UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAWARIMEDIA LLC, DEBORAHL PARKER, JUDY KELLOGG and PAUL ELY,
Plaintiffs,
v
GRETCHEN WHITMER, Governor of Michigan, JOCELYN BENSON, Secretary of State of Michigan and JONATHAN BRATER, Director of the Michigan Bureau of Elections, in their official capacities,

Defendants.

No. 20-11246

HON. MATTHEW F. LEITMAN

MAGISTRATE MICHAEL J. HLUCHANIUK

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR TRO/PRELMINARY INJUNCTION

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1. Whether Plaintiffs' motion for temporary restraining order should be denied where Plaintiffs have failed to satisfy the requirements for granting such extraordinary relief?

INTRODUCTION

Plaintiffs are proponents of an initiative petition to amend Michigan's truth-in-sentencing law, 1893 P.A. 118, Mich. Comp. Laws § 800.33.[1] Under the Michigan Constitution, they are required to file at least 340,047 valid signatures by the statutory deadline of May 27, 2020 to potentially gain access to the November 3, 2020 general election ballot. Plaintiffs ask this Court to enjoin the signature requirement and filing deadline for legislative initiative petitions. Plaintiffs argue the Covid-19 pandemic and the Governor's executive orders limiting social interactions made it impossible for them to meet these requirements. But Plaintiffs fail to demonstrate, as they must, a strong likelihood of success on the merits of their First and Fourteenth Amendment constitutional claims, and their similar failure to sufficiently demonstrate irreparable harm also requires denial of their motion.

STATEMENT OF FACTS

A. The Governor's declaration of emergency and other executive orders.

On March 10, 2020, Defendant Governor Gretchen Whitmer declared a state of emergency and invoked emergency powers in Executive Order No. 2020-4, in response to the spreading pandemic related to Covid-19 and to two confirmed

[1] See website for Michigan Prisoner Rehabilitation Credit Act, available at https://www.mprca.info/.

cases in Michigan.[2] While this order noted the serious nature of the virus, it did not restrict the movement or gathering of people in Michigan. On March 13, 2020, Governor Whitmer issued Executive Order 2020-5 prohibiting assemblages of 250 or more people in a single shared space with limited exceptions, and ordering the closure of all K-12 school buildings.[3] But the order stated that its "prohibition [did] not abridge protections guaranteed by the state or federal constitution under these emergency circumstances."[4]

Three days later, on March 16, 2020, Governor Whitmer ordered various places of public accommodation, like restaurants, bars, and exercise facilities, to close their premises to the public.[5] And on March 17, 2020, the Governor issued an order rescinding 2020-5, changing the cap on assemblages to 50 persons in a single shared indoor space, and expanding the scope of exceptions from that cap.[6] That order included the same language that its "prohibition [did] not abridge

[2] EO No. 2020-4, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521576--,00.html.
[3] EO No. 2020-5, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521595--,00.html.
[4] (*Id*.)
[5] EO No. 2020-9, available at, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html. Replaced by EO 2020-20.
[6] EO No. 2020-11, available at, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521890--,00.html.

protections guaranteed by the state or federal constitution under these emergency circumstances."[7]

Subsequently, on March 23, 2020, again in response to the spreading Covid-19 pandemic in Michigan, Governor Whitmer issued Executive Order No. 2020-21 (the "Stay-Home Order"), which essentially ordered all persons not performing essential or critical infrastructure job functions to stay in their place of residence, other than to obtain groceries, care for loved ones, engage in outdoor activity consistent with social distancing, and other limited exceptions.[8] The order also prohibited, with limited exceptions, all public and private gatherings of any number of people that are not part of a single household.[9] That order was to continue through April 13, 2020, however, on April 9, 2020, the Governor issued Executive Order 2020-42, extending the Stay-Home Order through April 30, 2020.[10] She then extended it through May 15, 2020, pursuant to Executive Order 2020-59.[11] These orders did not contain the "does not abridge" language. But the

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[7] (*Id.*)
[8] EO No. 2020-21, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.
[9] (*Id.*)
[10] EO No. 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf. See also EO No. 2020-43, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525927--,00.html.
[11] EO No. 2020-59, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html.

orders were interpreted to permit outdoor "expressive activities protected by the First Amendment," so long as "social distancing measures . . . including remaining at least six feet from people from outside the person's household" were followed.[12] Since then the Governor has additionally extended the Stay-Home Order, but has lessened the restrictions each time.[13]

B. General requirements for initiative petitions in Michigan

Article 2, § 9 of the Michigan Constitution empowers the people to propose laws or to enact or reject laws, called the initiative. Mich. Const. 1963, art. 2, § 9. With respect to initiatives, § 9 provides in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent for initiative . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required. [Mich. Const. 1963, art. 2, § 9.]

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[12] *See* EO No. 2020-21, FAQ's, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-522631--,00.html; EO No. 2020-42, FAQ's https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-525278--,00.html; EO No. 2020-59, FAQs, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-527027--,00.html.

[13] *See* EO Nos. 2020-70, 2020-77, 2020-92, 2020-96, and 2020-100 available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html. These orders were likewise interpreted to permit outdoor, expressive First Amendment activities. See FAQ's for EOs 70, 77, 92 and 96, available at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-521682--,00.html.

The Michigan Legislature implemented article 2, § 9 with respect to initiatives in various sections of the Michigan Election Law, Mich. Comp. Laws § 168.1 *et seq*. Under the Constitution and the Election Law, in order for the people to place an initiative on the general election ballot, the people must: (1) prepare a petition that meets the form requirements of Mich. Comp. Laws § 168.482; (2) gather the required number of valid signatures under article 2, § 9; and (3) timely file the petitions with the Secretary of State under Mich. Comp. Laws § 168.472. After filing, Michigan's Board of State Canvassers must canvass the petition to determine whether there are sufficient valid signatures under Mich. Comp. Laws § 168.476. Once the review is complete, the Board of State Canvassers must make an official declaration of the sufficiency or insufficiency of the initiative petition at least 100 days before the election at which the proposal is to be submitted. Mich. Comp. Laws § 168.477(1).

If the initiative petition is certified as sufficient, the Secretary of State must present it to the Legislature for enactment or rejection within 40 sessions days under article 2, § 9. If the Legislature rejects the initiative, it must be submitted to the people for a vote at the next general election. Mich. Const. 1963, art. 2, § 9.

