Case No. 20-3526

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAD THOMPSON, *et al.*	:	
Plaintiffs-Appellees	:	
v.	:	On Appeal from the United States District Court for the Southern District of Ohio
GOVERNOR OF OHIO, MIKE DEWINE, *et al.*	:	
Defendants-Appellants	:	No. 2:20-cv-2129
OHIOANS FOR SECURE AND FAIR ELECTIONS, *et al.*	:	
Intervenors-Appellees	:	

DEFENDANTS-APPELLANTS MERIT BRIEF

DAVE YOST
Ohio Attorney General

MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
STEPHEN P. CARNEY
SHAMS H. HIRJI
ZACHERY P. KELLER
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Defendants-Appellants

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STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important constitutional issues regarding Ohio's signature requirements for ballot initiatives, Defendants-Appellants—Ohio's Governor, Secretary of State, and the Director of its Department of Health—request oral argument.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction in this 42 U.S.C. §1983 suit under 28 U.S.C. §1331. On May 19, 2020, the District Court partially granted the plaintiffs' motions for preliminary relief, enjoining the State from enforcing provisions of Ohio law that govern the signature-collection process for ballot initiatives. Op., R.44, PageID#675–76. The State appealed that injunction the next day. Notice, R.45, PageID#677. This Court has jurisdiction under 28 U.S.C. §1292.

STATEMENT OF THE ISSUES

The people of Ohio, in their Constitution, reserved to themselves the right to legislate through ballot initiatives. Ohio Const., Art. II, §§1, 1a, 1f. To secure a place on the ballot, initiative proponents must gather a certain number of signatures by about four months before an election. *Id.*, §§1a, 1g; Ohio Rev. Code §731.28. Those signatures must be handwritten in ink and witnessed. Ohio Const., Art. II, §1g. The District Court held that Ohio's signature deadlines, along with its ink and witness requirements, likely violated the First Amendment when applied during the COVID-19 pandemic. Op., R.44, PageID#675. The court reasoned that the pandemic made it too difficult for ballot-initiative proponents to gather the needed signatures by the early- and mid-July deadlines that apply to the upcoming election. So the District Court enjoined the laws, gave the plaintiff and intervenor proponents more time to collect signatures, and allowed them to gather electronic signatures online, rather than in person, using up to three still-to-be-developed systems that the State would have to implement on the fly. *See id.*

This case presents two questions. *First,* did the District Court err when it held that Ohio's signature deadlines, and its ink and witness requirements, violate the Free Speech Clause? *Second*, did the District Court err by entering an injunction that effectively rewrites Ohio ballot-eligibility law?

INTRODUCTION

The United States Constitution leaves it "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). It follows that, when States choose to have an initiative process, they "enjoy considerable leeway" to manage the process and "to specify the requirements for obtaining ballot access." *Id.* (quotations omitted). Ohioans, for their part, have chosen to permit voter initiatives. And they have adopted various procedural requirements governing how to legislate by popular action. This case involves a challenge to three such requirements. First, to gain ballot access, initiative proponents must gather a sufficient number of signatures by deadlines keyed to the date of the election. Second, the signatures must be signed in ink. Third, the petition circulator must attest that he or she witnessed the signings.

These unremarkable requirements, even when applied during a pandemic, satisfy any applicable First Amendment standard, including the *Anderson-Burdick* test. *See Thompson v. DeWine*, 959 F.3d 804, 809 (6th Cir. 2020). That test balances the burdens a law imposes on First Amendment rights against the state interests it furthers. Severely burdensome laws—laws that "exclude[] or virtually exclude[]" the plaintiff from engaging in conduct protected by the First Amendment,

id.—receive strict scrutiny, while less burdensome laws receive less-exacting scrutiny. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Ohio's signature requirements impose only slight or moderate burden on ballot access. Though it would be *easier* to qualify for ballot access if state law imposed no prerequisites at all, initiative proponents can and do qualify their initiatives while complying with the deadlines, the ink requirement, and the witness requirement. The COVID-19 pandemic does not change the analysis. Ballot-initiative proponents have had months to gather signatures, and at no point did Ohio ever stop them from doing so. Even when state officials issued public-health orders (such as stay-at-home orders) designed to stop the spread of COVID-19, they permitted Ohioans to continue engaging in First Amendment activities—including signature gathering—notwithstanding the otherwise-applicable orders. It follows that the State did not "exclude[] or virtually exclude[]" initiatives from gaining ballot access, and that the burdens imposed by the deadlines, the ink requirement, and the witness requirement were moderate at most. *Thompson*, 959 F.3d at 809.

These slight-to-moderate burdens are justified by the important interests the signature requirements serve. Ohio's compelling interests in a fair and orderly ini-

tiative process justify all of its requirements: requiring a sufficient number of signatures ensures that initiatives have enough grass-roots support to justify space on the ballot; the ink and witness requirements assure the signatures' authenticity; and the deadlines give election officials time to review those signatures and give interested parties time to challenge officials' determinations. Nothing about COVID-19 lessens the importance of these state interests, which are more than enough to justify an at-most-moderate burden. *Id.*

Notwithstanding all this, the District Court below enjoined Ohio's signature requirements. Perhaps worse, it commanded the State to implement, on the fly, as many as three yet-to-be-developed online signature-collection systems. Why this result? Because, the District Court said, the COVID-19 pandemic made it too hard to gather the required signatures. The court therefore concluded that enforcing the deadline and signing requirements violated the Free Speech Clause of the First Amendment. Several mistakes contributed to that conclusion. For one thing, the District Court ignored Ohio's protection of First Amendment activity during the pandemic. For another, it ignored the challengers' own failures to adjust their signature-collection efforts to the pandemic. And it also held Ohio liable for private decisions beyond the State's control. In combination, these mistakes led the District Court to conclude that the burden was severe, not (at most) moderate. That

led in turn to strict scrutiny—a standard that, in effect, left Ohio *no* leeway to manage its own initiative process.

In late May, this Court recognized these mistakes and stayed the District Court's decision. *Thompson*, 959 F.3d 804. It should now reverse the District Court's decision.

STATEMENT OF THE CASE

1. The Ohio Constitution reserves to the People the right to make law by initiative. Ohio Const., Art. II, §§1, 1a, 1f. On a statewide level, Ohioans have the power to "propos[e] an amendment to the constitution … for the approval or rejection of the electors." Ohio Const., Art. II, §1a. Citizens may also seek to amend Ohio's statutory law by initiative. *Id.*, §1b. And Ohioans engage in direct democracy at the municipal level, too: Ohioans may, by initiative, enact municipal legislation "on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action." *Id.*, §1f.

Ohio's Constitution and Revised Code guide the initiative process by setting forth a variety of eligibility requirements that initiatives must satisfy before being placed on the ballot. Ohio Const., Art. II, §§1a–1b, 1g; Ohio Rev. Code §3501.38(B), (E)(1). For example, Ohio law imposes signature requirements. For both constitutional and municipal initiatives, proponents must collect signatures

amounting to at least ten percent of the total votes cast by the relevant electorate in the most recent governor's race. Ohio Const., Art. II, §1a; Ohio Rev. Code §731.28. For constitutional initiatives, proponents must also collect a sufficient number of signatures from at least half of Ohio's eighty-eight counties. Ohio Const., Art. II, §1g.

Three aspects of this signature-collection process are at stake here. *First*, Ohio law imposes an "ink requirement." That is, initiative proponents must gather a sufficient number of signatures hand-signed in ink. Ohio Const., Article II, §1g ("names of all signers … shall be written in ink"); Ohio Rev. Code §3501.38(B) ("Signatures shall be affixed in ink."). To be counted, each signature must match the signature that is on file with election officials. *See* O.R.C. §§3519.01(B)(2)(a), 3519.15; *State ex rel. Mann v. Del. Cty. Bd. of Elections*, 143 Ohio St. 3d 45, 47 (2015); *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St. 3d 205, 208–09 (1992).

