No. 19A1054

In the Supreme Court of the United States

CHAD THOMPSON, ET AL.,

Applicants,

v.

RICHARD MICHAEL DEWINE, ET AL.,

Respondents.

ON APPLICATION FOR STAY FROM THE UNITED STATES CIRCUIT COURT FOR THE SIXTH CIRCUIT

OPPOSITION TO EMERGENCY APPLICATION TO VACATE THE SIXTH CIRCUIT'S STAY

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
SHAMS H. HIRJI
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087, fax
benjamin.flowers@ohioattorneygeneral.gov

Counsel for Respondents Ohio Governor Mike DeWine; Lance Himes, Director of the Ohio Department of Health; and Ohio Secretary of State Frank LaRose

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INTRODUCTION

Our 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). Ohioans have chosen to permit voter initiatives, and they have adopted various procedural requirements governing "how" to legislate by popular action. Three such requirements are relevant here. First, to gain ballot access, ballot-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.

The applicants in this case wish to put municipal initiatives regarding marijuana on the November 2020 ballot. They have had *months* to gather ink-signed, witnessed signatures in advance of the July 16 deadline. But they say the COVID-19 pandemic made it too hard to gather the required signatures, and that enforcing the deadline and the signing requirements would therefore violate the Free Speech Clause of the First Amendment. The District Court agreed. And it ordered the State to fix the problem by implementing, on the fly, an online signature-collection system. The court did not specify how the online signature gathering would work. But it envisioned allowing signatories to "sign" initiative petitions by providing the last four digits of their social security numbers to a third-party vendor. This system could not possibly work; state election officials do not have all voters' social security numbers and so cannot identify signatories in the manner proposed. Still, the District Court ordered the State to move forward, and to meet and confer with the

plaintiffs to iron out "technical" and "security" concerns with its half-baked plan. Appx.56.

The Sixth Circuit stayed the District Court's injunction pending a merits appeal. The applicants ask this Court to vacate that stay. To win relief, they must show that the Sixth Circuit "clearly and demonstrably erred in its application of accepted standards." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay) (internal quotations omitted); *accord id.* at 1065 (Breyer, J., dissenting from denial of application to vacate the stay). The application therefore presents the following question: Did the Sixth Circuit clearly and demonstrably err? The answer is no. For three reasons, the applicants cannot meet that lofty standard.

First, the applicants' claims fail because the challenged laws do not implicate the Free Speech Clause *at all*. Laws "that determine the process by which legislation is enacted"—including laws governing the initiative process, like those at issue here—do not implicate the Free Speech Clause. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (*en banc*) (per McConnell, J.); *see also Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002) (per Tatel, J.); *Molinari v. Bloomberg*, 564 F.3d 587, 599–601 (2d Cir. 2009). The initiative process is a *legislative* process, and the Free Speech Clause protects the right to express oneself, not the right to legislate. *Marijuana Policy Project*, 304 F.3d at 83; *Walker*, 450 F.3d at 1099–1100. Since the deadlines, the ink requirement, and the witness requirement all "determine the process by which legislation is enacted" by

initiative—they govern legislative procedure, not communicative conduct—they are not subject to the Free Speech Clause at all, and the applicants' challenge fails. It would therefore be improper to resuscitate the District Court's injunction.

Second, even if the First Amendment applied to such laws, the Sixth Circuit correctly recognize that the challenged laws pass constitutional muster under the *Anderson-Burdick* test. That test requires balancing the burdens a law imposes against the state interests it furthers. The burden here is moderate at most. The applicants had months to gather the necessary signatures—in some cases, just a few dozen signatures—and they still have until July 16. And during all that time, they were free to gather signatures because Ohio's stay-at-home orders *always* exempted First Amendment activity, including signature gathering. The at-most moderate burden resulting from the stay-at-home orders was more than justified by the important interests served by the laws challenged in this case. This Court has made clear 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 v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018). 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 elec-

tion 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.