C. Requirements and timeline for initiatives for the November 2020 general election

For this election cycle, proponents of a legislative initiative, like Plaintiffs, must file a petition containing at least 340,047 valid signatures of registered voters

with the Secretary of State by May 27, 2020. Mich. Const. 1963, art. 2, § 9; Mich. Comp. Laws § 168.477.[14] As explained by Defendant Director of Elections Jonathan Brater in his declaration, after a petition is filed it undergoes a rigorous and time-sensitive canvassing process that includes a face review of every petition sheet, a random signature sampling process, and a signature challenge period. (Ex A, Brater Dec, ¶¶ 7-8). The canvassing process ends with the State Board of Canvassers, which must meet to declare the sufficiency or insufficiency of an initiative petition by July 24, 2020 for this cycle. (*Id*., ¶ 6). If a petition is declared sufficient, the Secretary of State will transmit the proposal to the Legislature for its 40-session day review. (*Id*., ¶¶10-11). By September 4, 2020, the Board must assign a proposal number to any initiative that is not passed by the Legislature and approve ballot wording. (*Id*., ¶ 11). The Secretary of State will immediately thereafter certify the ballot to the county clerks, which clerks must then prepare to print ballots. (*Id*., ¶ 11). As explained in Director Brater's declaration, ballot printing is, or at least can be, a complex process involving significant levels of preparation and review. (*Id*., ¶ 13-17). But ultimately, ballots must be printed and available for delivery to military and overseas voters beginning September 21,

[14] *See also* Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition, p 5, available at www.michigan.gov/documents/sos/Initiative_and_Referendum_Petition_Instructions_2019-20_061119_658168_7.

2020. (*Id*., ¶19). The following table shows the timeline of pertinent dates leading up to the November 2020 general election:

Date and Time	Action	Statute
By 5:00 pm on May 27, 2020	Petitions for legislative initiative filed with Secretary of State (340,047 valid signatures required)	Mich. Comp. Laws § 168.471 Art 2, § 9
May 27, 2020 to July 23, 2020	Canvass of initiative petitions begins, including random sampling process; signature challenges permitted during this time period. (Canvassing may take up to 60 days)	Mich. Comp. Laws § 168.476
July 24, 2020	Board of State Canvassers to declare sufficiency or insufficiency of initiative petitions	Mich. Comp. Laws § 168.477
September 4, 2020	Board of State Canvassers must assign numerical designation and approve ballot wording for all statewide proposals, and Secretary of State must certify the ballot to county clerks	Mich. Comp. Laws §§ 168.474a, 168.480, 168.648
September 5, 2020	County clerks begin ballot proofing and printing	Mich. Comp. Laws § 168.689
September 19, 2020	Deadline for county boards of election commissioners to deliver AV ballots to county clerks for November Election	Mich. Comp. Laws § 168.713
September 21, 2020	Deadline for county clerks to deliver AV ballots to local clerks; deadline for AV ballots to be available for delivery to military and overseas voters	Mich. Comp. Laws §§ 168.759a, 168.714 Art. 2, § 4 52 U.S.C. § 20302
November 3, 2020	General Election	

D. Procedural History

Plaintiffs filed the complaint for declaratory and injunctive relief, along with a motion for a temporary restraining order, on May 4, 2020. Defendants have not

been served with the complaint or motion. The undersigned counsel received an e-mail from the Court on May 21, 2020, alerting them to the existence of the motion and requesting they join a scheduling conference by telephone that afternoon. During that telephone conference, the Court indicated that—due to some issue involving the mail—the complaint and motion had just arrived to the Court that day. Defendants agreed to submit a response to the motion by Wednesday, May 27, 2020.

ARGUMENT

I. Plaintiffs' motion for a temporary restraining order should be denied where they have not shown a likelihood of success on the merits of their claims or imminent irreparable harm.

A. Temporary or preliminary injunction factors.

Like a preliminary injunction, a temporary restraining order is an extraordinary remedy "designed to preserve the relative positions of the parties until a trial on the merits can be held." *Cf. Tennessee Scrap Recyclers Ass'n v. Bredesen,* 556 F.3d 442, 447 (6th Cir. 2009). A court considers "four factors when determining whether to grant a temporary restraining order: '(1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of [a TRO] would cause substantial harm to others; and (4) whether the public interest would be served by issuance of [a TRO].' " *Kendall Holdings, Ltd. v. Eden Cryogenics*

LLC, 630 F. Supp.2d 853, 860 (S.D. Ohio 2008) (quoting *Leary v. Daeschner,* 228 F.3d 729, 736 (6th Cir. 2000)). No one factor is dispositive; rather the court must balance all four factors. *In re De Lorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985). The burden of persuasion is on the party seeking the injunctive relief. *Stenberg v. Cheker Oil Co.,* 573 F.2d 921, 925 (6th Cir. 1978).

B. Plaintiffs have not shown a strong likelihood of success on the merits of their First and Fourteenth Amendment claims.

The Sixth Circuit has long held that in determining whether to grant an injunction, the movant must show a "strong likelihood of success on the merits." *See e.g. Ohio Republican Party v. Brunner,* 543 F.3d 357, 361 (6th Cir. 2008); *NEOCH v. Blackwell,* 467 F.3d 999, 1009 (6th Cir. 2006); *Summit County Democratic Cent. & Exec Comm. v. Blackwell,* 388 F.3d 547, 550 (6th Cir. 2004).

A. Plaintiffs are unlikely to succeed because their claims are barred by the doctrine of laches.

The defense of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160 (6th Cir. 1941). An action may be barred by the equitable defense of laches if: (1) the plaintiff delayed unreasonably in asserting their rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000). Laches applies in this case for both of these reasons.

First, Plaintiffs unreasonably delayed raising their claims before this Court. Plaintiffs have been well aware of both the legal requirements for having an initiative proposal reach the ballot and of the emergency posed by a global pandemic. Plaintiffs seek an injunction to order the State Defendants to change the number of signatures required, the method of gathering them, and the May 27 deadline, but the complaint and motion for preliminary injunction in this matter were filed on May 4, 2020. Moreover, the State Defendants have still *never been served with the complaint or motion.* Rather, they were informed by the Court on May 21 that this case existed and that the Court wanted to schedule times for briefing and hearing the motion. While there was apparently some delay in the mail that resulted in the complaint not reaching the Court until that time, even the May 4 filing date was already an unreasonable delay for a complaint seeking to modify a deadline less than 30 days away.

