individual voters." 504 U.S. at 433. But the State doesn't argue that its ballot initiative regulations impose only a minimal burden. And because those regulations satisfy intermediate scrutiny, they would survive under the framework for regulations that impose a minimal burden. So we proceed under the intermediate burden analysis discussed in *Schmitt*. 933 F.3d at 641.

in support of their initiative is a burden. That said, Ohio requires the same from Plaintiffs now as it does during non-pandemic times. So the burden here is not severe.

Whether this intermediate burden on Plaintiffs' First Amendment rights passes constitutional muster depends on whether the State has legitimate interests to impose the burden that outweigh it. *See Burdick*, 504 U.S. at 434. Here they offer two.[4] Defendants claim the witness and ink requirements help prevent fraud by ensuring that the signatures are authentic. And the deadlines allow them time to verify signatures in an orderly and fair fashion, while also providing initiative proponents time to challenge any adverse decision in court.

These interests are not only legitimate, they are compelling. *John Doe No. 1*, 561 U.S. at 186 ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008) ("[E]liminating election fraud is certainly a compelling state interest[.]"); *Austin*, 994 F.2d at 297 ("[S]tate[s] ha[ve] a strong interest in ensuring that its elections are run fairly and honestly," as well as "in maintaining the integrity of its initiative process." (internal quotation marks omitted)). The district court faulted Defendants for not narrowly tailoring their regulations. But *Anderson-Burdick*'s intermediate scrutiny doesn't require narrow tailoring. Because the State's compelling and well-established interests in administering its ballot initiative regulations outweigh the intermediate burden those regulations place on Plaintiffs, Defendants are likely to prevail on the merits.

II.

Unless the statute is unconstitutional, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Defendants have shown they are likely to prevail on the merits. Serious and irreparable harm will thus result if Ohio cannot conduct its

[4]Defendants also claim a third state interest: ensuring that each initiative on the ballot has a threshold amount of support to justify taking up space on the ballot. This interest is more appropriately related to Ohio's number of signatures requirement. *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012) (A State may legitimately "avoid[ ] overcrowded ballots" and "protect the integrity of its political processes from frivolous or fraudulent candidacies."). But the district court did not enjoin the State's enforcement of that regulation so it's not properly before us in this motion for a stay pending appeal.

election in accordance with its lawfully enacted ballot-access regulations. Comparatively, Plaintiffs have not shown that complying with a law we find is likely constitutional will harm them. So the balance of the equities favors Defendants. Finally, giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006). With all four factors favoring Defendants, we grant their motion for a stay pending appeal.

III.

Last, even though we grant Defendants' motion for a stay pending appeal, we note that the district court exceeded its authority by rewriting Ohio law with its injunction. Despite relying heavily on *Esshaki*, the district court failed to apply its primary holding: "federal courts have no authority to dictate to the States precisely how they should conduct their elections." ---F. App'x ----, 2020 WL 218553 at *2. In *Esshaki* we granted a stay for the affirmative portion of the district court's injunction that (1) reduced the number of signatures required to appear on the ballot, (2) extended the filing deadline, and (3) ordered the State to permit the collection of signatures by electronic mail. While it may not have done the first of these, the court below did the second and third. The district court extended the filing deadline by almost a month, to July 31, and ordered Defendants to accept petitions electronically signed, under the plan Plaintiffs drafted.

Federal courts can enter positive injunctions that require parties to comply with existing law. But they cannot "usurp[] a State's legislative authority by re-writing its statutes" to create new law. *Id*. The district court read this holding too narrowly; recognizing it could not modify the Ohio Code but remained free to amend the Ohio Constitution. Instead of simply invalidating Ohio's initiative deadline and signature requirement, the district court chose a new deadline and prescribed the form of signature the State must accept. The Ohio Constitution requires elector approval for all amendments. Ohio Const. art. II, § 1a; *id.* art. XVI, §§ 1, 2. By unilaterally modifying the Ohio Constitution's ballot initiative regulations, the district court usurped this authority from Ohio electors.