Second, Ohio law imposes a "witness requirement." To meet this requirement, petition circulators must attest that they "witnessed the affixing of every signature." Ohio Const., Art. II, §1g; *accord* Ohio Rev. Code §3501.38(E)(1).

Third, Ohio law sets deadlines by which initiative proponents must submit valid signatures. For constitutional initiatives, the proper number of valid signatures must be turned in at least 125 days before the election. Ohio Const., Art. II,

§§1a, 1g. So, to qualify for the November 3, 2020 election, signatures had to be submitted by July 1, 2020. Proponents of municipal initiatives must gather the required signatures at least 110 days before the election. *See* Ohio Rev. Code §731.28. Thus, for a municipal initiative to appear on the November 2020 ballot, supporting signatures had to be submitted by July 16, 2020.

These signature deadlines kick off a chain of related deadlines. With respect to constitutional initiatives, the Secretary of State has twenty days from the signatures' submission date to verify their authenticity. Ohio Const., Art. II, §1g. After that, Ohio law sets aside another period for the Ohio Supreme Court to review any challenges that arise from signature gathering and verification. After that, there are supplemental rounds of signature gathering, verification, and court challenges. *See id.* For municipal initiatives, the process is similar but the timeframe more condensed: the county board of elections has just ten days to verify signatures. Ohio Rev. Code §731.28.

Ultimately, for constitutional and municipal initiatives alike, everything must be completed in time for the boards of elections to finalize and print ballots. Those ballots must be ready to go at least forty-six days before an election, when overseas and military voting begins. *See* Ohio Rev. Code §3509.01(B)(1).

2. Ohio, like the rest of the country, is fighting the spread of COVID-19. Ohio's Governor Mike DeWine, along with the Director of the Ohio Department of Health, have strived to protect Ohioans from this pandemic. (Dr. Amy Acton stepped down as Director after this suit was filed. The current Director is Lance Himes.) With this in mind, they have issued orders restricting certain activities. These orders have always been temporary. And, on the whole, the restrictions in these orders have lessened over time. *See* April 30 Order, online at https://tinyurl.com/y7s6cre2; May 20 Order, online at https://bit.ly/303A8de (both last visited on July 14, 2020). As one key example, the State has not reinstituted the stay-at-home orders that were in place this past spring. *See* March 22 Order, online at https://tinyurl.com/y8urb7mn; April 2 Order, online at https://tinyurl.com/vbwpwp2 (both last visited on July 14, 2020).

Even at their peak, these orders always sought to balance concerns for protecting Ohioans' health with concerns about protecting Ohioans' rights. As a result, pandemic-related restrictions have never been absolute. For example, the stay-at-home orders in place during March and April exempted a variety of essential activities. March 22 Order ¶¶7–14, online at https://tinyurl.com/y8urb7mn; April 2 Order ¶¶7–14, online at https://tinyurl.com/vbwpwp2. Relevant here, every order restricting the public's conduct has expressly permitted individuals to

engage in activity protected by the First Amendment. *See* April 30 Order ¶4, online at https://tinyurl.com/y7s6cre2; April 2 Order ¶12g, online at https://tinyurl.com/vbwpwp2, March 22 Order ¶12g, online at https://tinyurl.com/y8urb7mn; March 17 Order ¶5, online at https://tinyurl.com/y9zfcnpq. Under well-settled law, the First Amendment protects the gathering of signatures in support of initiatives. *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). That means that all initiative proponents have, at all times, been free to solicit signatures throughout the pandemic. To remove any doubt, the April 30 order expressly listed the circulation of "petition[s] or referend[a]" as an example of protected First Amendment activity exempt from the stay-at-home order. *See* April 30 Order ¶4, online at https://tinyurl.com/y7s6cre2. Thus, initiative proponents have unquestionably been free since then to solicit signatures. And they had until either July 1 (in the case of statewide initiatives) or July 16 (for municipal initiatives) to gather the needed signatures.

3. This case began when various plaintiffs and intervenors sued Governor DeWine, Dr. Amy Acton, and Ohio Secretary of State Frank LaRose. (For ease of reference, this brief calls the defendants "Ohio" or "the State.") Some of these challengers wanted ballot access for constitutional amendments, while others

wanted ballot access for municipal initiatives. The challengers all fall into one of three groups.

The first group consists of Chad Thompson, William Schmitt, and Don Keeney (together, "Thompson"), all of whom regularly circulate municipal initiatives to change local marijuana-possession laws. Thompson Compl. ¶5, R.1, PageID#2. For this November's election, their goal was to place municipal initiatives on the ballots of localities ranging from the large City of Akron to the small village of Cadiz and the even-smaller village of Adena. Stip. Facts ¶¶3–4, R.35, PageID#469.

A ballot-issue committee called "Ohioans for Secure and Fair Elections" leads the second group of challengers. This group proposed a constitutional initiative that would amend Ohio's election laws. *See* OSFE Compl., R.14, PageID#103. It was hoping to place its initiative on the November ballot. *Id.*, PageID#103–04. But, for reasons separate from the pandemic, it was not ready to begin gathering signatures until late April. *See id.*, PageID#105; Dippold-Webb Decl. ¶¶11–12, R.14-2, PageID#136. This group has since announced that it will cease its efforts to gather the signatures needed to win ballot access. *See Ohioans for Secure and Fair Elections Suspends Campaign*, ACLUOhio.org (June 3, 2020), online at https://tinyurl.com/OSFEsusp (last visited on July 14, 2020).

The final group of challengers includes another ballot-issue committee, "Ohioans for Raising the Wage," and its members. Ohioans for Raising the Wage proposes a constitutional initiative that would increase Ohio's minimum wage. OFRW Compl. Ex.A-1, R.17-1, PageID#238–42. It began gathering signatures for its initiative this past February. *Id.*, PageID#224–25. It reported collecting "nearly 74,000 signatures" in just a few weeks. *Id.*, PageID#221, 230. It continued to gather signatures until mid-March, but it then voluntarily stopped its efforts because it "saw a significant reduction in the number of signatures able to be collected due to the effects of the public health crisis." *Id.*, PageID#230.

The various challengers all asked for preliminary injunctions, and they all advanced the same theory. They argued that the ink requirement, the witness requirement, and the signature deadlines violated the First Amendment's Free Speech Clause. Each claimed that the pandemic made it too difficult to gather signatures in person, and thus too difficult to obtain and witness enough signatures by the applicable deadlines in early- and mid-July. *See, e.g.*, Thompson Compl. ¶52, R.1, PageID#14; OSFE Compl. ¶3, R.14, PageID#99–100; OFRW Compl. ¶3, R.17-1, PageID#221–22. Despite the challengers' focus on the pandemic, none of them sought relief from Ohio's pandemic-related orders. *See* Thompson Compl., R.1, PageID#18–19; OSFE Compl. ¶3, R.14, PageID#121–24; OFRW Compl., R.17-1,

PageID#233–35. They instead sought to alter Ohio's signature requirements and loosen the applicable deadlines.