Finally, and independent of the merits, the District Court's expansive remedy was improper: Ohio cannot be forced, with deadlines fast approaching, to devise and secure an online signature-gathering system that verifies signatories' identities using information not in election officials' possession.

STATEMENT

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 statutes 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 10 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 Ohio Manufacturers' Ass'n v. Ohioans for Drug Price Relief Act*, 149 Ohio St. 3d 250, 250–51 (2016).

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 general election. Ohio Const., Art. II, §§1a, 1g. So, to qualify for the November 3, 2020 election, signatures must 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 must 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 to verify the

supporting signatures upon their being submitted. 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 the filing of this suit. The current Director is Lance Himes.) With this in mind, they have issued orders restricting certain activities. These orders have always been temporary. Nearly all have been eased or eliminated as the State "reopens." *See* April 30 Order, online at https://tinyurl.com/y7s6cre2; May 20 Order, online at https://bit.ly/303A8de.

Even at their peak, these orders always sought to balance the State's interests in protecting Ohioans' health and 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 legislation. *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 have 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 will call the defendants "Ohio" or "the State." Some of the challengers wanted ballot access for constitutional amendments, while others wanted ballot access for municipal initiatives. Of particular note here, the applicants—

Chad Thompson, William Schmitt, and Don Keeney (together, "Thompson")—are individuals who regularly circulate municipal initiatives to change local laws about marijuana possession. 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 rather-large City of Akron to the quite-small township of Cadiz and the even-smaller village of Adena. Stip. Facts ¶¶3–4, R.35, PageID#469.

The various plaintiffs and intervenors 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. 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 plaintiffs' 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 deadlines that, as just discussed, mostly come straight out of the Ohio Constitution.

In moving for preliminary relief, the plaintiffs 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. Indeed, Thompson submitted no evidence at all. 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 pandemic circumstances.

4. On May 19, the District Court granted the request for a preliminary injunction as to the ink requirement, witness requirement, and signature deadlines. Appx.55–56.

On the merits, the District Court held that all of these requirements and deadlines likely violated the First Amendment by unduly restricting ballot access "during a global pandemic." Appx.29. 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. Appx.35. 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) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *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. Appx.39 (internal quotation omitted). That leeway changed, however, because of the "unique historical circumstances of a global pandemic." Appx.40. 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. Appx.42. 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. Appx.35 n.2.) The court said that the ink and witness requirements were not narrowly tailored to allowing state interests because other approaches—like using the last four digits of social security numbers—*might* work to verify the identities of the signatories. Appx.45–46. And the signature-gathering deadlines, the court concluded, were not "narrowly tailored in light of Plaintiffs' inability to safely circulate petitions" during the pandemic. Appx.49.

As to relief, the District Court enjoined the ink and witness requirements. Appx.55–56. In place of those requirements, it ordered the State to "accept electronically-signed and witnessed petitions." Appx.56. Apparently recognizing the likely "technical" and "security" issues with that approach, the District Court further ordered the parties to meet and confer to iron out those issues. *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.*

5. Ohio immediately appealed and sought a stay pending appeal. The Sixth Circuit unanimously granted a stay the next week. Appx.3–14. 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. Appx.6–7 n.2. It further observed that Sixth Circuit judges have "often questioned" whether the Circuit overuses the *Anderson-Burdick* test. *Id.* But, based on the Sixth Circuit's past precedent, it applied that test. Appx.6.

The Sixth Circuit first rejected the notion that Ohio's signature requirements impose a severe burden; it held the burden was instead "intermediate." Appx.8–11. It credited, as "vitally important," the fact that Ohio's pandemic-related restrictions always permitted First Amendment activity. Appx.9. Ohio's actions, therefore, did not "exclude[] or virtually exclude[]" the plaintiffs' initiatives from the ballot. Appx.8. The plaintiffs instead 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." Appx.9–10. What is more, the panel explained, the State could not be held liable for "private citizens' decisions to stay home for their own safety." Appx.10.