The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections. And because that's where the decision-making authority is, federal courts don't lightly tamper with election regulations. These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into unchartered waters. It may well be that the new methods for gathering signatures and verifying them proposed by Plaintiffs (using electronic signatures gathered online by third parties and identified by social security number) will prove workable. But they may also pose serious security concerns and other, as yet unrealized, problems. So the decision to drastically alter Ohio's election procedures must rest with the Ohio Secretary of State and other elected officials, not the courts.

One final point, rewriting a state's election procedures or moving deadlines rarely ends with one court order. Moving one piece on the game board invariably leads to additional moves. This is exactly why we must heed the Supreme Court's warning that federal courts are not supposed to change state election rules as elections approach. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). Here, the November election itself may be months away but important, interim deadlines that affect Plaintiffs, other ballot initiative proponents, and the State are imminent. And moving or changing a deadline or procedure now will have inevitable, other consequences.

There is no doubt that the COVID-19 pandemic and Ohio's responsive restrictions to halt the spread of that disease have made it difficult for all Ohioans to carry on with their lives. But for the most part we are letting our elected officials, with input from public health experts, decide when and how to apply those restrictions. The election context is no different. And while the Constitution provides a backstop, as it must—we are unwilling to conclude that the State is infringing upon Plaintiffs' First Amendment rights in this particular case.

For these reasons, we **GRANT** Defendants' motion for a stay pending appeal and **DISMISS AS MOOT** their motion for an administrative stay.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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DIRECT DEMOCRACY DENIED:
THE RIGHT TO INITIATIVE IN A PANDEMIC

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DIRECT DEMOCRACY DENIED: THE RIGHT TO INITIATIVE IN A PANDEMIC

RICHARD L. HASEN*

I. INTRODUCTION

Putting aside the Supreme Court's controversial decision in *Republican National Committee v. Democratic National Committee*,[1] the case over extending the date for receipt of absentee ballots in the April 2020 Wisconsin primary, courts so far have done a fairly good job protecting voting rights during the COVID-19 pandemic. From easing candidate and party signature requirements for ballot access,[2] to temporarily eliminating witness[3] or notarization[4] requirements for casting an absentee ballot, to interpreting the excuse provisions in for-cause absentee ballot laws to cover voters without coronavirus immunity who fear voting in person,[5] courts have recognized that election laws that ordinarily do not burden voters can become burdensome in a pandemic. Courts have interpreted such laws to avoid disenfranchisement, and sometimes temporarily suspended or altered them.[6]

That welcome thumb on the scale favoring voters, however, has not extended uniformly to claims for the easing of signature gathering rules by ballot

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[1] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020). I provide a critique of the opinion in Part II.A of Richard L. Hasen, *Three Pathologies of American Voting Rights Iluminated by the COVID-10 Pandemic, and How to Treat and Cure Them* (draft dated May 18, 2020), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3604668.

[2] Esshaki v. Witmer, No. 20-1336, 2020 WL 2185553, *1 (6th Cir. May 5, 2020).

[3] League of Women Voters of Va. v. Va. State Bd. of Elections, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020) (approving consent decree).

[4] League of Women Voters of Okla. v. Ziriax, 2020 OK 26, https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=486523. After the ruling, the Oklahoma Legislature reinstated the notarization requirement. Barbara Hoberock, *Gov. Stitt Signs Fast-Moving Bill to Restore Notary Requirements on Oklahoma Absentee Ballots*, TULSA WORLD, May 8, 2020, https://www.tulsaworld.com/news/state-and-regional/gov-stitt-signs-fast-moving-bill-to-restore-notary-requirement-on-oklahoma-absentee-ballots/article_13753f29-d58c-5bae-aa61-cbeb0ca1b76e.html#1.

[5] Tex. Democratic Party v. DeBeauvoir, Order on Application for Temporary Injunctions and Plea to the Jurisdiction, No. D-1-GN-20-001610, at 3-4 (Tex, 201st Jud. Distr., Apr. 17, 2020), https://electionlawblog.org/wp-content/uploads/texas-excuse-order-1.pdf.