Neither their complaint nor their motion make any attempt to explain the timing of their filing, and they make no allegation of any change in circumstance on or around May 4 that would give rise to a sudden emergency.[15] Simply stated,

[15] Plaintiffs' have variously referred in their complaint and brief to the emergency surrounding the COVID-19 pandemic, but Plaintiffs took no action after Governor Whitmer's declaration of emergency on March 10, or after the Stay-home order on March 23. There is nothing about the pandemic that necessitated Plaintiffs waiting until May 4 to file their complaint.

the Plaintiffs—of their own choosing—waited until less than a month before the deadline to raise their claims. That delay is simply unreasonable.

"As a general rule, last-minute injunctions changing election procedures are strongly disfavored." *Serv. Employees Int'l Union Local 1 v. Husted,* 698 F.3d 341, 345 (6th Cir. 2012)(citing *Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006)("Court orders affecting elections…can themselves result in voter confusion…As an election draws closer, that risk will increase.")); *William v. Rhodes*, 393 U.S. 23, 34-35 (1968) (affirming denial of request for injunction requiring last-minute changes to ballots, given risk of disrupting election process). The Supreme Court recently reaffirmed that principle in *Republican Nat'l Comm. v. Democratic Nat'l Comm*., 206 L.Ed.2d 452, 454 (2020) (staying portions of an injunction modifying process for mailing ballots on eve of primary election). The Sixth Circuit has also recognized that the federal courts should not quickly "become entangled, as overseers and micromanagers, in the minutiae of state election processes." *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016).

In *Crookston v. Johnson,* 841 F.3d 396, 398 (6th Cir. 2016), the Sixth Circuit stayed an injunction affecting election procedures, and the reasoning could just as readily apply in this case:

> There are many reasons to grant the stay. The first and most essential is that Crookston offers no reasonable explanation for waiting so long to file this action. When an election is "imminen[t] and when there is "inadequate time to resolve [] factual legal disputes" and legal

> disputes, courts will generally decline to grant an injunction to alter a State's established election procedures. See *Purcell v. Gonzalez*, 549 U.S. 1, 5-6, 127 S. Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam). That is especially true when a plaintiff has unreasonably delayed bringing his claim, as Crookston most assuredly has. See *Operating Engineers Local 324 Health Care Plan v. G & W Contr. Co.,* 783 F.3d 1045, 1053 (6th Cir. 2015); *Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000); *Kay v. Austin,* 621 F.2d 809, 813 (6th Cir. 1980). Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.

Faced with similar delays by parties, the Sixth Circuit has reasoned that as time passes, the interests in proceeding with an election increase in importance. *See Kay v. Austin*, 621 F.2d 809, 813 (1980); *see also Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000); *Libertarian Party of Michigan v. Johnson*, 905 F. Supp. 2d 751, 754 n.2 (E.D. Mich. 2012). See also *Shelby Cty. Advocates for Valid Elections v. Hargett,* 348 F. Supp. 3d 764, 773 (W.D. Tenn. 2018).

Second, the State Defendants have been severely prejudiced by the Plaintiffs' delay as the filing deadline elapses today, May 27, 2020. The ability of the State Defendants to meaningfully respond to the complaint—or even to effectively comply with any potential injunction—has been effectively destroyed by the last-minute filing of this action. Indeed, this motion is scheduled for hearing the week of June 1, 2020—after the deadline the Plaintiffs seek to challenge. Even if the Court were to issue an injunction from the bench during that hearing, it would leave no time to implement any relief for other ballot proposal

petitioners, who must either file their petitions on May 27, 2020 or gamble on the prospect of relief in this case. Had Plaintiffs acted with greater diligence in filing this action, any relief could have been publicized and implemented *before* the deadline, but that is no longer possible.

Plaintiffs have unreasonably delayed in raising these claims before this Court, and the consequences of their delay have prejudiced the State Defendants. This Court should refuse to issue an injunction based on the doctrine of laches.

B. Plaintiffs are unlikely to succeed on the merits of their First and Fourteenth amendment claims.

Plaintiffs argue that the enforcement of the statutory deadline and the constitutional signature requirement "during this national time of crisis and in light of Governor Whitmer's Stay-home Order is unconstitutional." (Doc. 2, TRO Brf, Page ID # 59). This is because "Defendants have stripped proponents of ballot initiatives of the ability to meet these requirements because the Stay-home Order prohibits Michigan electors from leaving their homes for non-essential purposes like signature gathering." (*Id*. at Page ID # 59-60). They further note that the Stay-home Order "further requires the Plaintiffs and all Michigan's citizens to maintain a distance of six feet from all other individuals, which effectively eliminates any possibility of electors to provide their signatures without themselves having violated the Order." (*Id*.) And that taken together, the statutes and "the Stay-home Order impose burdens so severe that they 'function as an absolute bar'

to SawariMedia getting their initiative on the November 2020 ballot." (*Id*., quoting *Graveline, et al v. Benson, et al*., 336 F. Supp. 3d 801, 809 (E.D. Mich. 2018)).

Plaintiffs have no fundamental right to initiate legislation, *see, e.g*., *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("[W]e must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution."); see also *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[T]he right to an initiative is not guaranteed by the federal Constitution"). Each State, acting in their sovereign capacity, has the power to decide whether and how to permit legislation by popular action. *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182, 191 (1999).

However, once having adopted an initiative process, a state may violate the federal Constitution if it "unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United*, 994 F.2d at 295 (citing *Meyer v. Grant*, 486 U.S. 414 (1988)). Accordingly, "although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." *Id*.

Nonetheless, the Supreme Court has emphasized that, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley*, 525 U.S. at 191.

To analyze state initiative process requirements, the Sixth Circuit has applied the *Anderson-Burdick* analysis from *Anderson v. Celebrezze,* 460 U.S. 780, 786-87 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). *Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.,* 885 F.3d 443, 448 (6th Cir. 2018); *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019). Under the *Anderson-Burdick* framework, if a state imposes "severe restrictions" on a plaintiff's constitutional right, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "'the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett (Hargett I)*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). Regulations falling somewhere in between—"i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the

state's asserted interest and chosen means of pursuing it.' " *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

1. The burden on Plaintiffs is not severe.

Plaintiffs argue that the signature requirement and statutory deadline combined with the Governor's Stay-home Order imposes a severe burden on their ability to have their initiative proposal reach the ballot by limiting their ability to collect the required number of signatures—at least 340,047—by the required deadline, May 27. While there is an undeniable burden imposed by these regulations on Plaintiffs, it is not severe under the circumstances.