In moving for preliminary relief, the challengers relied on a sparse record. The parties stipulated to some background facts, many of which simply summarized Ohio's pandemic response. *See* Stip. Facts, R.35, PageID#469–75. But the challengers supplied little evidence about their efforts to collect signatures, either while Ohio's stay-at-home orders were in place or since. Thompson rested on the limited information within his pleadings. The remaining challengers submitted declarations from a few individuals stating their personal unwillingness to circulate or sign petitions during the pandemic. *E.g.*, Ziegler Decl. ¶¶7–8, R.15-3, PageID#178; Cambpell Decl. ¶13, R.15-4, PageID#183. One group of challengers also proposed a "model" for gathering signatures online, which presumed changes to Ohio's signature requirements. Leonard Decl. ¶8, R.30-1, PageID#434; *accord* OFSE Reply, R.43, PageID#626 n.11. None of these materials detailed what, if anything, the plaintiffs had been doing to adapt their signature-collection efforts to the reality of COVID-19.

4. On May 19, the District Court granted the request for a preliminary injunction as to the ink requirement, witness requirement, and signature deadlines. Op., R.44, PageID#675.

On the merits, the District Court held that these requirements and deadlines likely violated the First Amendment by unduly restricting ballot access "during a global pandemic." *Id.*, PageID#649. To reach that holding, the court applied the *Anderson-Burdick* test—a flexible test that requires weighing the burdens a state law imposes against the state interest it furthers. *Id.*, PageID#655. Under *Anderson-Burdick*, severe burdens on First Amendment interests are strictly scrutinized, minimal burdens are reviewed under a deferential standard resembling rational-basis review, and intermediate burdens are subjected to a more *ad hoc* balancing. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019). The District Court suggested that, "[i]n ordinary times," Ohio would likely have "considerable leeway" to set the requirements for its ballot-initiative process. Op., R.44, PageID#659 (quotations omitted). That leeway changed, however, because of the "unique historical circumstances of a global pandemic." *Id.*, PageID#660. Those unique circumstances changed the standard of review, the District Court held, transforming Ohio's signature requirements into a severe burden deserving of strict scrutiny. *Id.*, PageID#662. And the court held that the challenged laws all failed strict scrutiny. (At one point it noted, without analysis, that the requirements would have flunked intermediate scrutiny, too. *Id.*, PageID#656 n.2.) The court said that the ink and witness requirements were not

narrowly tailored to allowing state interests because other approaches—like allowing signatories to "sign" using last four digits of social security numbers—*might* work to verify the identities of the signatories. *Id.*, PageID#665–66. It additionally suggested that Ohio can simply rely on criminal enforcement to protect against fraud. *Id.* And the signature-gathering deadlines, the court concluded, were not "narrowly tailored in light of Plaintiffs' inability to safely circulate petitions" during the pandemic. *Id.*, PageID#669.

Throughout its analysis, the District Court relied heavily on this Court's unpublished decision in *Esshaki v. Whitmer*, No. 20-1336, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020). In *Esshaki*, the Court denied a stay of a preliminary injunction against Michigan's signature requirements for ballot initiatives. *Id.* at *1–2. Ohio argued below that *Esshaki* was distinct because Michigan, unlike Ohio, had issued stay-at-home orders that *barred* signature collecting in the lead-up to the State's submission deadlines. The District Court said that distinction was "irrelevant." Op., R.44, PageID#653.

As to relief, the District Court enjoined the ink and witness requirements. Op., R.44, PageID#675–76. In place of those requirements, it ordered the State to "accept electronically-signed and witnessed petitions." *Id.* The District Court further ordered the parties to meet and confer to iron out the "technical" and "se-

curity" issues that its injunction left unresolved. *Id.* The District Court also enjoined enforcement of Ohio's signature deadlines. The court ordered the State to accept signatures pertaining to constitutional initiatives through at least July 31, 2020. *Id.* It is unclear what new deadline the District Court imposed for municipal initiatives. *See id.*

After its preliminary-injunction decision, the District Court denied the State's request for a stay pending appeal. It stressed that Ohio officials, in response to COVID-19, closed polling locations to be used during 2020 primary, a decision it apparently agreed with. Op., R.50, PageID#709–10. It then faulted Ohio for what, in its view, was "chang[ing] course" by not lifting signature requirements for ballot initiatives. Op., R.50, PageID#710–11.

5. Ohio immediately appealed and sought a stay pending appeal. This Court granted a stay the next week. *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020). It initially noted a circuit split over the applicable standard—it recognized that at least two circuits have held that laws governing the mechanics of the initiative process do not implicate the First Amendment *at all*, since the initiative process is a *legislative* process, and since legislation is not expression protected by the First Amendment. *Id.* at 808 n.2. It further observed that this Court's judges have "of-

ten questioned" whether this Circuit overuses the *Anderson-Burdick* test. *Id.* But, based on this Circuit's past approach, the court applied that test. *Id.* at 808.

The Court first rejected the notion that Ohio's signature requirements impose a severe burden; it held the burden was instead "intermediate." *Id.* at *809–11. It credited, as "vitally important," the fact that Ohio's pandemic-related restrictions permitted First Amendment activity. *Id.* at 810. Ohio's actions, therefore, did not "exclude[] or virtually exclude[]" the plaintiffs' initiatives from the ballot. *Id.* at 809. The plaintiffs could have adapted their behavior "within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them." *Id.* at 810. What is more, the panel explained, the State could not be held liable for "private citizens' decisions to stay home for their own safety." *Id.*

The Court next concluded that the intermediate burden was justified by the important state interests advanced by the deadlines, the ink requirement, and the witness requirement. With respect to the ink and witness requirements, it emphasized that Ohio has "compelling and well-established interests in administering its ballot initiative regulations" in a manner that ensures signatures are authentic and verified in an orderly fashion. *Id.* at 811. And the deadlines played a critical role in this process, since "[m]oving one piece on the game board invariably" would have

consequences elsewhere and require "additional moves"—that is, additional alterations to state law and state-initiative processes. *Id.* at 813.

This Court distinguished *Esshaki*. The key difference was that, in *Esshaki*, Michigan's stricter stay-at-home orders had "abruptly prohibited" signature gathering about a month before the deadline. *Id.* at 809. In other words, the severe burden in *Esshaki* was due to "the *combination* of" Michigan's existing initiative requirements *and* its strict response to the pandemic. *Id.* (quotations omitted).

Lastly, this Court stressed that the District Court "exceeded its authority" by entering an injunction forcing Ohio, with no guidance, to accept electronic signatures. *Id.* at 812. It reasoned that the District Court was not "free to amend the Ohio Constitution," particularly not in a way that "threaten[ed] to take the state into unchartered waters." *Id.*

That threat became particularly stark because the challengers, in their stay-stage briefing, revealed that they did not even agree on a uniform process for collecting or validating electronic signatures under the District Court's injunction. The injunction required the State "to accept electronically-signed and witnessed petitions collected through the on-line signature collection plans proposed by" Ohioans for Raising the Wage and Ohioans for Secure and Fair Elections. Op., R.44, PageID#675–76. But as it turned out, the challengers did not really agree on

what form signature-gathering should take. Ohioans for Raising the Wage said it would collect signatures for its proposed initiative through its own website (with the help of a third-party vendor). OFRW Stay Br. 15–16, Doc.23 (6th Cir.). The Ohioans for Secure and Fair Elections group wanted to implement its own signature-collection plan—an unexplained plan for which it had yet to "retain[] an online vendor" or "set[] up an online signature collection system." OSFE Stay Br. 1, Doc.25-2 (6th Cir.). And Thompson, for his part, did not propose any concrete plan at all. Instead, he argued that the District Court actually left the State "with discretion to fashion a remedy." Thompson Stay Br. 3, Doc.21 (6th Cir.). In sum, no one seemed to know what the District Court required, and no one could offer a uniform plan for implementing the District Court's injunction.

6. Thompson applied to the Supreme Court for an order vacating this Court's stay. The Court denied the request without any noted dissents. *See Thompson v. DeWine*, No. 19A1054, 2020 U.S. LEXIS 3376 (June 25, 2020).

SUMMARY OF ARGUMENT

I. Ohio's ink requirement, witness requirement, and signature deadlines do not violate the First Amendment's Free Speech Clause.

A. As an initial matter, the State preserves its position that the First Amendment is not even implicated by laws that regulate only the process by which

initiatives become law. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (*en banc*) (per McConnell, J.); *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002) (per Tatel, J.). The First Amendment confers no "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). And it confers no right to an initiative process. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *accord Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018) (per Easterbrook, J.) (compiling authority). Consequently, a distinction emerges between laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum," which implicate the First Amendment, and laws "that determine the process by which legislation is enacted, which do not." *Initiative & Referendum Inst.*, 450 F.3d at 1099–1100. This distinction should halt any First Amendment analysis before it begins.

B. Contrary to the holdings of the Tenth and D.C. Circuits, this Circuit has presumed that laws regulating the ballot access of initiatives are scrutinized under the *Anderson-Burdick* test. *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019); *but see id.* at 644–49 (Bush, J., concurring in part and concurring in the judgment). Even applying that test, however, all of Ohio's signature requirements still survive

review, as this Court correctly concluded when it granted a stay. *Thompson v. DeWine,* 959 F.3d 804, 808–11 (6th Cir. 2020).

The *Anderson-Burdick* test requires balancing the burdens a law imposes on First Amendment rights against the benefits it achieves. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The test operates on a sliding scale: laws that impose severe burdens—that is, laws that "totally den[y]" the right at stake, *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020)—receive strict scrutiny. In contrast, laws that "impose lesser burdens" receive deference, and the State's important interests in regulating elections will usually carry the day. *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005).

The burden here is moderate at most. The challengers have all had months to gather the necessary signatures. They could have made a greater effort to collect signatures before the pandemic hit. And once the pandemic hit in mid-March, they were free to gather signatures because Ohio's pandemic-related orders *always* exempted First Amendment activity, including signature gathering. And even if some early orders did not protect signature gathering (as Thompson persistently and wrongly suggests), Ohio gave an express exemption for petition circulators on April 30. The challengers failed to take advantage of these exemptions, and they failed to adapt their efforts to pandemic times. What is more, to the extent the

pandemic reduced the number of willing signers, Ohio cannot control the voluntary steps private citizens take to protect their health—*that* portion of the burden is not state action that can be considered a "burden" for *Anderson-Burdick* purposes.

The at-most-moderate burdens resulting from Ohio's signature requirements are more than justified by the important interests these requirements serve. The Supreme Court has explained that signature requirements serve States' important "interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot." *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Limiting ballot access to initiatives with sufficient support "improves the chance that each will receive enough attention, from enough voters, to promote a well-considered outcome." *Jones*, 892 F.3d at 938. The ink and witness requirements ensure the authenticity of that grass-roots support and protect against fraud in the initiative process. They also provide aggrieved parties a means of challenging initiative eligibility. The deadlines serve an important purpose, too: they ensure election officials have ample time to review the signatures, and they ensure parties have enough time to challenge election officials' determinations, before the time comes to print ballots.

In enjoining Ohio's signature requirements, the District Court made many errors. Chief among them was its finding of a severe burden. *See* Op., R.44, Page-

ID#662. That finding went against this Court's binding cases, which teach that a severe burden exists only when a law totally denies or practically excludes ballot access. *Mays*, 951 F.3d at 786; *Schmitt*, 933 F.3d at 639. Because the District Court wrongly found a severe burden, it wrongly applied strict scrutiny. Under that exacting standard, the court it imagined hypothetical alternatives to Ohio's signature requirements, such as an online verification process using the last four digits of voters' social security numbers. Op., R.44, PageID#665–66. The court's alternative process—the details of which the court did not explain, would not work to verify signatories' identities. The State does not have social-security information for many registered voters, and thus could not use social-security information to verify the authenticity of signatures. In any event, the District Court's alternatives would lead to other serious problems. Forcing Ohio to craft an online-signature system, with only months to go before an election, is a recipe for an unsecure, uncertain initiative process.

The District Court's mistakes on the merits bled into its award of relief. It ordered Ohio to conduct an experiment with its initiative process—giving the parties a week to figure out a way "to accept electronically-signed and witnessed petitions collected" online. Op., R.44, PageID#675–76. As this Court rightly noted

when it stayed that relief, the District Court "exceeded its authority by rewriting Ohio law." *Thompson*, 959 F.3d at 812.

II. As go the merits, so go the balance of factors bearing on injunctive relief. *See Bailey v. Callaghan*, 715 F.3d 956, 958 (6th Cir. 2013). Because Ohio's signature requirements do not offend the First Amendment, any injunction would harm Ohio and its citizens, all of whom have an interest in the State's self-government. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The challengers, in contrast, would suffer no legal harm without an injunction, since they have no right to a workaround for getting their initiatives onto Ohio's ballot. And the public interest is always best served by allowing state law, if it is constitutional, to be given effect. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006).

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits will often be the determinative factor." *Bailey v. Callaghan*, 715 F.3d 956, 958 (6th Cir. 2013) (quotations

omitted). This Court reviews "a district court's legal conclusions de novo, its factual findings for clear error, and its ultimate decision to grant preliminary relief for abuse of discretion." *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017). In practice, this means that the Court "independently appl[ies] the Constitution" when it evaluates the likelihood of success. *Id.*

ARGUMENT

Reasonable minds can disagree about how best to respond to an unprecedented pandemic. *Tex. Democratic Party v. Abbott*, No. 20-50407, 961 F.3d 389, 2020 U.S. App. LEXIS 17564 at *2–3 (5th Cir. 2020). But it is the job of elected officials, not unelected judges, to address these issues. The District Court lost sight of this principle in its decision enjoining Ohio's signature requirements. This Court should reverse.

I. Ohio's ink requirement, witness requirement, and signature deadlines do not violate the First Amendment, even during pandemic conditions.

This case presents the question whether Ohio violated the First Amendment by requiring the challengers to submit enough ink-signed, witnessed signatures before the applicable July deadlines. To answer that question, the Court must first consider which test governs the First Amendment's application to state laws that regulate the initiative process. In past cases, this Circuit has applied the *Anderson-Burdick* test to adjudicate the constitutionality of such laws. *See, e.g., Schmitt v.*

LaRose, 933 F.3d 628, 639 (6th Cir. 2019). The bulk of this brief discusses why Ohio's signature requirements pass that test. But, before turning to *Anderson-Burdick*, this brief quickly reviews and preserves the State's position that the First Amendment does not apply at all.

A. Laws regulating ballot access for state initiatives do not implicate the First Amendment at all.

1. The First Amendment confers no positive "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). And the First Amendment makes no promise that States will even have an initiative process. *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018). Rather, it is "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). It follows that, even if a State's actions are "equivalent to a decision to skip all" initiatives for an election cycle—whether due to the pandemic or other reasons—"there is no federal problem." *Morgan v. White*, —F.3d —, 2020 U.S. App. LEXIS 21160, *5 (7th Cir. July 8, 2020) (*per curiam*).

To be sure, States that adopt an initiative process must run it without violating rights the Constitution *does* guarantee. For instance, under the First Amendment's Free Speech Clause, States that choose to have an initiative process cannot

then abridge speech relating to the process. Take the Supreme Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988). In that case, the Court invalidated a Colorado law that criminalized the payment of petition circulators. That crossed the line, the Court held, because it regulated "interactive communication" between petition circulators and potential signatories—it regulated *who* could communicate about an initiative. *Id.* at 421–22. That holding makes sense because "freedom of speech," U.S. Const., Am. 1, "undoubtedly" includes the freedom to engage in political speech in the initiative context, "just as it" includes the freedom to engage in "speech intended to influence other political decisions," *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (*en banc*). It follows that laws "restrict[ing] the communicative conduct of persons advocating a position" on an initiative—for example, laws regulating *who* may advocate for the initiative's passage—implicate the Free Speech Clause. *Id.* at 1100; *see, e.g.*, *Meyer*, 486 U.S. at 415–16; *Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187 (1999).