[6] *See* Hasen, *supra* note 1, Parts II.B, II.C (analyzing how courts have adjudicated election law disputes in light of the COVID-19 pandemic).

measure proponents. In four cases I examine,[7] courts have rejected the demands of initiative proponents to ease requirements to qualify a measure for the ballot, such as allowing electronic instead of "wet" (in person) signatures, and easing witness requirements, total number of signatures required, or geographic requirements for signature collection. In just one case, *Thompson v. DeWine*,[8] a federal district court ordered Ohio to alter its procedures for qualifying proposed measures for the ballot, including allowing the acceptance of electronic signatures. The decision, however, was put on hold by the Sixth Circuit in a stay order that was very dismissive of the rights of direct democracy and that portends bad things to come.[9]

In this short analysis, I argue that some of the reasons courts and states have offered against easing ballot measure qualification requirements during a pandemic are weak, and that the district court in *Thompson* was right to see that normal ballot qualification rules can impose a severe First Amendment burden on direct democracy proponents under pandemic conditions. The problem, as illustrated by the *Thompson* case, is fashioning appropriate relief consistent with principles of federalism and separation of powers. It is difficult to craft a remedy would put the plaintiffs in the position they would have been in had there been no pandemic and that does not usurp the state's general role in enforcing its election rules or undermine sound principles of election administration and fairness.

II.
DIRECT DEMOCRACY AS INFERIOR DEMOCRACY

States and local governments do not have to offer voters the devices of direct democracy such as the initiative, referendum, or recall as a means of supplementing the regular legislative process, but when they do, activity related to these direct democracy measures is protected by the First Amendment. In *Meyer v. Grant*,[10] for example, the Supreme Court struck down a Colorado rule that barred

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[7] Arizonans for Fair Elections v. Hobbs, No. CV-20-00658-PHX-DWL, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020); Bambenek v. White, No. 3:20-cv-3107, 2020 WL 2123951, *2 (C.D. Ill. May 1, 2020); Morgan v. White, No. 1-20-cv-02189, https://electionlawblog.org/wp-content/uploads/Morgan-v.-White.pdf (N.D. Ill. May 18, 2020); Thompson v. DeWine, ___ F.3d. ___, 2020 WL 2702483 (6th Cir. May 26, 2020). Although beyond the scope of this article, a federal district court also rejected an attempt to relax signature requirements for a gubernatorial recall in Nevada. Fight for Nevada v. Cegavske, No. 2:20-cv-00837-RFB-EJY, https://www.scribd.com/document/461649223/Fight-for-Nevada-TRO-rejection (D. Nevada, May 15, 2020). The court distinguished cases relaxing signature requirements for candidate and party ballot qualification, calling them "very different" from qualifying a recall for the ballot. *Id*. (slip op. at 7-8).

[8] 2020 WL 2557064 (S.D. Ohio, May 19, 2020).

[9] *Thompson*, 2020 WL 2702483. *See infra* Part III.

[10] 486 U.S. 414 (1988).

paying ballot petition circulators. "The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion."[11] And in *Buckley v. American Constitutional Law Foundation*,[12] the Court struck down, among other things, a Colorado law requiring petition circulators be registered voters and to wear badges indicating whether or not they were paid circulators.

As lower courts have considered First-Amendment challenges to various aspects of laws regulating ballot petitions and direct democracy, they typically have applied a sliding scale balancing test, commonly known as the *Anderson-Burdick* test, which requires the state to justify laws imposing severe burdens on plaintiffs under strict scrutiny and less severe burdens under looser standards of review.[13]

Ballot circulation is generally an in-person activity, in which a ballot circulator typically sets up a table in a popular area such as outside of a supermarket and asks voters to sign petitions to put the measure on the ballot.[14] To qualify a measure to appear on the ballot for voter approval, ballot circulators must comply with standards such as a minimum number of signatures collected in a finite period of time

Signature collection that is usually not burdensome in ordinary times has become extremely burdensome during the pandemic when states put in place orders confining people to their homes except for essential activities. Even in areas without formal orders, signature collection can be very difficult as health experts have cautioned against unnecessary close contact with other people and with surfaces such as the pens and clipboards that are typically used to collect signatures

As in cases involving other election laws that have become burdensome in light of the COVID-19 pandemic,[15] proponents of state and local ballot measures have asked federal courts for relief from the usual election rules in light of the

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[11] *Id*. at 422-23 (footnote omitted).