Plaintiffs decided late to start circulating their petition. Indeed, they could have begun circulating a petition after filing it with the Secretary of State any time after the November 2018 general election. The only restriction is that signatures older than 180 days cannot be counted. Mich. Comp. Laws § 168.472a. For example, the Michigan Values Life ballot proposal committee obtained approval as to form of its initiative petition from the Board of State Canvassers on June 19, 2019, and the committee filed its initiative petition with the Secretary of State on December 23, 2019.[16] Here, it appears that Plaintiffs waited to file their petition

[16] *See* May 15, 2020, Announcement, Michigan Values Life Initiative, https://www.michigan.gov/documents/sos/Announcement_-_MVL_Challenge_Deadline_690763_7.pdf, and approved petition at https://www.michigan.gov/documents/sos/MVL_Petition_061719_version_658581_7.pdf. The committee reported that it filed approximately 380,000 signatures

with the Secretary of State until January 16, 2020, (Doc 1, Cmplt, ¶22, Page ID # 5), and presumably only started gathering signatures on or after that date. As a result, Plaintiffs lost a significant portion of their 180-day signature gathering period before gathering their first signature. Indeed, they could have begun collecting signatures on November 29, 2019—180 days before May 27, 2020. As a result, their assertions that they have been diligent in the exercise of their rights under the initiative process and in collecting signatures or that the Stay-Home Orders are the sole restraint on their efforts, are neither substantiated nor persuasive. See, e.g., *Storer v. Brown*, 415 U.S. 724, 742 (1974) (in assessing ballot access claims by independent candidates, the question is "could a reasonably diligent independent candidate be expected to satisfy the signature requirements").

In fact, by their own admission, Plaintiffs "postponed many of their efforts to collect signatures" after President Trump issued his "slow the spread" initiative on March 15—over a week before the Governor issued the Stay-Home Order. (Doc. 1, ¶28, Page ID # 6). Moreover, Governor Whitmer's declaration of emergency on March 10, 2020 by no means required or even suggested that Plaintiffs must suspend their signature collection efforts immediately and indefinitely. The first Stay-Home Order was not issued until March 23, meaning

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with the Secretary of State. *See* https://www.wxyz.com/news/michigan-group-submits-petition-to-ban-abortion-method.

Plaintiffs had 13 additional days from the declaration of emergency to collect signatures before social interaction was curtailed. Between these 13 days and the nearly 7 weeks they gave up by not filing and circulating their petition until January 16, Plaintiffs effectively abandoned the equivalent of the time between March 23 and May 27.[17]

In addition, even after issuance of the Stay-Home Order, that order and the subsequent orders were interpreted as permitting persons to engage in outdoor expressive activities protected by the First Amendment so long as social distancing measures are observed. Plaintiffs also had the ability to continue collecting signatures by switching to the use of regular mail. Voter address lists may be obtained from local clerks or the Michigan Bureau of Elections, and voters can be mailed a copy of a petition, asked to sign the petition as a signer and a circulator, and to send the completed petition back to the committee, typically in a self-addressed, stamped envelope.[18] This process does involve a cost, but Plaintiffs are not entitled to free access to the ballot. *See, e.g.*, *Libertarian Party of Ky v. Grimes*, 835 F.3d 570, 577 (6th Cir. 2016) ("the incidental costs of gathering signatures on petitions do not come close to exclusion from the ballot, and thus do

[17] There are 65 days between March 23 and May 27. But there are 48 days between November 29 and January 16, and adding the 13 days in March leads to a total of 61 days.

[18] Plaintiffs' website indicates that they also sought signatures by mail. *See* https://www.mprca.info/.

not impose a severe burden on ballot access"). *See also Green Party of Arkansas v. Martin*, 649 F.3d 675, 683 (8th Cir. 2011) ("Although the Green Party may incur some costs because of its choice to hire individuals to collect signatures, the ballot access scheme does not impose severe burdens on the Green Party and Arkansas need not collapse every barrier to ballot access.")

Under these circumstances, the burden on continuing to require Plaintiffs to meet the constitutional and statutory requirements is not severe. Rather, it is somewhere between the minimal and severe burdens discussed in *Anderson* and *Burdick*, thus necessitating a flexible analysis. *Ohio Democratic Party*, 834 F.3d at 627.

In fact, the Sixth Circuit just recently held that similar initiative petition regulations did *not* impose a severe burden in light of the pandemic, and were therefore subject to intermediate scrutiny under the *Anderson-Burdick* standard. *Thompson v. DeWine,* No. 20-3526, 6th Cir. May 26, 2020, *8-9 (unpublished, copy attached as Exhibit B).

2. The State's interest in the signature and deadline requirements is substantial.

The "right to vote in any manner . . . [is not] absolute," *Burdick*, 504 U.S. at 433 (citation omitted); the Constitution recognizes the states' clear prerogative to prescribe time, place, and manner restrictions for holding elections. U.S. Const. art. I, § 4, cl. 1. Indeed, there "must be a substantial regulation of elections if they

are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Federal law thus generally defers to the states' authority to regulate the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (Stevens, J., op.) (recognizing that neutral, nondiscriminatory regulation will not be lightly struck down). Michigan's Constitution expressly provides that the Legislature "shall enact laws . . . to preserve the purity of elections," and to "guard against abuses of the elective franchise[.]" Mich. Const. 1963 art. 2, § 4(2). Also, the Sixth Circuit in *Thompson* held that the state interests supporting Ohio's statute and constitution were not merely legitimate, but compelling. *Thompson v. DeWine, supra* at *9. The same interests—prevention of fraud and allowing sufficient time to verify signatures while also providing time for challenges—are present here. *Id.* The Court further held that "[b]ecause the State's compelling and well-established interests in administering its ballot initiative regulations outweigh the intermediate burden those regulations place on the plaintiffs, Defendants are likely to prevail on the merits." *Id.*