Although the "freedom of speech" includes the right to communicate during an initiative campaign or circulation drive, it does not include the freedom to ignore rules governing the mechanics of the initiative process. This follows from the fact that the initiative power is a legislative power; the "'power of direct legisla-

tion by the electorate.'" *Marijuana Policy Project*, 304 F.3d at 85 (quoting *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections*, 441 A.2d 889, 897 (D.C. 1981) (*en banc*)). The nature of the power means that the People act as legislators when they make law by initiative. The First Amendment does not confer on legislators (or anyone else) a "right to use governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127; *see also Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283–84 (1984).

Nor does the Free Speech Clause have anything to say about the process by which law is made. When a State regulates the process by which voter initiatives become law, how is it "abridging the freedom of speech"? Again, everyone seems to agree that there is no First Amendment right to legislate by initiative, *Doe*, 561 U.S. at 212 (Sotomayor, J., concurring), and that the right to free speech does not include any "right to use governmental mechanics to convey a message," *Carrigan*, 564 U.S. at 127. Given that, how do laws regulating the initiative process (as opposed to communication occurring within that process) affect speech rights at all? The Ninth Circuit has suggested that such laws, at least in the initiative context, "indirectly impact core political speech" because they decrease the odds that the law in question will become "the focus of statewide discussion." *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2011) (internal quotation omitted). That, however,

proves too much. *Every* limit on the legislative power, including Article I's limits on congressional power, "indirectly impact[s] core political speech" by making it less likely that issues beyond the legislative power become "the focus of [widespread] discussion." *Id.* Thus, accepting this logic "would call into question all subject matter restrictions on what Congress or state legislatures may legislate about." *Schmitt*, 933 F.3d at 649 n.3 (Bush, J., concurring in part and concurring in the judgment) (internal quotation omitted).

Putting all this together, courts must distinguish between laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum," which implicate the First Amendment, and laws "that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1100. Laws within the latter category limit legislative power, not expression, and such laws do not implicate the Free Speech Clause. Thus, while the Free Speech Clause applies to state laws restricting what initiative proponents may say to the public, it does not apply to laws that govern the process by which initiatives gain ballot access and become law.

2. Alas, that is not the law in the Sixth Circuit. Instead, this Court has repeatedly assumed—with little explanation—that the First Amendment's Free Speech Clause covers laws that regulate the mechanics of state-initiative processes;

and it has applied the Supreme Court's *Anderson-Burdick* test to such laws. *Schmitt*, 933 F.3d at 639; *Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, ("*CITL*"), 885 F.3d 443, 448 (6th Cir. 2018); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993).

For the reasons laid out above, the Circuit's approach is wrong, and at some point, the Court should change course. *Schmitt*, 933 F.3d at 644–49 (Bush, J., concurring in part and concurring in the judgment); *see also Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020); *Daunt v. Benson*, 956 F.3d 396, 422–26 (6th Cir. 2020) (Readler, J., concurring in the judgment).

B. The challenged laws are constitutional under *Anderson-Burdick*.

The remainder of this brief accepts this Court's assumption that *Anderson-Burdick* applies to laws governing state-initiative processes. Ohio's ink requirement, witness requirement, and signature deadlines all satisfy that test. This Court already explained why in its decision staying the District Court's ruling. *Thompson v. DeWine,* 959 F.3d 804, 808–11 (6th Cir. 2020).

1. Ohio's compelling interests in the challenged laws outweigh the at-most-moderate burdens the laws impose.

The *Anderson-Burdick* test is a "flexible standard." *Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 789. It requires courts to "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

Amendments that the plaintiff seeks to vindicate' 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.'" *Id.* (quoting *Anderson*, 460 U.S. at 789). In fewer words, the test balances voting burdens against state justifications.

The test operates on a sliding scale. Laws that impose "severe" burdens receive strict scrutiny. *Id.* Laws that impose minimal burdens receive "a form of review akin to rational-basis review." *Ohio Council 8 Am. Fedn. of State v. Husted*, 814 F.3d 329, 338 (6th Cir. 2016). When a law's burden "is somewhere between minimal and severe," the analysis remains "flexible." *Schmitt*, 933 F.3d at 641. And for all less-than-severely-burdensome laws, *Anderson-Burdick* presumes that the State's important interests in regulating elections will "usually be enough to justify reasonable, nondiscriminatory restrictions." *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005) (quotations omitted).

Burden. Given *Anderson-Burdick*'s sliding scale, the first consideration is whether the challenged laws impose a severe burden or something less. Three points about burden-measuring are especially relevant here. *First*, a severe burden is one that "totally denie[s]" the right at stake. *Mays*, 951 F.3d at 786. "'The hallmark of a severe burden is *exclusion or virtual exclusion* from the ballot.'"

Schmitt, 933 F.3d at 639 (emphasis added) (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)). Put differently, a burden qualifies as "severe" only if it makes exercising the First Amendment right "'virtually impossible.'" *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment) (quoting *Storer v. Brown*, 415 U.S. 724, 728–29 (1974)); *accord Williams v. Rhodes*, 393 U.S. 23, 24 (1968); *Grimes*, 835 F.3d at 574. *Second*, in measuring the severity of the burden, States are accountable only for the burdens *they* impose. That is so because, for purposes of both the First Amendment and 42 U.S.C. §1983, state actors are liable only for their own conduct, not private action. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999); *Thompson*, 959 F.3d at 810. Thus, litigants cannot hold the State responsible for the decisions of private, third parties. *Third*, in assessing the nature of any potential First Amendment burden, there is a difference between regulations that concern conduct and those that restrict speech. *Morgan*, 2020 U.S. App. LEXIS 21160 at *4. Even if pandemic-related orders concern conduct incidental to speech, "this does not require courts to treat them as if they were regulations *of* speech." *Id.*

Applying these principles here, Ohio's ink requirement, witness requirement, and signature deadlines impose moderate burdens at most. *Thompson*, 959

F.3d at 809–11. Each provision no doubt makes it harder to legislate by initiative than it would otherwise be. But it does not follow that these provisions totally deny or virtually exclude ballot access. Far from it. These are all longstanding requirements that many initiative proponents have been able to satisfy in the past, including at least some of the plaintiffs. *See* Thompson Compl. ¶4, R.1, PageID#2. And the pandemic does not transform these requirements into severe burdens on direct democracy. Ohio officials have consistently exempted First Amendment activity from their pandemic-related restrictions. *See above* 9–10. And the April 30 order made express that people could continue circulating "petition[s] or referend[a]." April 30 Order ¶4, online at https://tinyurl.com/y7s6cre2 (last visited July 14, 2020). Thus, all of the plaintiffs and intervenors unquestionably had *months* to circulate their proposed initiatives. Ohio's stay-at-home orders were not in effect during much of that time. *See id.*; May 20 Order, online at https://bit.ly/303A8de (last visited July 14, 2020).

The challengers' failure to gather sufficient signatures is, at least in large part, attributable to their own lack of effort and creativity. In recent months, organizations across this country have come up with many "contactless" ways to go about their business and interact with the public. Whether it be ordering a pizza, curbside shopping, or even buying a car, innovators have accomplished tasks the

pandemic made harder. Surely the plaintiffs and the intervenors could have done the same. They could have, for example, "advertise[d] their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them." *Thompson*, 959 F.3d at 810. Or they could have set up booths outside food stores and other facilities, allowing interested parties to sign their names with disposable or sanitized pens from a safe distance. Or they could have solicited signatures door to door, maintaining a six-foot distance while speaking to the resident, and then, if the resident wished to sign, putting down the clipboard and allowing the signer to sign his or her name from six feet away. But, from the limited record the challengers presented below, it appears that, instead of trying these alternatives, the challengers just threw down their clipboards, threw up their hands, and sued.