The Sixth Circuit next concluded that the intermediate burden was justified by the important state interests advanced by the deadlines, the ink requirement, and the witness requirement. Appx.11. With respect to the ink and witness requirements, the court 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.* 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. Appx.13.

Lastly, the Sixth Circuit stressed that the District Court "exceeded its authority" by entering an injunction forcing Ohio, with no guidance, to accept electronic signatures. Appx.12. 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." Appx.12–13. And the threat became particularly stark because the plaintiffs and intervenors, in their Sixth Circuit briefing, revealed that they did not even agree on a uniform process for collecting or validating electronic signatures under the District Court's injunction. That injunction required the State "to accept electronically-signed and witnessed petitions collected through the on-line signature collection plans proposed by" two groups of intervenor plaintiffs (neither of which are applicants here). Appx.55–56. But as it turned out, the parties did not really agree on what form that signature-gathering should take. One intervenor group said it would collect signatures for its proposed initiative through its own

website (with the help of a third-party vendor). Another 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 Br., Doc.25-2 at 1 (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 Br., Doc.21 at 3 (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. If the Sixth Circuit's stay is vacated, the parties will be put right back in that same, uncertain position.

ARGUMENT

This Court will "not vacate a stay entered by a court of appeals unless that court clearly and demonstrably erred in its application of accepted standards." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring in denial of application to vacate stay) (internal quotation omitted); *accord id.* at 1065 (Breyer, J., dissenting from denial of application to vacate the stay). Thus, to justify vacating a stay, an applicant must show that the stay was "'demonstrably wrong.'" *Western Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)).

When deciding whether to issue a stay, a court of appeals considers four factors: "(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) (quotations omitted); Appx.6 (same). The first two factors "are the most critical." *Nken*, 556 U.S. at 434.

I. The Sixth Circuit's decision to grant Ohio a stay was correct; and it certainly was not "demonstrably wrong."

For at least three reasons, Thompson falls far short of his burden in asking to undo the Sixth Circuit's stay. *First*, the process by which initiatives gain ballot access does not implicate the First Amendment at all. As a result, Thompson's First Amendment challenge fails as a matter of law, and the Sixth Circuit's stay of the District Court's free-speech-based injunction must be left in place. *Second*, even if this Court's *Anderson-Burdick* test applies, as the Sixth Circuit assumed, the challenged laws pass that test and the District Court erred in holding otherwise. *Third*, the remaining balance of harms also favored a stay: in particular, the District Court's injunction would have forced Ohio to experiment with a never-before-tried electronic-signature system—or perhaps three separate systems—and that experiment would have occurred with an election fast approaching.

A. Laws regulating the mechanics of the initiative process do not implicate the First Amendment.

Thompson argues that the State violated the First Amendment's Free Speech Clause by requiring compliance with its laws governing the mechanics of the State's initiative process. That cannot be. The initiative process is a *legislative* process. And "the freedom of speech" protected by the First Amendment does not include the right to legislate. It follows that States do not implicate the First Amendment when

they structure the process by which initiatives become law. The D.C. and Tenth Circuits—in opinions by Judges Tatel and McConnell—have already so held. *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (*en banc*). And while some other courts have concluded otherwise without meaningful analysis, the existence of the split suggests that the Sixth Circuit's judgment was not demonstrably wrong, as it would have to be for this Court to vacate the stay order. *See Lux v. Rodrigues*, 561 U.S. 1306, 1308 (2010) (Roberts, C.J., in chambers).

1. The First Amendment's Free Speech Clause prohibits laws "abridging the freedom of speech." U.S. Const., Am. 1. But 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).

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 this 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, this 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," *Walker*, 450 F.3d at 1099. 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).

But while 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 flows from the fact that the initiative power is a legislative power; the "'power of direct legislation 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 or legislative bills 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 these laws impact 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. Decisions from several circuits support this distinction. The D.C. Circuit's decision in *Marijuana Policy Project* and the *en banc* Tenth Circuit's decision in *Walker* are particularly illustrative.