With respect to signature requirements, the U.S. Supreme Court has recognized that states, like Michigan, have an important interest in requiring some preliminary showing of a significant modicum of support before granting access to

their ballots. *See e.g. Jenness v. Forton*, 403 U.S. 431, 441 (1971); *American Party of Texas v. White*, 415 U.S. 767, 783 (1974); *Munro v. Socialist Workers Party,* 479 U.S. 189, 194 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). The Michigan Supreme Court has observed that "[t]here may be an 'overarching right' to the initiative petition, 'but only in accordance with the standards of the constitution; otherwise, there is an "overarching right" to have public policy determined by a majority of the people's democratically elected representatives.' " *Citizens Protecting Michigan's Constitution v. Sec'y of State*, 921 N.W.2d 247, 252 (2018) (footnote and citations omitted). While that case involved initiative petitions to amend the Michigan Constitution, the principles apply equally to legislative initiatives. And as the Michigan Supreme Court observed in that case, the enactment of "a signature requirement" in the Michigan Constitution for initiatives can be "viewed" as a "clear[ ] and [ ] stringent limitation" on the right of initiative. *Id*. at 260 (footnotes and citations omitted). Michigan's interest in ensuring a modicum of support for legislative initiatives is thus substantial when individuals or groups seek to act as legislators by invoking the initiative process. And article 2, § 9's signature requirement advances that important interest in Michigan by requiring Plaintiffs to demonstrate that their proposed initiative has a significant modicum of public support in the State.

Turning to the filing deadline, as noted above, states have the power to prescribe time, place, and manner restrictions for holding elections. *Burdick*, 504 U.S. at 433. Here, the filing deadline is not arbitrary or designed to short-change petition proponents like Plaintiffs; it is part of a carefully constructed set of election deadlines extending backward from the date of the election.

The Secretary, through the Bureau of Elections, must canvass all ballot initiative petitions filed by Plaintiffs or *any other groups also seeking to reach the ballot*. There is at least one other legislative initiative petition that was circulated with an intent to gain ballot access for the November 2020 general election.[19] Accordingly, the Bureau of Elections will have hundreds of thousands of signatures to canvass between May 27 and July 24, 2020, the date by which the Board of State Canvassers must certify the sufficiency or insufficiency of legislative initiatives. Infringing on any of the statutory deadlines threatens the integrity of the entire process.

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[19] That initiative petition was circulated by Fair and Equal Michigan, a ballot proposal committee. On May 26, 2020, Fair and Equal Michigan filed a complaint for declaratory and injunctive relief in the Michigan Court of Claims. *Fair and Equal Michigan, et al. v. Secretary of State, et al*., Court of Claims Case No. 20-000095-MM. Like the Plaintiffs here, the Fair and Equal Michigan Plaintiffs also claim they had trouble obtaining the required 340,047 signatures. They claim violations of their right to initiative under article 2, § 9 of Michigan's Constitution, as well as violations of their right to speech and association under article 1, §§ 3 and 5 of the Michigan Constitution. They also request an extension of the May 27 filing deadline and a reduction in required signatures on an as-applied basis.

The May 27 deadline reflects a necessary cog in Michigan's election machinery that keeps the process running in an orderly manner. The Sixth Circuit has recognized that "easing administrative burdens" on elections officials is "undoubtedly '[an] important regulatory interest[ ].' " *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) (citation omitted). The filing deadline advances that important regulatory interest by ensuring that the Secretary of State and her staff have sufficient time to canvass petitions, provide a challenge period, and meet the ballot certification deadline, which triggers final preparations for ballot printing by the counties.

Any burden on Plaintiffs here is not the result of any statute or constitutional provision, but the state of emergency created by the Covid-19 pandemic and the necessary orders limiting social interaction. As the Governor explained in those orders, her actions are necessary to preserve and protect the lives of Michigan's citizens.[20] Providing Plaintiffs with the opportunity to have their proposal reach the ballot is important. But under the Governor's emergency orders, every citizen is potentially experiencing some *necessary* infringement of a constitutional right. *See Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 26-27 (1905) ("The possession and enjoyment of all rights are subject to such reasonable

[20] EO No. 2020-42, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/09/file_attachments/1423850/EO%202020-42.pdf.

conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.") With so much disruption already occurring at all levels of government, the Secretary and the Governor are trying to maintain processes where they can to limit further disruption and confusion. This includes limiting unnecessary disruptions to the electoral process.[21] On balance, and under these circumstances, requiring proponents like Plaintiffs to continue to meet their signature and filing deadlines is not an unconstitutional burden.

C. Plaintiffs have not shown they will suffer irreparable harm absent an injunction.

In considering issuing an injunction, courts must consider whether the plaintiff will suffer irreparable injury without the injunction. *Certified Restoration Dry Cleaning Network v. Tenke Corp.,* 511 F.3d 535, 550 (6th Cir. 2007). But unless the statute is unconstitutional, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature…would seriously and

[21] Plaintiffs note that the Governor issued Executive Orders extending the canvass of the March 10, 2020, presidential primary election, *see* https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522936--,00.html, and accommodating the conducting of the May 5, 2020, election to be principally by absent voter ballot, *see* https://www.michigan.gov/whitmer/ 0,9309,7-387-90499_90705-523400--,00.html. These orders were necessary to address the problems and dangers of in-person canvassing and in-person voting without unduly disrupting the electoral process. The relief Plaintiffs seek here, meanwhile, is not similarly necessary and unduly disruptive, for the reasons set forth in this brief.

irreparably harm [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Pointedly, the Sixth Circuit held in *Thompson*, supra, at *9-10, that complying with a law that the Court had just determined likely constitutional was not likely to harm the plaintiffs. The Court further held that giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest. *Id.* (citing *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006)).

In their declarations, Plaintiffs assert that the Stay-home Order has impeded or prohibited them from continuing to gather signatures in person. (Doc. 2, TRO Brf, Ex A, Sawari Dec, Page ID # 69). Plaintiffs argue that without relief, they will have lost a substantial amount of time and money attempting to collect signatures by mail "but the U.S. Postal Service is running several weeks behind in the processing of mail in Michigan." (*Id.*) They assert that they and their supporters "will be further injured and will suffer irreparable harm to our voting, speech, and associational rights because our initiative will not appear on the ballot and we will not be able to make our voices heard on an issue we wish to bring about change." (*Id.*, Page ID # 69).