What is more, the difficulty of signature gathering in a pandemic is, at least largely, "beyond the control of the State." *Id.* The State can exempt First Amendment activity from pandemic restrictions. But it cannot force private citizens to carry on with speech in the same way they usually would. As the Seventh Circuit observed just last week, one thing that "make[s] it hard to round up signatures" at the moment is "the reluctance of many people to approach strangers during a pandemic." *Morgan*, 2020 U.S. App. LEXIS 21160 at *4. The bottom line is

that if potential signers expressed limited interest over fear of the virus, that is attributable to their own choices, not state action.

The above points apply across the board, but the challengers' individual circumstances sharpen them. For example, the Ohioans for Raising the Wage continued to circulate its initiative for signatures into mid-March. OFRW Compl. ¶43, R.17-1, PageID#230. It stopped not because state officials forced it to, but because it was not having success "due to the effects of the public health crisis." *Id.* This drives home the distinction between private decisions and state action discussed above. Ohio cannot control the pandemic's effects on private behavior.

With respect to timing, Ohioans for Secure and Fair Elections have an especially weak case. For reasons unrelated to the pandemic, that group was not ready to begin circulating until late April. OSFE Compl., R.14, PageID#105; Dippold-Webb Decl. ¶¶11–12, R.14-2, PageID#136. And while it has tried to blame Ohio's Ballot Board for the time crunch, the Ohio Supreme Court already deemed that excuse insufficient to justify an extension of time. *See State ex rel. Ohioans for Secure & Fair Elections v. LaRose*, 2020-Ohio-1459, ¶¶21–22 (2020). Thus, even if, as the challengers argue, Ohio's pre-April 30 pandemic orders were unclear as to whether petition circulation could continue, Ohioans for Secure and Fair Elections lost only a week of circulation time.

Finally, Thompson too is poorly positioned to complain about a burden. Recall that Thompson seeks to advance municipal initiatives to decriminalize marijuana in various municipalities. Stip. Facts ¶¶3–4, R.35, PageID#469. Some of the municipalities he targets are quite small—for example, Adena (population 704) and Cadiz (population 3,481). *See* 2019 Population Estimates: Cities, Villages and Townships by County, Research Office (May 2020), online at https://bit.ly/2MObEwQ. To win ballot access for his initiatives, Thompson must obtain "the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation." Ohio Rev. Code §731.28. Assuming (unrealistically) fifty-percent of the entire town population voted in the last election, that would mean just 36 signatures in Adena and 175 in Cadiz. Even taking Akron, Thompson's largest target, he would need just 9,880 signatures assuming (again, very unrealistically) that half of the Rubber City voted in the 2018 governor's race.

At bottom, none of the plaintiffs have shown that Ohio's requirements totally or virtually excluded any initiative from the ballot. *See Mays*, 951 F.3d at 786; *Schmitt*, 933 F.3d at 639. That makes the burden moderate at most.

State interests. Those at-most-moderate burdens must be balanced against the State's justifications. To understand the justifications, begin by considering the

reason that Ohio (and other States) require signatures. States have a "substantial" interest in "avoid[ing] overcrowded ballots." *Schmitt*, 933 F.3d at 641 (quotations omitted). After all, if States were to put every initiative on the ballot, the ballot would be confusing and would likely *dissuade* democratic participation; voters have neither the time nor the interest to learn about every idea that every citizen might wish to turn into state law. "Limiting the number of referenda" and initiatives thus "improves the chance that each will receive enough attention, from enough voters, to promote a well-considered outcome." *Jones*, 892 F.3d at 938. States reasonably limit ballot access to initiatives with "sufficient grass roots support." *Meyer*, 486 U.S. at 425–26.

Once States require signatures, they must ensure the signatures' authenticity. *See Buckley v. Am. Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187 (1999). In other words, States have an interest in preventing fraud in the initiative process. They also have related-but-separate interests in ferreting out mistakes, promoting transparency, and preserving the public's confidence in the initiative process. *See Reed*, 561 U.S. at 198; *Crawford*, 553 U.S. at 197 (op. of Stevens, J.). These interests are compelling as to all election-related laws, but particularly with respect to those that govern the initiative process. One reason is that signature gathering takes place, by and large, outside the presence of election officials. Moreover,

there is often quite a bit of money riding on initiatives. For example, in 2015, proponents of a marijuana initiative stood to make millions (likely billions) because they had built a distribution monopoly into their proposed constitutional amendment. *See Fears Of Marijuana 'Monopoly' In Ohio Undercut Support For Legalization*, NPR (Sept. 2, 2015), online at https://n.pr/2B1763i (last visited July 14, 2020); *cf. State ex rel. ResponsibleOhio v. Ohio Ballot Bd.*, 2015-Ohio-3758 (2015). Those types of stakes, unfortunately, create financial incentives to cut corners. Thus, Ohio may be proactive in ensuring that self-interested proponents, hired circulators, and all others are playing fair throughout the initiative process. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986).

The ink and witness requirements further these interests. The ink requirement, by mandating a handwritten signature in ink, gives election officials signatures that they can then compare to the ones in voters' records. The signatures thus aid election officials in fulfilling their "duty … to establish the authenticity of the elector." *Georgetown v. Brown Cty. Bd. of Elections*, 158 Ohio St. 3d 4, 9 (2019). The witness requirement also helps counteract potential fraud. By requiring that petition circulators swear to having personally witnessed each signing, circulators have a strong incentive to keep close watch over the initiative petition and to stop improper signatures. Both requirements ensure that each elector signs the petition

by themselves and not by proxy, and decreases the odds that fraud will corrupt Ohio's initiative-lawmaking process. *See State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St. 3d 167, 173–74 (1992). (As addressed below, and contrary to the District Court's suggestions, it is not possible to further these interests using the last four digits of the signatory's social security number, at least not without creating other serious problems.)

The deadlines for submitting signatures are vital, too. As a general matter, deadlines allow election officials to accomplish the many tasks they have to complete in the "busy pre-election period." *Mays*, 951 F.3d at 787–88. More specifically here, Ohio's signature deadlines ensure that petitions are submitted far enough in advance that election officials can verify the signatures in an orderly, fair fashion. In addition to allowing time for verification, the initial signature deadlines trigger other deadlines, which ensure, among other things, that initiative proponents and opponents can seek judicial review of adverse decisions about signatures. *See* Ohio Const., Art. II, §1g. And importantly, the ultimate cutoff for completing all initiative-related tasks comes long before Election Day, since ballots are sent six weeks early to military and overseas voters. *See* Ohio Rev. Code §3509.01(B)(1).

When all is said and done, Ohio's compelling interests in an orderly initiative process easily justify all of its reasonable, nondiscriminatory signature requirements. Thus, the challenged laws pass muster even if *Anderson-Burdick* applies.

2. The District Court erred in enjoining the challenged laws.

In its preliminary-injunction ruling, the District Court made a number of significant mistakes.

a. First, the District Court wrongly held that Ohio's laws impose a "severe" burden on the plaintiffs' First Amendment rights. It found "that in these unique historical circumstances of a global pandemic and [given] the impact of Ohio's Stay-at-Home Orders, the State's strict enforcement of the signature requirements for local initiatives and constitutional amendments severely burden Plaintiffs' First Amendment rights." Op., R.44, PageID#660. In reaching this conclusion, the District Court overlooked controlling precedent teaching that regulations impose a "severe" burden only when they "totally den[y]" plaintiffs their ability to exercise a First (or Fourteenth) Amendment right. *Mays*, 951 F.3d at 786; *see also Schmitt*, 933 F.3d at 639. As detailed above, Ohio has not "totally denied" the plaintiffs the ability to place their initiatives on the ballot; indeed, Ohio never stopped them from soliciting signatures at any point during the pandemic. And even if Ohio's initial exemptions for First Amendment activity were vague (as Thompson argues), it is

undisputed that Ohio's orders have expressly allowed the challengers to collect signatures since at least April 30. Because the State neither totally nor virtually prevented the challengers from winning ballot access, the District Court incorrectly applied strict scrutiny.

The District Court's "as applied" approach to the level of scrutiny—considering the burden in pandemic times only—reveals another problem. The District Court did little to sort out whether pandemic-related burdens were attributable to state action or something else. Much of what it said recognized that it was "the COVID-19 pandemic" itself that created obstacles for signature collection. Op., R.44, PageID#659–60. Ohio, however, can be held liable only for state action: it cannot control the effects an unprecedented pandemic has on private citizens, many of whom may choose to forgo their normal speech and political activities to protect their health. *Thompson*, 959 F.3d at 810.

b. The remainder of the District Court's decision does not justify liability under anything less than strict scrutiny. The District Court did suggest, in a footnote with no development, that it would have reached the same result even under the "intermediate level of scrutiny" applicable to moderate burdens. Op., R.44, PageID#656 n.2. But its analysis fails to support that conclusion.

With respect to the ink and witness requirements, the District Court presumed that the State had compelling interests in protecting against fraud. *Id.*, PageID#664. But it suggested the State might prevent fraud in other ways. For example, the court imagined, the State might require the signers to provide *other* personal identifiers, "such as the last four digits of a signer's social security number." Op., R.44, PageID#665. Or perhaps the State can devise "a method for circulators to monitor [] online petitions." *Id.*, PageID#666. And anyway, the court presumed, the State does not need to protect against fraud within its initiative process, because it can criminally prosecute fraud after the fact. *Id.*, PageID#665.

This speculation is relevant, if at all, only to a narrow-tailoring analysis under strict scrutiny—a form of review inapplicable to moderate burdens like those at issue here. *Thompson*, 959 F.3d at 811. Regardless, these musings are all off base. To begin, the State has many good reasons not to use the last four digits of social security numbers as part of its verification process. *First*, requiring this information would allow identity thieves posing as initiative proponents to credibly convince people to hand over their social security numbers. *See Identity Theft and Your Social Security Number*, Social Security Administration (June 2018), online at https://www.ssa.gov/pubs/EN-05-10064.pdf (last visited July 14, 2020). The State has a strong interest in making clear to voters that they will *never* be asked to

share this information as a means of signing a petition supporting an initiative—and that anyone asking them to do so is a fraudster. *Second*, neither the Secretary of State nor the county boards of elections have the social security numbers of all registered voters. That should come as no surprise, since Ohio does not require that voters provide this information when registering to vote. Ohio Rev. Code §3503.14(A)(5). *Finally*, everyone agrees that the last four digits of a social security number, in contrast to the signatures on file with election officials, are not public records. *See* Ohio Rev. Code §149.45(A)(1)(a). That creates a problem for anyone hoping to challenge the validity of submitted signatures, as they will be unable to view the four digits linked to each "signature" even after making a public-records request. And even if would-be challengers could see those numbers, they would have no way of knowing whether the social security number matches the name of the voter to which it is linked on the petition. Thus, resorting to social security numbers would deprive initiative proponents and opponents of the ability to seek meaningful judicial review of ballot-qualification decisions.

The idea of accepting signatures "online" was perhaps the worst part of the District Court's plan. *See* Op., R.44, PageID#666. Any such online system would present tremendous security risks. Even the most thoughtfully designed online systems are vulnerable to attack, creating a risk that petitions signed electronically

and emailed or submitted online can be manipulated. *Cf. Letter to Governors and Secretaries of State on the insecurity of online voting*, American Association for the Advancement of Science (April 9, 2020), online at https://bit.ly/3fjVaZz (last visited July 14, 2020). A system developed and implemented on the fly, while state election officials deal with countless other pressures, would be even more likely to have serious vulnerabilities.

The District Court's suggestion that the ink and witness requirements are unnecessary, since the State can criminally prosecute lawbreakers, is also misguided. It is often hard to find lawbreakers, and it will be harder still if the State is barred from a tried-and-true method of review (signature review) with which it has years of experience. What is more, Ohio's goal is not just to punish misconduct, but to stop it from happening in the first place. Ohio need not "sustain some level of damage"—perhaps a fraudulently-advanced ballot issue succeeding at the polls—before it takes preventative measures. *See Munro*, 479 U.S. at 195–96.

With respect to the deadlines, the District Court simply asserted that, while the State no doubt must assure itself "enough time to verify signatures," the current deadlines are "not narrowly tailored." Op., R.44, PageID#668–69. Of course, narrow tailoring is not required of laws that impose only moderate burdens. More fundamentally, this conclusion is unsupported by any reasoning. If courts are going

to invalidate state constitutional and statutory provisions, the States are owed more than *ipse dixit*.

c. The District Court also erred by equating this case to *Esshaki v. Whitmer*, No. 20-1336, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020). There are "several key differences" between the two cases. *Thompson*, 959 F.3d at 809. Of particular importance, the plaintiff in *Esshaki* had a far stronger claim that he was "totally denied" ballot access. *Mays*, 951 F.3d at 786. The Michigan stay-at-home orders at issue in *Esshaki*—unlike Ohio's orders—abruptly blocked the collection of signatures in "the last month before the deadline." *Thompson*, 959 F.3d at 809. Thus, in *Esshaki*, it was "the *combination* of" Michigan's signature requirements, its stricter stay-at-home restrictions, and the fact that these restrictions remained in place through the deadline that created a severe burden. *Id.* at 809 (quotations omitted). That combination is lacking here: Ohio has always exempted signature gathering from its pandemic restrictions, expressly so since April 30, and began lifting its more lenient stay-at-home restrictions long before the July signature deadlines. *Id.* at 810.

d. The District Court's decision below to deny a stay was also mistaken. The decision repeated the same errors as the initial ruling, but it also added a new one. The District Court said that, by refusing to alter signature requirements, Ohio

officials were "chang[ing] course" from their decision to continue the March primary. Op., R.50, PageID#709–11. The District Court apparently believed that state officials were right to continue the primary but wrong to keep Ohio's signature requirements in place.

This injunction-by-contrast approach has both legal and factual holes. Legally, what happened with the primary is irrelevant. This case has nothing to do with Ohio officials' "exercise of judgment" as to the primary. *Thompson*, 959 F.3d at 806. Ohio's signature requirements must stand or fall on their own merits. Factually, the primary presented a much different situation. Election-day voting for the primary was set to take place on March 17, when Ohio was still coming to grips with the emerging pandemic. *See* March 9 Order, online at https://bit.ly/2Xs0W56. Thus, the *only* way to confront the COVID-19 threat posed by the primary, without abruptly cutting off voting, was to continue the election. In contrast, the signature deadlines did not expire until July 1 or July 16. Given the many options that ballot-initiative proponents had to safely gather signatures, the State did not need to extend the deadlines to afford them a chance to gain ballot access. The State cannot be blamed for the fact that the challengers have failed to take advantage of months when they could have been adjusting their signature-collection efforts to the circumstances. *See Thompson*, 959 F.3d at 810.