In *Marijuana Policy Project*, the D.C. Circuit held that "the First Amendment imposes no restriction on the withdrawal of subject matters from the initiative process." 304 F.3d at 86. The case involved a federal law prohibiting the District of Columbia from passing any law, by initiative or otherwise, that reduced penalties for drug-related crimes. *Id.* at 83. In upholding the prohibition, the D.C. Circuit stressed the difference between ballot access and speech surrounding a ballot issue. *Id.* The court noted that the initiative process is "'a power of direct legislation by the electorate.'" *Id.* at 85 (quoting *Convention Ctr. Referendum Comm.*, 441 A.2d at 897). While the "First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.* Because the challenged law "silence[d] no one," but instead just stopped them from legislating, it had no impact on the plaintiffs' First Amendment rights. *Id.* at 86.

The *en banc* Tenth Circuit drew the same line in *Walker*. That case involved a First Amendment challenge to a provision of Utah's constitution that required a

supermajority for all initiatives involving wildlife-management issues. 450 F.3d at 1086, 1099. The Tenth Circuit held that Utah's requirement did "not implicate the First Amendment at all." *Id*. at 1099. The Tenth Circuit held that the supermajority requirement did not "regulate or restrict the communicative conduct of persons advocating a position" on issues being put to a vote, but rather set forth "the process by which legislation is enacted." *Id*. at 1099–1100. And such laws, the court held, do not "implicate the First Amendment at all." *Id*. at 1099

Decisions from other courts are in accord. *See, e.g.*, *Jones*, 892 F.3d at 937–38; *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d. Cir. 2009); *Pony Lake Sch. Dist. 30 v. State Comm. for the Reorganization of Sch. Dists.*, 271 Neb. 173, 191 (Neb. 2006); *Port of Tacoma v. Save Tacoma Water*, 422 P.3d 917, 924–25 (Wash. Ct. App. 2018). Consider especially the Second Circuit's decision in *Molinari*. That case addressed whether New York City's City Council could repeal a local law passed by popular referendum. *Molinari,* 564 F.3d at 595. The Second Circuit held that the legality of such repeals did not implicate the First Amendment. *Id*. at 596. Relying on *Walker*, it explained that "First Amendment rights are not implicated by referendum schemes *per se* … but by the regulation of advocacy within the referenda process." *Id*. at 602. New York City's different legislative processes did not restrict referenda proponents "from engaging in First Amendment activity," so the proponent's First Amendment challenges failed. *Id*. at 599.

3. True enough, not all courts have recognized the distinction between laws regulating communicative conduct about initiatives and laws that simply regulate

the initiative process. *See, e.g.*, *Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, ("*CITL*"), 885 F.3d 443, 448 (6th Cir. 2018); *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2011)*; Wirzburger v. Galvin*, 412 F.3d 271, 278 (1st Cir. 2005). But the weakness of their arguments *for* applying the Free Speech Clause to laws governing the mechanics of the initiative process bolsters the argument *against* the Clause's application.

The first sign of weakness is that most of the courts that analyze these laws under the Free Speech Clause simply assume the Clause applies or provide only cursory reasoning. *See, e.g.*, *Wirzburger*, 412 F.3d at 275, 279; *Schmitt*, 933 F.3d at 639. On the rare occasion that courts show their work, the results are unsatisfying. Again, courts that apply the First Amendment in this context absolutely must have an answer to the following question: When a State regulates the process by which voter initiatives become law, how is it "abridging the freedom of speech"? Most courts do not even try to answer this question. The only one that has—the Ninth Circuit—offered the unsatisfying explanation already rejected above: that such laws "indirectly impact core political speech" by decreasing the odds that proposed initiatives will qualify for the ballot and thereby become "the focus of statewide discussion." *Angle*, 673 F.3d at 1133. Again, embracing *that* explanation entails calling into question all subject-matter and procedural limitations on the legislative process, since all such limitations "indirectly impact core political speech" by making legislation harder. *See above* 17; *Schmitt*, 933 F.3d at 649 n.3 (Bush, J., concurring in part and concurring in the judgment).