It is worth noting again that Plaintiffs commenced their campaign late, and despite circulating their petitions for five months, are still more than 125,000 signatures short of the minimum threshold. A late start and questionable diligence

certainly place much of the alleged injury on Plaintiffs' shoulders. Regardless, losing time and money is something that every petition proponent faces, whether it is because they fail to make the ballot or ultimately lose an election.

As far as spending money on a mail campaign, Defendants are aware that a number of candidates successfully gathered signatures by mail under the same circumstances Plaintiffs claim to be insurmountable. Moreover, it is not clear from the declarations how diligent Plaintiffs have been in their mail campaign, stating merely that they mail petitions to those who request it. But, again, Plaintiffs may obtain voter lists and mail petitions to as many voters as they choose. That they have not done so may be a strategic or economic decision, but it is not a restraint imposed by Michigan's Constitution, statutes, or Governor. Further, Plaintiffs neglect to report how many signatures they have received through even their limited mail efforts, providing an incomplete and inadequate record on which to base a claim for irreparable harm. Plaintiffs have not carried their burden.

Lastly, much of what Plaintiffs complain of are not consequences of the Governor's orders so much as they are natural results of a global pandemic. Plaintiffs describe their signature-gathering plan as involving a number of "pop-up" and "pick-up and drop-off" locations throughout the state for electors to sign the petition or take copies to circulate on their own. (Doc. 1, Page ID # 6). However, even without the Stay-home Order, prudence and the advice of medical

experts would nonetheless have counseled the majority of electors to avoid the public places targeted by Plaintiffs and to refrain from unnecessary gatherings. The difficulty encountered in gathering petitions during a pandemic—similar, it must be imagined, to gathering signatures during any other disaster—should not be held against or framed as a constitutional violation by government officials merely trying to protect the lives of the people they serve.

D. The balance of harms weighs in Defendants' favor, and an injunction is contrary to the public interest.

The remaining factors, "harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009). While there will be no irreparable harm to the Plaintiffs without an injunction, the issuance of an injunction will irreparably harm the State and its citizens. The Supreme Court has recognized that "anytime 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) (C.J. Roberts in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). The election laws challenged here were duly enacted by the people in the Constitution or by the Michigan Legislature, and as discussed above, they serve an important governmental interest. The people of Michigan have a strong interest in having the State's election laws effectuated. *See Maryland*, 567 U.S. at *3. As the Sixth Circuit recognized this week in the

Thompson decision, "serious and irreparable harm will thus result if [the state] cannot conduct its election in accordance with its lawfully enacted ballot-access regulations." *Thompson*, *supra* at *9-10.

In addition to the State's concern regarding disruption to the electoral process discussed above, the State has an interest in upholding and adhering to its Constitution. The people of the State of Michigan adopted article 2, § 9, which expressly provides that in order to have invoke the constitutionally-created powers of initiative or referendum, "petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required." The eight percent requirement was imposed by the people to implement the Constitution—it is included in the Constitution itself. This constitutional provision makes clear that it was the will of the people that initiative petitions demonstrate significant support among the electorate before being voted upon.

Conversely, the harms claimed by the Plaintiffs may just as readily be ascribed to their own delays, lack of diligence, and the difficulties inherent to a global pandemic. But, Plaintiffs' failure to reach the required number of signatures could just as well be the result of a lack of popular support than any impediment

arising from social distancing. In that case, granting Plaintiffs the relief they seek acts as a windfall and not equity.

This Court should deny Plaintiffs' request for temporary injunctive relief.

E. Request if the Court is inclined to grant injunctive relief.

If this Court is inclined to grant relief that would include extending or modifying the filing deadline, Governor Whitmer, Secretary Benson and Director Brater respectfully request an opportunity to comment on what a workable deadline would be under the circumstances. But Defendants would urge this Court to refrain from altering the signature requirements.

These are, of course, difficult times. Few among us can claim not to have been affected by the virus or the consequences of social distancing. Indeed, it is difficult to think of any social, political, or legal process that has *not* been disrupted by the pandemic to some degree. It may be tempting to think that this case presents an opportunity to fix just one problem brought about by the crisis. But there are risks to rewriting statutes and constitutions on the fly while the election is already underway—especially when there are precious few legal principles to guide the outcome. As the Sixth Circuit observed this week:

> There is no doubt that the COVID-19 pandemic and Ohio's responsive restrictions to halt the spread of that disease have made it difficult for all Ohioans to carry on with their lives. But for the most part we are letting our elected officials, with input from public health experts, decide when and how to apply those restrictions. The election context is no different.

Thompson, at *11.

The Plaintiffs point to the *Esshaki* case and suggest that they should have the same relief, without recognizing or mentioning that the *Esshaki* decisions did not involve state constitutional requirements. But even there, the Sixth Circuit was clear that it is not for federal courts to rewrite a state's election laws. *Esshaki, et al. v. Whitmer, et al.*, 2020 U.S. App. LEXIS 14376, *4. The District Court in *Esshaki, et al. v. Whitmer, et al*., 2020 U.S. Dist. LEXIS 68254, *36, acknowledged that "any line-drawing inevitably involves some degree of arbitrariness," before settling on a 50% reduction in signatures considering that a "reasonably diligent" candidate should have reached the half-way point one month before the filing deadline.

But in contrast to the deadline in *Esshaki,* the deadline here was more than month away when the Stay-Home Order was issued, and so the same rationale in arriving at a percentage is not easily applied in this case. And because the Plaintiffs have provided no information about the efficacy of their efforts following the Stay-Home Order, there is no data from which to craft a formula to determine how much more time they would need to reach any particular reduced threshold.

This Court has previously referred to the case of *Thompson v. Dewine*, 2020 U.S. Dist. LEXIS 87773 as being potentially persuasive on the outcome of this case. The Ohio District Court, of course, recognized that the state defendants were

incapable of amending their constitution on their own, and so it issued an injunction requiring the acceptance of electronically gathered signatures and enjoining the constitutional deadlines. *Id.* at *59-62. The Court did not directly change the number of signatures required but instead appeared to direct the defendants to make "adjustments to the enjoined requirements." *Id.* That approach does not neatly fit here, and changing the number of signatures would require this Court to order a new number to replace the one provided in the state Constitution. Again, there is little or no guidance available to aid the Court in drawing such a line beyond what the people of Michigan have already done in adopting their Constitution.