[12] 525 U.S. 182 (1999).

[13] The test is named after two Supreme Court cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). For more on the test, see Hasen, *supra* note 1, at notes 117-24 and accompanying text and Part II.B; Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (forthcoming 2020). On lower court application of *Anderson-Burdick* to First Amendment ballot measure cases, see *Thompson*, 2020 WL 2557064, at *10 ("Importantly, this Court is bound by the Sixth Circuit, which has twice in the last two years applied the *Anderson-Burdick* framework to First Amendment challenges to Ohio's statutory requirements for initiative petitions.").

[14] *Thompson*, 2020 WL 2557064 at *14.

[15] *See* Hasen, *supra* note 1, at Part II.B (describing COVID-19-related election litigation).

difficulty of meeting the rules during the pandemic. For the most part, courts have been unsympathetic to the claims of ballot measure proponents even while other courts have granted relief to minor political parties and candidates who also need to collect signatures to remain on the ballot.[16]

For example, in *Morgan v. White*,[17] plaintiffs were Illinois registered voters who wished to circulate a constitutional amendment referendum on the Illinois Democracy Amendment and an initiative for a local government referendum in Evanston, Illinois.[18] As is typical, Illinois requires ballot circulators to collect a certain number of signatures on paper (so-called "wet" signatures) as well as requires ballot circulators to add a sworn statement "certifying that the signatures on that sheet . . . were signed in his or her presence."[19] Circulators must file the original signed witness sheets with election authorities.

Plaintiffs sought a court order modifying some of these rules and extending the deadline for submitting signatures. The court held that the plaintiffs lacked standing, because they had not circulated petitions for the first 16 months of the 18-month period to collect signatures for the upcoming election and so they could not show they were injured by the existing ballot access rules.[20] Plaintiffs argued they were waiting for a reform commission to first make recommendations about election reform before they decided to circulate the petition on the same topic, but the court concluded that "[n]othing in the record supports an inference that, absent [the stay-at-home order of the Illinois governor], Plaintiffs would have been able to collect necessary signatures in the weeks between the issuance of the order and [the deadline]."[21]

The court further held that even if the plaintiffs had standing, they should lose on the merits. After stating that "there is no constitutional right to place referenda on the ballot,"[22] the court distinguished cases in which other courts had loosened requirements for minor parties and candidates to appears on the ballot as somehow more worthy of protection.[23] Despite the flexible *Anderson-Burdick* balancing test, the court applied rational basis review, which is easy for the state to satisfy in order to justify its restrictions.[24]

The court held that the challenge to requiring a wet signature and witness statements was more weighty given COVID-19, but concluded that there should be no relief for plaintiffs because "[t]hese circumstances are caused by the virus

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[16] *E.g.*, Esshaki v. Witmer, No. 20-1336, 2020 WL 2185553, *1 (6th Cir. May 5, 2020).
[17] Morgan v. White, No. 1-20-cv-02189 (N.D. Ill. May 18, 2020).
[18] *Id*. at 1.
[19] *Id*. at 3.
[20] *Id.* at 6.
[21] *Id.* at 7.
[22] *Id*. at 9.
[23] *Id*. at 9 n.6.
[24] *Id*. at 10.

itself…not by state law. It is only when state law prevents certain individuals from circulating petitions that Frist Amendment harms are implicated."[25] Finally, the court concluded that it was plaintiffs' own dilatory conduct, rather than state law, that was responsible for its predicament.[26]

Similar reasoning appears in the other two cases rejecting arguments to loosen ballot access requirements in light of the virus. In *Bambenek v White*,[27] a different federal district court reviewing another challenge to Illinois rules for ballot measures followed the reasoning in *Morgan*.[28] The *Bambenek* court distinguished cases giving relief to political parties collecting signatures, cases which "concern[] placing candidates on the ballot, which implicates unique constitutional concerns, as opposed to this case which involves placing a proposed constitutional amendment and various referenda on the ballot and therefore does not implicate precisely the same constitutional concerns."[29] The court, citing *Morgan*, described that court as distinguishing candidate ballot access from a "state-created right to non-binding ballot initiatives"[30]—even though plaintiffs were proposing a binding ballot measure, not an advisory one.[31] The court also found that easing the ballot access rules for initiative proponents would place a burden on state defendants,[32] and that the plaintiffs waited too long to file suit.[33]

In *Arizonans for Fair Elections v. Hobbs*,[34] plaintiffs who wished to circulate ballot measures for the 2020 general election ballot sought a change in ballot measure qualification rules, including allowing the electronic submission of signatures through a system that had already been set up for Arizona candidates to collect qualifying signatures.[35] The court rejected the relief on a number of grounds. First, plaintiffs had challenged only Arizona's statutory rules concerning the ballot measure qualification process, and not the requirements in the state constitution

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[25] *Id.* at 11. *See also id.* at 14.

[26] *Id.* at 11-12. The court also noted that changes in the laws would burden election administrators who need to determine if measures qualify for the ballot and then prepare them for inclusion. "Preventing Defendants from being able to fulfill these statutory duties [on time] not only imposes harm on them but also appears contrary to the public interest." *Id*. at 13.

[27] Bambenek v. White, 2020 WL 2123951 (C.D. Ill. May 1, 2020).

[28] *Id*. at *2.

[29] *Id*.

[30] *Id*. a *2.

[31] The case that the *Bambenek* court erroneously relied on for this proposition, *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935 (7th. Cir. 2018) involved a binding referendum, not an advisory voter plebiscite.

[32] As to those plaintiffs in the case seeking to place a measure on local ballots, the court noted that the deadline for signature submission was August 3, and it was speculative whether the virus would affect signature gathering during the summer. *Bambenek*, 2020 WL 2123951. at *3.

[33] *Id*.

[34] 2020 WL 1905747 (D. Ariz. Apr. 17, 2020).

[35] *Id.* at *2.

requiring, among other things, in-person signature qualification. Given this limited challenge, the court concluded that the relief plaintiffs sought would not help them.[36] Second, the court characterized plaintiffs' conduct as dilatory, in that other ballot measure committees had gathered enough signatures but "the two committees in this case didn't start organizing and gathering signatures until the second half of 2019."[37] Further, given that the pandemic could lift before the July 2020 deadline for the submission of signatures, the court held that plaintiffs did not demonstrate that "Arizona law creates a severe burden that would prevent a reasonably diligent initiative committee from placing its proposed initiative on the ballot."[38]

The court also expressed separation of powers and federalism concerns, raising doubt about the power of the federal court "to rewrite state election laws that have been in place since the 1910s." Finally, the court was concerned about the "array of granular policy choices this Court would need to make in order to effectively implement: relief for the plaintiffs."[39] As in *Morgan*, the *Arizonans for Fair Elections* court distinguished cases granting relief for plaintiffs wishing to vote during the pandemic on grounds that those were "vote restriction" cases to which a "reasonable diligence" standard would not apply.[40]

Some of the points made by these three courts are meritorious.[41] For example, a ballot measure proponent who challenges statutory requirements but fails to challenge state constitutional requirements for in-person signature gathering cannot expect a federal court to be able to grant effective relief. And an initiative proponent who would have no chance of qualifying a ballot measure under normal conditions should not expect relief from a federal court to account for increased difficulty created by the pandemic. A court should put plaintiff in the rightful position, which is the position they would have been in had there been no wrong.[42]

But these cases are deeply problematic. They denigrate the rights that ballot measure proponents are seeking to vindicate in these cases by unfavorably comparing them to the rights of candidates to get on the ballot. Once a jurisdiction offers direct democracy options to the public, severe burdens on that right should be subject to closer scrutiny. The courts' arguments seeking to distinguish candidate ballot access from ballot measure ballot access are unsupported by any reasoning. Both involve voting rights and both involve severe burdens caused by the pandemic. If the external shock of COVID-19 is enough to justify judicial

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[36] *Id*.
[37] *Id.*; *see also id*. at *10-*11.
[38] *Id*.
[39] *Id.*
[40] *Id*. at *12-*13.
[41] I address the federalism and separation of powers issues in Part III below.
[42] DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 14-15 (5th ed. 2019).

changes in candidate signature requirements, it should for ballot measures as well.[43] Cases in both areas should be judged under the flexible *Anderson-Burdick* standard.

The ballot measure cases also appear to impose too high a standard for ballot measure proponents' standing requirements and for obtaining relief. As the *Bambenek* court recognized, "signature collection efforts for referenda drives…tend to ramp up in the final weeks."[44] That ballot measure proponents did not seek to gather signatures during the entire window for signature gathering should not be evidence of dilatory conduct. A court should instead ask if plaintiffs had a realistic chance of qualifying a measure for the ballot had there been no pandemic.

III.
FASHIONING APPROPRIATE DIRECT DEMOCRACY RELIEF IN A PANDEMIC

I am much more sympathetic to the constitutional analysis of the federal district court in *Thompson v. DeWine*,[45] a case brought by proponents of a ballot measure in Ohio. But the case demonstrates the difficulty of federal courts appropriately granting relief, especially given election administration issues and given separation of powers and federalism concerns as raised in the *Arizonans for Fair Elections*[46] case. And given the Sixth Circuit's analysis granting a stay in *Thompson*, the case likely will soon be reversed.

As to constitutional rights, the district court agreed that once a state offers direct democracy devices, limits on the practice may violate the Constitution and are subject to *Anderson-Burdick* balancing.[47] The court also recognized that it was appropriate to take the COVID-19 pandemic into account when balancing, and that normally non-severe ballot access rules become severe under pandemic conditions.[48] The state's stay-at-home orders and other restrictions have "pulled the rug out from under [plaintiffs'] ability to collect signatures,"[49] creating a severe burden on plaintiffs' rights.[50] This synergistic approach is fairer than the *Morgan*

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[43] One answer to the argument that these laws infringe First Amendment rights is that ballot measure proponents could simply decide to propose a measure in a later election. But we would not accept such an answer if applied to a candidate kept off the ballot for lack of enough signatures during a pandemic. Just like a candidate expresses her First Amendment right by choosing to run in a particular election, so too do ballot proponents pick the times for attempting to place measures on the ballot.

[44] *Bambenek*, 2020 WL 2123951, *3.

[45] 2020 WL 2557064 (S.D. Ohio, May 19, 2020).

[46] 2020 WL 1905747, at *11-*12.

[47] *Thompson*, 2020 WL 2557064 at *7-*12.

[48] *Id.* at *10-*12.

[49] *Id*. at *12.

[50] *Id.* and *12-*13.

court's nonsensical view that these problem were "caused by the virus itself…not by state law."[51]

Once the court concluded that Ohio's ballot access laws imposed a severe burden on plaintiffs rights and other factors meriting injunctive relief, the question became one of remedy. The court recognized that state officials were without power to waive those requirements for ballot access contained in the state constitution, and so while it deferred to state officials to some extent, it ordered the state "to accept electronically-signed and witnessed petitions collected through the on-line signature collection plans" that the plaintiffs had proposed for their ballot measure drives.[52] The court also extended the deadlines for collection of signatures and ordered the parties to meet as to appropriate standards for electronic signature collection.[53]

The *Thompson* court did a good job trying to put the plaintiffs in the position they would have been in if there had been no pandemic and, following the Sixth Circuit precedent in the *Esshaki* case extending petitioning deadline for political parties,[54] the district court gave state officials maximum flexibility to cure the constitutional defects created by the confluence of the coronavirus and state law.