In addition to their inability to explain *why* the First Amendment applies in this context, courts have yet to identify any good test for analyzing alleged violations. For example, the Sixth and Ninth Circuits apply the *Anderson-Burdick* test for which Thompson advocates here. But that test is poorly suited to the initiative context. 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.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The first problem with applying *Anderson-Burdick* here stems from the already-discussed fact that no one can explain how laws regulating the mechanics of the initiative process "injur[e] … the rights protected by the First and Fourteenth Amendments." *Burdick*, 504 U.S. at 434. Without a definable injury, the test makes no sense: asking whether an impossible-to-identify injury outweighs the State's interests is about as sensible as asking "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

There also is a second, more serious problem. *Anderson-Burdick* "is a dangerous tool." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment). It is a "quintessential balancing test," and one that "does little to define the key concepts a court must balance." *Id.* (internal quotation omit-

ted). Thus, "*Anderson-Burdick* leaves much to a judge's subjective determination." *Id*. That discretion is unacceptable in the context of deciding what the initiative process within a given State should look like. Courts "are ill-suited to determine whether or not a state advances an important governmental interest" in the structuring of the State's legislative power. *Schmitt*, 933 F.3d at 648–49 (Bush, J., concurring in part and concurring in the judgment). Indeed, courts should be especially deferential with respect to the questions of whether and how the People may wield the legislative power directly. Few issues more clearly bear on state sovereignty than the States' processes for making law

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If it is true that the Free Speech Clause does not apply to laws governing the mechanics of the initiative process—or if the courts saying so are at least not demonstrably wrong—then Thompson's application must be denied. None of Ohio's signature requirements for ballot initiatives restrict communication between initiative proponents and the potential signatories they must convince. As a result, they do not trigger scrutiny under the Free Speech Clause.

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

Even assuming that laws regulating the mechanics of the initiative process are subject to *Anderson-Burdick* balancing, as the District Court held, the Sixth Circuit correctly held that the ink requirement, witness requirement, and signature deadlines pass constitutional muster. Appx.6–11.

The *Anderson-Burdick* test is a "flexible standard." *Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 789. As mentioned above, the test requires courts to balance voting burdens against state interests. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). It operates on a sliding scale. Laws that impose "severe" burdens receive strict scrutiny. *Id.* Laws that impose "lesser burdens" receive far more deference. *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005). For those less-than-severely-burdensome laws, the *Anderson-Burdick* test presumes that the State's important interests in regulating elections will "usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (internal quotations omitted).

1. Ohio's signature requirements impose (at most) moderate burdens.

Given *Anderson-Burdick*'s sliding scale, the first consideration is whether the challenged laws impose a severe burden or something less. Two points about burden measuring are especially relevant here. *First*, 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); *Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020). *Second*, in measuring the severity of the burden, States are accountable only for the burdens *they* impose. That is so because, under 42 U.S.C. §1983, state actors are liable only for their own conduct, not private action. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999); Appx.10. Thus, litigants cannot hold the State liable for the private decisions of third parties.

Applying these principles here, Ohio's ink requirement, witness requirement, and signature deadlines impose moderate burdens at most. Appx.8–11. Each provision no doubt makes it harder to legislate by initiative than it would otherwise be. But it does not follow that these provisions make ballot access virtually impossible. 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. For one thing, Ohio officials have consistently exempted First Amendment activity from their pandemic-related restrictions. *See above* 6–7. 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. 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. And the signature-gathering deadlines have not even expired: those gathering signatures have until July 1 (for statewide initiatives) or July 16 (for municipal initiatives).