And in reversing the injunction issued by the district court in *Thompson*, the Sixth Circuit rebuked the district court for relying on *Esshaki* but failing to apply the Court's primary holding: "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Thompson*, *supra*, at *10. The Sixth Circuit emphasized that district courts should refrain from (1) reducing the number of signatures, (2) extending filing deadlines, and (3) ordering a state to permit electronic gathering of signatures. *Id.* While a district court may enter positive injunctions to require parties to comply with existing law, they cannot "usurp a State's legislative authority by re-writing its statutes" to create new law. *Id.* The Sixth Circuit specifically noted that the same proscription also

applied to rewriting a state's constitution. *Id.* The Court also recognized that, as elections draw closer, changing one deadline or procedure would likely have other, inevitable consequences. *Id.* at *11. So, should this Court find that Michigan's election statute and its Constitution are unconstitutional as applied under the circumstances, the decision on how they should be modified must rest with the State Defendants. *Id.*

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendants Secretary of State Jocelyn Benson, Governor Gretchen Whitmer and Director of Bureau of Elections Jonathan Brater respectfully request that this Honorable Court deny Plaintiffs' request for a temporary restraining order.

Respectfully submitted,

s/Erik A. Grill
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Dated: May 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record, as well as via electronic mail to the following parties appearing *in pro per*:

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Judy Kellogg, *In Pro Per*, judykellogg95@gmail.com
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAWARIMEDIA LLC, DEBORAHL PARKER, JUDY KELLOGG and PAUL ELY,
Plaintiffs,
v
GRETCHEN WHITMER, Governor of Michigan, JOCELYN BENSON, Secretary of State of Michigan and JONATHAN BRATER, Director of the Michigan Bureau of Elections, in their official capacities,

Defendants.

No. 20-11246

HON. MATTHEW F. LEITMAN

MAGISTRATE MICHAEL J. HLUCHANIUK

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR TRO/PRELMINARY INJUNCTION

Exhibit List

A. Declaration of Jonathan Brater
B. *Thompson v. DeWine*

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

SAWARIMEDIA, LLC, DEBORAH PARKER, JUDY KELLOGG, AND PAUL ELY,

Plaintiffs,

Case No 4:20-cv-11246-MFL-MJH

v

GRETCHEN WHITMER, Governor of Michigan JOCELYN BENSON, Secretary of State, JONATHAN BRATER, Director of Elections, and BOARD OF STATE CANVASSERS, in their official capacities,

Defendants.

DECLARATION OF JONATHAN BRATER

I, Jonathan Brater, state as follows:

1. I have been employed by the Secretary of State as Director of Elections since January 2, 2020 and in such capacity serve as Director of the Bureau of Elections (Bureau). See M.C.L. § 168.32.

2. I bring this declaration in support of Defendants' Response to Plaintiffs' Motion for a Temporary Restraining Order or for a Preliminary Injunction. If called as a witness, I could testify truthfully and accurately as to the information contained within this declaration.

3. I am personally knowledgeable about provisions of the Michigan Election Law and Michigan Constitution that govern the canvass of statewide petitions for the initiation of legislation. Additionally, I have personal knowledge of the federal and state laws governing ballot printing and distribution deadlines, particularly those that are relevant to military and overseas civilian absent voter ballots.

4. An initiative petition must "be filed with the Secretary of State at least 160 days before the election at which the proposed law is to be voted on." M.C.L. §168.471. This deadline is May 27, 2020 for this election cycle.

5. In order to be counted, a signature on an initiative petition must be made no more than 180 days before the petition is filed with the office of the Secretary of state. The 180 days runs back not from the May 27, 2020 deadline for filing the petition, but rather from the date that the petition was actually filed. M.C.L. §168.472a.

6. The Board of State Canvassers must complete the canvass of an initiative petition on or before the 100th day prior to the November general election, as (a) the Board of State Canvassers must approve ballot wording and assign a numerical ballot designation (i.e., "Proposal 20-1") at least 60 days prior to Election Day, or by September 4, 2020 (see M.C.L. §§ 168.480 and 168. 474a); and (b) the Legislature is afforded a period of 40 session days in which to enact the

proposal, reject the proposal, or reject the proposal and submit an alternative proposal on the same subject to the electorate (see Mich. Const. 1963, Art. 2, § 9). In order to comply with these deadlines, the canvass of Plaintiffs' initiative petition must be completed on or before July 24, 2020.

7. Statewide ballot proposal petitions filed with the Secretary of State are canvassed through random sampling, the process by which the Board of State Canvassers determines whether a sufficient number of valid signatures have been submitted in order to qualify for placement on the ballot.

8. Under the random sampling process:

a. Every petition sheet is reviewed. Any petition sheet that is determined to be wholly invalid is set aside and excluded from the pool from which the samples are pulled.

b. The remaining petition sheets are numbered and every signature appearing on numbered sheets is counted and added. This step yields the precise number of signatures that are within the pool of potentially valid signatures.

c. Once the total number of signatures is ascertained, random signatures are selected from the numbered sheets by a computer program for comprehensive scrutiny. The size of the sample can range from approximately 500 to 4,000 signatures

depending on the number of excess signatures filed. Copies of the petition sheets containing signatures within the random sample are made available to the petition sponsor and potential challengers.

d. Every petition entry within the random sample is reviewed for facial validity, a process by which Bureau of Elections staff examines each entry for fatal errors or defects, such as an incomplete address, a signature dated after the circulator's signature is affixed, and so on. Signatures that pass the facial validity examination are checked against the Qualified Voter File (QVF) to verify the signer's registration status.

e. Challenges may be filed concerning the registration status of a signer or the authenticity of a signer's signature. M.C.L. §168.476(1). Under Board policy, a challenge must be filed within 10 business days of the date that copies of the petition sheets selected for the random sample are made available to potential challengers. The challenges are processed by comparing the challenges to the determinations rendered by staff under the facial validity and registration status examinations utilizing the QVF.

f. The computer program estimates the number of valid signatures contained in the filing based on the error rate found in the random sample, and a "Staff Report" is prepared. The Staff Report is presented to the Board of State Canvassers for consideration in determining whether the petition contains a sufficient number of valid signatures to qualify for placement on the ballot, and includes the staff's recommendation regarding the disposition of any challenges filed against the petition. The Staff Report must be published "[a]t least 2 business days before the board of state canvassers meets to make a final determination on challenges to and sufficiency of a petition[.]" M.C.L. § 168.476(3).