But these cases do raise a host of difficult problems of election administration, federalism, and separation of powers. To begin with, state deadlines for ballot qualification are necessary so that election officials have time to adequately determine whether measures qualify for the ballot, and if they do, properly prepare them for inclusion in ballot materials. As a court extends deadlines, it puts more pressure on election officials to do more in less time under their own pandemic-related stresses. Having state officials process electronic ballot measure signatures under pandemic conditions when they have not done so before may be difficult. Before a court grants relief to ballot measure proponents, it should insure that the new procedures will not unduly interfere with the other responsibilities of election officials.

Second, as the courts rejecting relief for ballot measure proponents have noted, having a federal court intervene in state and local ballot measure machinery is both intrusive and difficult work.[55] There is no set way for courts to ease rules. States might consider electronic submission of ballots (in states that already have some such system in place), or a reduction of the number of required signatures, or an end to witness requirements, or an extension of deadlines or some other relief.

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[51] *Morgan*, No. 1-20-cv-02189, at 11.
[52] *Thompson*, 2020 WL 2557064 at *20.
[53] *Id*. at *21. Given the adjustments of deadlines and the acceptance of electronic signature, the court found it unnecessary to reduce the state's numerical and geographical requirements for signature collection. *Id.* at *18.
[54] *Esshaki*, 2020 WL 2185553.
[55] Having a state court rather than a federal court make these changes removes the federalism concern but the election administration and separation of powers concerns remain.

Unlike a legislature that can consider input from a variety of sources on how to best balance these kinds of questions, courts can only take advice offered by the party, by witnesses, or by others submitting formal amicus briefs. The chances are high that in setting forth detailed changes in procedures a court will get things wrong.

So how best to engage in this balancing? The *Thompson* court seems to have the balance right. While it put a thumb on the scale favoring plaintiffs' rights when it came to the question of whether or not there is a constitutional violation, it offered deference to the state over how to best remedy the loss of plaintiffs' constitutional rights. It ordered the parties to meet and confer as to how to best put the electronic signature collection mechanism into place, and the court should continue to be open to state concerns about burden, cost, and availability of a remedy.

A Sixth Circuit panel, granting a stay of the district court's order for the state of Ohio, viewed the matter very differently. The court applied the *Anderson-Burdick* framework as binding circuit precedent, but left open the possibility of an *en banc* change of standard going forward.[56] Dismissing the realities of how the pandemic had essentially ended successful petitioning activity,[57] the court held the law imposed only a minor burden on plaintiffs. It declared that "just because

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[56] *Thompson*, 2020 WL 2702483, at *2 n.2 ("But until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this."). Ohio in seeking initial en banc consideration of the district court's order in *Thompson*, argued that *Anderson-Burdick* should not even apply to challenges to the mechanics of the initiative process. Petition for Initial En Banc Review, Thompson v. DeWine, No. 20-3526 (6th Cir. May 21, 2020), https://www.bloomberglaw.com/product/blaw/document/X2U08L8GSKV9SVA4KMOCA5G18RU?update=true. In the petition, the sate conceded that existing Sixth Circuit authority requires use of the *Anderson-Burdick* balancing test to determine whether state ballot measure procedures are unduly burdensome. It asked for en banc review to reverse those precedents, arguing that D.C. Circuit and Tenth Circuit cases reject *Anderson-Burdick* in this context and pointing to a purported circuit split. In fact, the D.C. case, *Marijuana Policy Project v. U.S.*, 304 F3d 82 (D.C. Cir. 2002) does not mention the *Anderson-Burdick* test and instead held that federal legislation barring the District of Columbia from passing any laws on the subject of marijuana legalization did not violate the First Amendment. The Tenth Circuit case, *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), upheld against First Amendment challenge a provision of the Utah constitution requiring wildlife-related ballot measures to pass by a supermajority vote. This case too did not mention *Anderson-Burdick*, and neither case involved claims as in *Thompson* that the *mechanics* of the ballot measure process imposed a severe burden on ballot measure proponents in violation of the First Amendment.

[57] *Thompson*, 2020 WL 2702483, at *4 ("Plaintiffs' claim effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds) as they would without the pandemic. But that's not necessarily true. There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them and bring the petitions to the electors' home to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.").

procuring signatures is now harder (largely because of a disease beyond the control of the State) doesn't mean that Plaintiffs are *excluded* from the ballot."[58] The court did not explain how anything short of full exclusion of the plaintiffs from the ballot could count as merely a minor burden. The court rejected the district court's order even assuming an intermediate burden, holding the state's rules appeared justified on antifraud and election administration grounds even in the midst of a pandemic.[59]

The Sixth Circuit panel distinguished the Circuit's earlier *Esshaki* case, which had eased ballot access rules for party and candidate qualification in Michigan, on grounds that Ohio's stay-at-home order did not formally ban First Amendment activity like petition circulating.[60] It noted that Ohio was beginning to lift its stay-at-home order,[61] suggesting without evidence that petition circulators would have an easier time collecting signatures in Ohio than in Michigan as the pandemic spread in both states.

Finally, the Sixth Circuit, turning to the federalism and separation of powers issues that the district court flagged before granting plaintiffs relief, held that the district court exceeded its powers in granting plaintiffs a remedy:

> The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections. And because that's where the decision-making authority is, federal courts don't lightly tamper with election regulations. These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into unchartered waters. It may well be that the new methods for gathering signatures and verifying them proposed by Plaintiffs (using electronic signatures gathered online by third parties and identified by social security number) will prove workable. But they may also pose serious security concerns and other, as yet unrealized, problems. So the decision to drastically alter Ohio's election procedures must rest with the Ohio Secretary of State and other elected officials, not the courts.[62]

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[58] *Id*. (original emphasis).

[59] *Id*. at n.3, *5 ("Defendants claim the witness and ink requirements help prevent fraud by ensuring that the signatures are authentic. And the deadlines allow them time to verify signatures in an orderly and fair fashion, while also providing initiative proponents time to challenge any adverse decision in court. [¶] These interests are not only legitimate, they are compelling.").

[60] *Id.* at *3.

[61] *Id*. at *4

[62] *Id*. at *6. The court also cautioned against court orders issued too close to the election, citing the *Purcell* Principle and *Purcell v. Gonzalez*, 549 U.S. 1 (2006). For a critique of the principle as applied in the context of the pandemic, see Hasen, *supra* note 1 (draft at 44-45); for a more general critique, see Richard L. Hasen, *Reining in The Purcell Principle*, 43 FLA. ST. U. L. REV. 427 (2015).

The decision of the Sixth Circuit is unfortunate. The district court's resolution of the difficult issues posed by ballot circulation during a pandemic may not have been perfect, but they demonstrate the efforts of a court that both takes the First Amendment rights of ballot measure proponents seriously and considers the real costs of a federal court changing election rules in the midst of a pandemic. A court sensitive to federalism and separation of powers concerns can craft targeted relief to protect the right to ballot circulation.

The Sixth Circuit, in contrast, has put a thumb on the scale favoring the state, denigrating the right to petition along the way, and minimizing the real costs that the pandemic has placed on democratic petitioning activity. The court weighed federalism and separation of powers issues too heavily as it dismissed the burdens on the right to petition as minor. Most importantly, the Sixth Circuit decision sends a disturbing signal about how some courts may approach burdens on fundamental voting rights questions during the pandemic.[63]

[63] As this Article went into production, a federal district court relaxed some Arkansas provisions related to the circulation of initiative petitions. Miller v. Thurston, 2020 WL 2617312 (W.D. Ark. May 25, 2020). The court applied the *Anderson/Burdick* framework, *id*. at *3, and decided to allow petition circulators to collect individual signatures from voters, signed under penalty of perjury, rather than requiring circulators to witness signatures and attest to their authenticity. It rejected other requests of the plaintiffs, such as lowering the number of required signatures. Arkansas may choose to appeal this ruling.