Thompson is in a particularly poor spot to assert a burden. Recall that Thompson seeks to advance municipal initiatives to decriminalize marijuana in several localities. Stip. Facts ¶¶3–4, R.35, PageID#469. Some of the municipalities he targets are quite small—for example, the village of Adena (population 704) and the township of 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 access to the ballot, 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.

Given these relatively small numbers, it would seem any failure on Thompson's part is more attributable to voters' lack of interest or his own lack of effort than it is to the difficulty of gathering signatures during a pandemic. 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 Thompson and the other plaintiffs 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." Appx.9–10. 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 homeowner, and then, if the homeowner 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 plaintiffs presented below, it appears that, instead of trying these alternatives, they just threw up their hands and sued.

On top of all this, the difficulty of signature gathering in a pandemic is "beyond the control of the State." Appx.10. 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. So, if potential signers expressed limited interest over fear of the virus, that is attributable to their own choices, not state action.

Thompson failed to show that the deadlines, the ink requirement, or the witnesses requirement imposed a severe burden. The burden is moderate at most, as the Sixth Circuit correctly held.

2. Ohio's compelling interests in a fair and orderly initiative process easily outweigh any non-severe burdens.

The moderate burdens must be balanced against the State's justifications. To understand those justifications, begin by recognizing 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 (internal quotation 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*, 525 U.S. at 205. 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; *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 everybody else is 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) (emphasis omitted). 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, 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, above-board initiative process easily justify all of its reasonable, nondiscriminatory signature requirements. Thus, the challenged laws pass muster even if *Anderson-Burdick* applies.

C. The remaining factors also support the Sixth Circuit's stay.

Ohio's strong likelihood of success in this case is more than enough to show that the Sixth Circuit's stay was not "demonstrably wrong." But, even apart from that, the potential harms of the District Court's remedy independently justified staying the decision. As the Sixth Circuit rightly concluded, allowing that impractical and experimental remedy to remain would have injected great uncertainty into Ohio's initiative lawmaking process with an election only "months away" and "interim deadlines" fast approaching. Appx.13.

1. The District Court ordered an unworkable remedy that exceeded its authority.

The District Court awarded the plaintiffs relief that was both impractical and improper. 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 a system "to accept electronically-signed and witnessed petition" collected online. Appx.56. How, between now and any pre-November

deadline for signature submission, is the State supposed to create a safe system for receiving and verifying electronic signatures submitted online? And even if the State manages to do so, how would it prove the safety so as to preserve the public's confidence in the electoral 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. Appx.55–56.

This is not a viable solution. First, 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. A system developed and implemented on the fly, and with all the other pressures now facing state election officials, would be even more likely to have serious vulnerabilities.

Putting security concerns aside, any attempt to verify online signatures using the last four digits of signers' social security numbers, as the District Court suggested, Appx.45, would prove unworkable. *First*, requiring this information would allow identity thieves *posing* as the State or 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. The State has a strong interest in making clear to voters that they will *never* be asked to hand over this sensitive infor-

mation in order to support an initiative or referendum—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 District Court's order enjoining the deadlines creates problems for would-be ballot-access challengers, too. 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. This 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 are just weeks away—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." Appx.12.

2. Reinstating the District Court's injunction would harm Ohio and the public.

"[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 Peo-

ple themselves. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Here, since Ohio's signature requirement do not even implicate—much less violate—the First Amendment, any injunction of those requirements would result in irreparable harm to the State.

The public interest comes out the same way. That interest 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) (per Sutton, J.). Because Ohio's signature requirements are lawful, the Court 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 plaintiffs receive a shortcut to the ballot.

That leaves only the question "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 434. It will not; at least, it will not impose an injury the law cares to acknowledge. While the stay requires Thompson to comply with Ohio law, he has no right *not* to comply with that law. And even if Thompson fails to qualify his initiatives for the November 2020 ballot, he 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.