9. It takes approximately 60 days to complete the random sampling and challenge process described above.

10. Once the Board of State Canvassers determines that an initiative petition contains a sufficient number of valid signatures, the proposed initiated law is transmitted to the Legislature.

11. If the Legislature does not enact the proposal within 40 session days, the Board of State Canvassers must prepare the proposal for the ballot by assigning a numerical ballot designation and approving ballot wording no later than the 60th

day prior to the election, which falls on September 4, 2020. M.C.L. §§ 168.474a, 168.480.

12. Additionally, the Secretary of State must certify the November 3, 2020 general election ballot—including any statewide ballot proposals—to Michigan's 83 County Clerks by the 60th day prior to the election, or September 4, 2020. M.C.L. § 168.648.

13. In turn, the 83 Boards of County Election Commissioners are responsible for preparing and printing ballots for the November general election. M.C.L. § 168.689.

14. The minimum number of ballots required to be printed for the general election by each County Election Commission equals the total number of registered voters at the close of registration. Mich. Admin. Code R. 168.774(6)(a). As of May 22, 2020, there are 7,704,305 registered voters in the State of Michigan. Accordingly, at least 7,704,305 ballots must be printed, but more will be required as the registration deadline has not yet passed and there may also be in-person registration through the day of the election. Mich. Comp. Laws 168.497.

15. Prior to printing, the Boards of County Election Commissioners are required to submit proof copies of each style of ballot used in their respective counties to the Secretary of State and to each candidate whose name appears on the ballot. M.C.L. § 168.711. The candidates are allotted two business days in which

to review the ballot proofs and notify the Board of County Election Commissioners of any corrections. *Id*. In addition, the Secretary of State reviews the ballot proofs for errors and if necessary, may require the Board of County Election Commissioners to make corrections. *Id*. Corrected ballot proofs must be submitted to the Secretary of State. *Id*.

16. Every county produces multiple ballot styles—often numbering in the dozens or even hundreds per county—for the general election, based on the geographic boundaries of the various elective offices that will appear on the ballot. For example, a precinct may be split into two different school districts or county commissioner districts, necessitating the printing of two different styles of ballot for that single precinct.[1]

17. After the Secretary of State's review is complete and after the expiration of the two business day period for candidates to review proof copies of the ballots and any necessary corrections are made, the Board of County Election Commissioners may proceed with ballot printing. *Id*.

18. Absent voter ballots must be delivered by the Board of County Election Commissioners to the County Clerk by the 47th day prior to Election Day, or by September 19, 2020. M.C.L. § 168.713.

[1] There are approximately 4,752 precincts in Michigan.

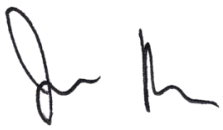
19. County clerks must deliver absent voter ballots to city and township clerks no later than the 45th day before the November General Election, or by September 21, 2020. M.C.L. § 168.714. Additionally, absent voter ballots must be available for distribution to all voters, and in particular military and overseas voters, no later than the 45th day before the November General Election, or by September 21, 2020. Mich. Const. 1963. Art. 2, § 4 (1)(b), M.C.L. § 168.759a. The deadline for distribution of absent voter ballots is governed by both the Federal Military and Overseas Voters Empowerment Act (MOVE Act), 52 U.S.C. § 20302(a)(8), and Michigan Election Law, M.C.L. §§ 168.714 and 759a.

20. Based on the above legal requirements and processes, the following table shows the timeline of pertinent dates leading up to the election:

Date and Time	Action	Statute
By 5:00 pm on May 27, 2020	Petitions for legislative initiative filed with Secretary of State (340,047 valid signatures required)	Mich. Comp. Laws § 168.471 Art 2, § 9
May 27, 2020 to July 23, 2020	Canvass of initiative petitions begins, including random sampling process; signature challenges permitted during this time period. (Canvassing may take up to 60 days)	Mich. Comp. Laws § 168.476
July 24, 2020	Board of State Canvassers to declare sufficiency or insufficiency of initiative petitions	Mich. Comp. Laws § 168.477
September 4, 2020	Board of State Canvassers must assign numerical designation and approve ballot wording for all statewide proposals, and Secretary	Mich. Comp. Laws §§ 168.474a,

	of State must certify the ballot to county clerks	168.480, 168.648
September 5, 2020	County clerks begin ballot proofing and printing	Mich. Comp. Laws § 168.689
September 19, 2020	Deadline for county boards of election commissioners to deliver AV ballots to county clerks for November Election	Mich. Comp. Laws § 168.713
September 21, 2020	Deadline for county clerks to deliver AV ballots to local clerks; deadline for AV ballots to be available for delivery to military and overseas voters	Mich. Comp. Laws §§ 168.759a, 168.714 Art. 2, § 4 52 U.S.C. § 20302
November 3, 2020	General Election	

21. I declare under the penalty of perjury that the foregoing is true and correct, based on personal knowledge.



Jonathan Brater

EXHIBIT B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0162p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs-Appellees,

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio; AMY ACTON, in her official capacity as Director of Ohio Department of Health; FRANK LAROSE, in his official capacity as Ohio Secretary of State,

Defendants-Appellants,

OHIOANS FOR SECURE AND FAIR ELECTIONS; DARLENE L. ENGLISH; LAURA A. GOLD; ISABEL C. ROBERTSON; EBONY SPEAKES-HALL; PAUL MOKE; ANDRE WASHINGTON; SCOTT A. CAMPBELL; SUSAN ZEIGLER; HASAN KWAME JEFFRIES; OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL; JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,

Intervenors-Appellees.

No. 20-3526

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

Decided and Filed: May 26, 2020

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

COUNSEL

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

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

ORDER

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

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

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

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

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

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

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

A movant must establish four factors to obtain a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When evaluating these factors for an alleged constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) ("In First Amendment cases, however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action." (internal quotation marks and alteration omitted)). So we turn first to that.

I.

"[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution[.]" *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("[I]nitiatives and referenda . . . are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action."). As Defendants concede, our precedent dictates that we evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework.[2] *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

III.

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

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

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

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

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

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk