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.

RESPONSE OF APPELLEES OHIOANS FOR SECURE AND FAIR ELECTIONS AND OHIOANS FOR RAISING THE WAGE IN OPPOSITION TO PETITION FOR EN BANC REVIEW

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INTRODUCTION

This Court should deny Appellants motion for hearing en banc. Initial en banc hearing, or even rehearing, is not favored. It will ordinarily not be ordered unless necessary to "secure or maintain uniformity of the court's decisions," or "the proceeding involves a question of exceptional importance." Rule 35(a) of the Federal Rules of Appellate Procedure. Neither circumstance exists in the instant case.

A petition requesting an en banc hearing must begin with one of two statements, either that: "(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b). The Defendants-Appellants' Rule 35 Statement asserts that this case presents a question of exceptional importance, on which courts of appeals are split. However, no such split exists. Further, an appeal to the en banc panel is not necessary as Appellants have been successful in their stay petition and the panel has indicated that they will be successful on the merits of their appeal.

ARGUMENT

I. Courts of Appeals are Not Split on the Question Posed by Appellants

Appellants' stated question is "Are laws regulating the mechanics of the initiative process subject to the First Amendment?" Appellants' Pet. for Initial En Banc Review ("App. Pet."), Doc. 9, p. 5. However, the law in this Circuit is clear and sister circuits are not divided on this question.

The law in this Circuit is unequivocal: the First Amendment applies to initiative petitions. The Anderson-Burdick test is used to measure the character and magnitude of the First Amendment injury and to weigh it against the state's justification(s) for the burden imposed. *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), as well as detailed discussion in Plaintiff-Intervenor OSFE's Opposition to Stay ("Stay Opp") Doc. 25-2, p. 10.

As support for their contention that the law of our circuit is different from others, Appellants rely on one case in the D.C. Circuit and another in the Tenth Circuit. *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002), and *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006). Importantly, and as discussed more fully in OFSE's stay opposition, neither of those cases in fact present the question of whether *Anderson-Burdick* applies to the

mechanics of the ballot measure process. *See* discussion at Stay Opp, pp. 14–15. In fact, neither case even mentions *Anderson-Burdick* let alone affirmatively rejects the *Anderson-Burdick* analysis. Instead, the D.C. Circuit's opinion in *Marijuana Policy Project* held—with no discussion of *Anderson-Burdick*—that federal legislation barring the District of Columbia from passing any laws on the subject did not violate the First Amendment. *See Marijuana Policy Project*, 304 F.3d at 87. And the Tenth Circuit's opinion in *Initiative and Referendum Institute* held—again, with no discussion of *Anderson-Burdick*—that a provision of the Utah constitution requiring wildlife-related ballot measures to pass by a supermajority vote did not violate the First Amendment. *See Initiative and Referendum Inst.*, 450 F.3d at 1085.

Additionally, neither of these cases stand for the proposition that no First Amendment protections attached to ballot petitions. The Tenth Circuit found 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." *Id.* at 1099.

Both the Tenth Circuit and D.C. Circuit opinions dealt with the application of the Supreme Court's precedent in *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). In finding that *Meyer v. Grant* was inapplicable to certain challenges to laws governing ballot petitions, those opinions were consistent with this Court. *See Schmitt*,933 F.3d at 644; *Walker*, 450 F.3d at1099; *Marijuana Policy Project*, 304 F.3d at 86.

As to the applicability of *Anderson-Burdick*, this Circuit is in line with sister circuits who have found that *Anderson-Burdick* applies to initiative petitions. *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").

II. Appellants Have Been Successful Before the Panel and this Court Need Not Render a Decision En Banc

Appellants have no need for their question to be answered by this Court en banc because they have already received the relief they sought from the panel that ruled on their Stay Motion in this case. When Appellants initiated this appeal, they filed one consolidated motion seeking both a Stay and Initial En Banc Review. They were subsequently instructed to separate their filing into two separate motions, which they did, by refiling two very similar filings simultaneously, under two different titles, labeling one a Motion for a Stay, and the other, a Petition for Initial En Banc Review (which is the motion addressed here). The relief they sought in their double-barreled filing, and that they still seek in this en banc petition, was provided when the panel ruled on their stay motion. Appellants won that motion with the panel determining that they were likely to succeed on the merits of their appeal. Despite the First Amendment aegis enjoyed by Appellees, the panel determined that it was "unwilling to conclude that the State is infringing upon Plaintiffs' First amendment rights in this particular case." Order, Doc. 36-2, p. 11.

A determination by this Court that the First Amendment does not protect ballot initiatives would thus not change the outcome for the Appellants. Therefore, it is not even necessary, much less exceptionally important, for the Appellants' question to be addressed en banc.

CONCLUSION

Appellees OSFE and OFRW thus submit that Appellants' Petition for Initial En Banc Review should be denied.

Dated: May 28, 2020

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because the brief contains 1,047 words, excluding the parts of the brief exempted by Rule 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in the Times New Roman 14-point font size.

/s/ *T. Alora Thomas-Lundborg*
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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2020, I filed a copy of the foregoing electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance, by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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