On a final note, this case is not over. If the Sixth Circuit agrees with Thompson that his constitutional rights have been violated, it will then, presumably, craft a remedy—one more workable than that envisioned by the District Court.

II. Thompson's arguments are unpersuasive.

Thompson's attempts to establish clear and demonstrable error come up short. To begin, he suggests that every circuit agrees about how the First Amendment applies in the initiative context, Appl.28, only to later admit that there is actually a circuit split on the topic, Appl.29. Thompson treats that split as an afterthought, but it is actually fatal to his application. As explained already, the fact that circuits have disagreed as to whether the First Amendment applies to initiative procedures *at all* makes it hard to show that the Sixth Circuit *clearly and demonstrably* erred. *Lux,* 561 U.S. at 1308 (Roberts, C.J., in chambers). Indeed, two of the Nation's most eminent jurists—namely, Judge Tatel and former Judge McConnell—would have gone even farther than the Sixth Circuit, upholding the challenged laws without even subjecting them to First Amendment scrutiny.

Thompson's other arguments fare no better. Consider his reliance on *South Bay United Pentecostal Church v. Newsom,* 590 U.S. __, Case No. 19A1044 (May 29, 2020), which serves as the cornerstone of his application. In that case, this Court declined to grant emergency injunctive relief to a California-based church that wished to assemble in numbers larger than California's stay-at-home order permitted. Thompson tries to link the decision in that case to the stay order in this one through a few steps. He first notes that Chief Justice Roberts, in his concurring opinion in *South Bay*, explained that he voted to deny injunctive relief because it

was not "'indisputably clear'" that California's restrictions violated the First Amendment. Appl.18 (quoting *South Bay*, slip op.3). From this, Thompson infers that the First Amendment's application is often (perhaps always) unclear. Why does that matter here? Because, Thompson says, if it is unclear what the First Amendment covers, then the First Amendment exemptions in Ohio's stay-at-home orders, *see above* 6–7, gave circulators no confidence that they could gather signatures while the stay-at-home order remained in effect. *See* Appl.18. Therefore, he concludes, the challenged laws impose a significant burden.

This argument suffers from several flaws. Right off the bat, Thompson overstates any vagueness of Ohio's First Amendment exemption as applied to the collection of signatures. This Court's cases leave zero doubt that petition circulation is communicative activity protected by the First Amendment. *Meyer*, 486 U.S. at 421–22; *Buckley*, 525 U.S. at 186–87. So an exemption for First Amendment activity covered signature collection, even if the exemption's precise boundaries were unclear in other circumstances.

In any event, it is undisputed that the State began *expressly* permitting signature-gathering campaigns on April 30, and Thompson has until mid-July to collect signatures supporting municipal initiatives. Thompson speculates that post-April signature-collection efforts would have been unsuccessful. *See* Appl.12. But he submitted no evidence about his signature collection efforts—including any attempts to adapt his efforts to pandemic times—despite having the burden to justify a preliminary injunction. Thus, contrary to Thompson's repeated suggestions, any

evidentiary gap is his fault, not the State's or the Sixth Circuit's. *See* Appl. 13, 16, 27. What is more, Thompson misstates Ohio's social-distancing requirements as an absolute command. Appl.6. While the stay-at-home orders did indeed impose social-distancing requirements, they also required maintaining a six-foot distance only "*as much as reasonably possible*." March 22 Order ¶1, online at https://tinyurl.com/y8urb7mn (emphasis added). If someone practicing a permitted activity (like signature gathering) briefly pierced the six-foot halo (to hand over a pen, perhaps), the piercing was necessary and therefore permitted. In any event, circulators could collect signatures while properly distancing. *See above* 25–26.