The District Court also missed a broader point that holds the two situations together. Both involve the difficult choices state officials made in the face of a unique emergency. Under our representative, federalist system of government, these are exactly "the types of actions and judgments that elected officials are supposed to take and make in times of crisis." *Id.* at 806; *see also League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, — F.3d —, 2020 U.S. App. LEXIS 19691, *4–5, 9 (6th Cir. June 24, 2020).

e. Finally, while no relief was warranted, the District Court compounded its mistakes by imposing an impractical and experimental remedy. Remember that the District Court did not simply issue a negative injunction to stop Ohio's signature requirements. It issued a positive injunction commanding that Ohio devise an online system "to accept electronically-signed and witnessed petitions." Op., R.44, PageID#675–76. How, between now and any pre-November deadline for signature submission, is the State supposed to create a secure system for receiving and verifying electronic signatures submitted online? And even if the State manages to do so, how would it prove the security so as to preserve the public's confidence in the initiative process? The District Court had no answer to these questions. So it told the parties to meet and confer to figure out all the "technical" and "security" issues; and then reach a solution in a week. *Id.* Yet, as just discussed,

quickly creating an online system that uses social security numbers (which the Secretary often does not have) to verify signatories' identities raises a host of problems and uncertainties.

Even stepping past all that, the District Court's injunction of the normal deadlines creates additional problems for would-be ballot-access challengers. Under the District Court's order, the new deadline for submitting signatures is apparently July 31. (As mentioned above, the order is vague as to municipal initiative deadlines). But July 31 is *also* the date, under state law, by which challenges to the validity of signatures must be filed in Ohio's Supreme Court. Grandjean Aff., R.40-1, PageID#560. The revised plan thus made it impossible for anyone to challenge the validity of submitted signatures.

The timing of the District Court's decision creates more problems still. The Supreme Court has repeatedly cautioned that late-in-the-day injunctions affecting election procedures are disfavored. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (*per curiam*); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5, (2006) (*per curiam*). Such injunctions, in and of themselves, increase the risk of "voter confusion and [the] consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. Any alteration of Ohio's initiative process at this point would implicate these concerns. Although the election itself is months

away, the signature deadlines recently passed—and altering deadlines and procedures now will affect the remainder of Ohio's initiative process, including the deadlines waiting downstream. *See* Ohio Const., Art. II, §1g. Worse still, creating last-minute confusion over Ohio's initiative requirements could create confusion over Ohio law itself. If an otherwise-ineligible issue makes it on the ballot, and is adopted, the State could be indefinitely saddled with a legal change (perhaps a constitutional change) that would not have been adopted but for federal interference.

Finally, and putting aside all the practical problems, the District Court strayed far beyond the role of an Article III court in crafting its injunction. When a constitutional violation exists, state officials—not federal courts—"have primary responsibility" for figuring out the cure. *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). It follows that, "in devising" an equitable remedy, federal courts "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)). There are, after all, "[t]wo clear restraints on the use of the equity power" that "derive from the very form of our Government"—federalism and the separation of powers. *Id.* at 131 (Thomas, J., concurring). These restraints should give federal courts "pause before using their inherent equitable powers to intrude into the proper sphere of

the States." *Id.* "When district courts seize complete control over" a State's election process, they "strip" the State "of one of" its "most important governmental responsibilities, and thus deny" its "existence as" an "independent governmental" entity. *Id.* They also exceed their authority under Article III: "There simply are certain things that courts, in order to remain courts, cannot and should not do." *Id.* at 132. One of those things is amending a State's initiative process. Despite these principles, the District Court substituted its wisdom for Ohio's: it rewrote Ohio's Constitution and Revised Code by "cho[osing] a new deadline and prescrib[ing] the form of signature the State must accept." *Thompson*, 959 F.3d at 812.

II. The remaining preliminary-injunction factors also favor Ohio.

Ohio's inevitable success on the merits dictates the outcome here. *See Bailey v. Callaghan*, 715 F.3d 956, 958 (6th Cir. 2013). But the remaining three preliminary-injunction factors also weigh against injunctive relief.

Irreparable harms. Imposing any relief in this case would irreparably harm Ohioans. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012)) (Roberts, C.J., in chambers) (alteration in original) (quotations omitted). The same goes for state constitutional provisions

adopted by the People directly. Thus, an injunction "seriously and irreparably harm[s]" a State any time it wrongly "bar[s] the State from conducting … elections pursuant to a statute enacted by the Legislature" or a constitutional provision ratified by the People themselves. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Here, since Ohio's signature requirements do not violate the First Amendment, any injunction of those requirements would result in irreparable harm to the State.

Harm to other parties. The challengers will not suffer any legally relevant harm from a denial of a preliminary injunction. While a denial of injunctive relief will force the challengers to follow Ohio law, they have no right *not* to comply with that law. And even if the challengers fail to qualify their initiatives for the November 2020 ballot, they can try again at the very next election. That distinguishes this case from the case of a political candidate, who cannot run again until the office is up for election. And presumably, the more the challengers did this year to raise awareness and gain support for their proposals, the better their chances of ballot access in upcoming election cycles (assuming the public is interested in passing those proposals).

Public interest. The public interest comes out the same way. The public interest always lies in a correct application of constitutional law and "upon the will of the people of [Ohio] being effected in accordance with [Ohio] law." *Coalition to*

Defend Affirmative Action v. Granholm, 473 F.3d 237, 252 (6th Cir. 2006). Because Ohio's signature requirements are lawful, the courts should not disrupt "the will of the people" by enjoining parts of Ohio's Constitution and Revised Code. Additionally, while this case is brought by proponents of certain initiatives, many *oppose* those initiatives. *See* Br. of *Amici Curiae* Ohio Manufacturers Assoc., *et. al.*, Doc.29-2 (6th Cir.). Initiative opponents will suffer harm if the challengers receive a shortcut to the ballot.

CONCLUSION

The Court should reverse the District Court's judgment.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
STEPHEN P. CARNEY
SHAMS H. HIRJI
ZACHERY P. KELLER
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for a principal brief and contains 11,361 words. *See* Fed. R. App. P. 32(a)(7)(B)(i).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
Benjamin M. Flowers

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, the foregoing was filed 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.

/s/ Benjamin M. Flowers
Benjamin M. Flowers

DESIGNATION OF DISTRICT COURT RECORD

Defendants-Appellants, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

***Chad Thompson, et al., v. Mike DeWine, et al.*, Case No. 2:20-cv-2129**

Date Filed	R. No.; PageID#	Document Description
4/27/2020	R.1; 2, 14–19	Complaint
4/30/2020	R.14; 99–105, 121–24	Complaint in Intervention for Temporary Restraining Order, Preliminary and Permanent Injunction Relief
4/30/2020	R.14-2; 136	Declaration of Antonia Dippold-Webb
4/30/2020	R.15-3; 178	Declaration of Susan G. Zeigler
4/30/2020	R.15-4; 183	Declaration of Scott Campbell
5/1/2020	R.17-1; 221–42	Proposed Intervenors' Complaint
5/4/2020	R.30-1; 434	Declaration of Gavin DeVore Leonard
5/6/2020	R.35; 469–75	Stipulated Facts
5/12/2020	R.40-1; 560	Affidavit of Amanda Grandjean
5/14/2020	R.43; 626	Reply Brief of Intervening Plaintiffs Ohioans for Secure and Fair Elections et al. in Support of Motion for Temporary Restraining Order/Preliminary Injunction
5/19/2020	R.44; 649–76	Opinion and Order on Preliminary Injunction
5/20/2020	R.45; 677	Defendants' Notice of Appeal
5/22/2020	R.50; 709–11	Opinion and Order on Motion to Stay