Three other points about *South Bay* are worth mentioning. *First*, the five-Justice majority did not issue an opinion explaining its decision. Thompson quotes liberally from the Chief Justice's concurrence, which no one else joined. *Second*, even if the concurrence had commanded a majority, it addressed the clarity of a church's entitlement to relief under the Religion Clauses—it had nothing to do with the Free Speech Clause, which is the clause at issue here. *Third*, the Chief Justice's concurrence supports the State, not Thompson. The Chief Justice stressed that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay*, slip op.2 (quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905)). In other words, the judiciary should not generally second-guess State officials' judgments as to when and how to calibrate responses to a health emergency. Here, Ohio chose *not* to amend its signature-gathering laws, even as its legislature deliberated and

adopted other electoral changes. The Chief Justice's opinion counsels against pandemic-motivated judicial tinkering with Ohio law.

Thompson also relies heavily on the Sixth Circuit's unpublished decision in *Esshaki v. Whitmer*, No. 20-1336, 2020 U.S. App. LEXIS 14376 (6th Cir., May 5, 2020). Of course, unpublished circuit decisions are not binding even in the circuit courts, let alone *this Court*. Regardless, the Sixth Circuit correctly distinguished this case from *Esshaki* in its opinion below. In *Esshaki*, Michigan had abruptly criminalized the collection of signatures through its incredibly strict stay-at-home orders, all in "the last month before the deadline." Appx.8. It was "the *combination* of" Michigan's ballot-access provisions *with* its stricter stay-at-home restrictions that led the Sixth Circuit to find a severe burden. *Esshaki*, 2020 U.S. App. LEXIS 14376 at *3 (emphasis added). That combination is lacking here, since Ohio always exempted signature gathering from its pandemic restrictions, and expressly so since April 30. On top of those distinctions, Ohio also began lifting its already-more-lenient stay-at-home restrictions long before Thompson's July 16 deadline.

Thompson also relies heavily on a forthcoming article by popular commentator Rick Hasen. *See* Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative in a Pandemic*, U. Chic. L. Rev. Online (2020) (reproduced in Thompson's Appendix beginning at App.217). The reliance is misplaced. First, the article focuses on how the author believes the law should be, not the law's actual state. It openly welcomes courts putting a "thumb on the scale favoring" election litigants in pandemic litigation. App.218. And it sets aside the Court's "controversial decision"

in *Republican National Committee v. Democratic National Committee*. Appx.218. Academic work of that nature deserves no special weight here. *See Kansas v. Nebraska*, 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part).

Anyway, the article, which is still in draft form, misstates basic facts. For example, the article says the Sixth Circuit found the burden in this case to be "minor," App.226, when in fact the Sixth Circuit in this case said the burden was "intermediate," App.10. That is a significant error: whereas minor burdens are subject to an exceedingly deferential form of review approximating rational-basis review, intermediate burdens are subjected to *Anderson-Burdick* balancing. *See Schmitt*, 933 F.3d at 639. The article also errs by suggesting that the *en banc* Tenth Circuit, in *Walker*, did not consider the First Amendment's application to a law governing the mechanics of a state-initiative process. Appx.226 n.56. In fact, the challenged law involved a provision in Utah's constitution that imposed a procedural requirement (in the form of a supermajority-vote requirement) on certain initiatives. *Walker*, 450 F.3d at 1085.

Regardless, the article still helps show why the Court should deny Thompson's application here. It notes that, "[f]or the most part, courts have been unsympathetic to the claims of ballot measure proponents." Appx.221. And it acknowledges the "host of difficult problems," including concerns of federalism and separation of powers, that these types of cases raise, including the intrusiveness of court-mandated relief. Appx.225. These observations reflect that, even assuming room

for disagreement, the Sixth Circuit's decision to stay the District Court's injunction was not demonstrably wrong.

CONCLUSION

The Court should deny the application for emergency relief.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
SHAMS H. HIRJI
Deputy Solicitors General
30 East Broad Street,
17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087, fax
benjamin.flowers@ohioattorneygeneral.gov

Counsel for Respondents Ohio Governor Mike DeWine; Lance Himes, Director of the Ohio Department of Health; and Ohio Secretary of State Frank LaRose