

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Chad Thompson, et al.,

Plaintiffs,

v.

Case No. 20-2129

**Richard "Mike" DeWine,
in his official capacity as Governor of
Ohio,**

**Amy Acton, in her official capacity
as Director of Ohio Department of
Health,**

and

**TEMPORARY RESTRAINING
ORDER/PRELIMINARY
INJUNCTION REQUESTED**

**Frank LaRose, in his official capacity
as Ohio Secretary of State,**

Defendants.

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING
ORDER AND/OR PRELIMINARY INJUNCTION**

Plaintiffs move for a Temporary Restraining Order and/or Preliminary Injunction against Defendants in the above-styled case either directing Defendants to immediately place Plaintiffs' marijuana decriminalization initiatives on local November 3, 2020 election ballots without the need for supporting signatures from Ohio voters, or alternatively:

(1) prohibiting enforcement of Ohio's in-person supporting signature requirements for initiatives for office for Ohio's November 3, 2020 general election;

(2) extending the deadline for submitting supporting signatures to city auditors, village clerks and local election boards of elections in order to qualify popular measures for local November 3, 2020 election ballots to September 1, 2020;

(3) directing Defendants to develop at their expense timely, efficient and realistic procedures and practices for gathering supporting signatures from voters electronically and submitting them to local officials electronically in order to qualify initiatives for local November 3, 2020 election ballots; and (iv) reducing the number of needed voters' signatures in support of proposed popular measures for local November 3, 2020 election ballots in Ohio to no more than ten percent of the number now prescribed by Ohio law; and

(4) declaring under 28 U.S.C. § 2201 that, in light of the current public health emergency caused by the COVID-19 pandemic and executive orders requiring that Ohio citizens stay at home and shelter in place, Ohio's supporting in-person, wet, witnessed signature requirements and submission deadlines for popular measures including initiatives and referenda proposed for local November 3, 2020 elections in Ohio violate the First and Fourteenth Amendments to the United States Constitution;

In support of this Motion, Plaintiffs respectfully submit their Verified Complaint and the accompanying Memorandum of Law. Plaintiffs certify that Defendants have been contemporaneously served by e-mail delivery with a copy of the Verified Complaint and a copy of this Motion through their attorney, Julie Pfeiffer, Associate Assistant Attorney General – Constitutional Offices, Office of Ohio Attorney General Dave Yost, 30 East Broad Street, Columbus, OH 43215, julie.pfeiffer@OhioAttorneyGeneral.gov. Plaintiffs and Defendants, through counsel, have agreed that in light of the COVID-19 pandemic and Ohio's stay-at-home

orders Defendants will accept service of process under Federal Rule of Civil Procedure 4 electronically through their attorneys.

Dated: April 27, 2020.

Respectfully submitted,

/s/ Mark R. Brown

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org
Pro hac vice pending

Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that this Motion, Memorandum of Law and a copy of the Verified Complaint were electronically served by e-mail delivery on Defendants through their attorney, Julie Pfeiffer, Associate Assistant Attorney General – Constitutional Offices, Office of Ohio Attorney General Dave Yost, 30 East Broad Street, Columbus, OH 43215, julie.pfeiffer@OhioAttorneyGeneral.gov, this 27th day of April 2020.

/s/ Mark R. Brown _____

Mark R. Brown

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING
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Plaintiffs Thompson, Schmitt and Keeley are residents of Ohio who regularly circulate initiative petitions for local election ballots. Compt. at ¶ 4; *see, e.g., Schmitt v. Husted*, 933 F.3d 628 (6th Cir. 2019) (describing Thompson's and Schmitt's circulation efforts for initiatives they presented in Windham and Garrettsville, Ohio), *cert. pending*, No. 19-974 (U.S., Feb. 4, 2020). Plaintiffs' initiatives address the continuing criminalization of marijuana possession. Compt. at ¶ 5. Plaintiffs have in past elections, including the November 2018 general election, succeeded in placing these initiatives on local ballots in cities and villages across Ohio. Compt. at ¶ 6.

Plaintiffs seek to place these same initiatives on local November 3, 2020 election ballots in cities and villages across Ohio. Compt. at ¶ 7. Plaintiffs, however, are prevented from collecting the needed supporting signatures required by Ohio law in order to place their initiatives on local November 3, 2020 election ballots by Defendants DeWine's and Acton's emergency orders effectively shutting down the State. Compt. at ¶ 8.

Defendants DeWine and Acton are jointly responsible for issuing Ohio's many emergency orders banning gatherings, shuttering businesses and other public places, requiring that people stay and shelter at home, and making it impossible for Plaintiffs to collect the signatures needed to place their initiatives on local November 3, 2020 election ballots in cities and villages across Ohio. Compt. at ¶¶ 9, 10. Defendant LaRose is vested by Ohio law with the enforcement of Ohio's election laws. This authority includes the power to direct local elections boards to comply with Ohio law, the Constitution of the United States, and his own directives and advisories. *See* O.R.C. § 3501.05(B), (C) & (M); *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992); *Hunter v. Hamilton County Board of Elections*, 850 F. Supp.2d 795, 806 (S.D. Ohio 2012). Defendants are sued in their official capacities for actions taken under color of law and in violation of the United States Constitution. *See Ex parte Young*, 209 U.S. 123 (1908).

Facts

This case is a product of the global pandemic that has strangled not only Ohio's economy and social relations, but also its political processes. On March 16, 2020, Defendants were forced to cancel Ohio's primary elections that were scheduled for the following morning. *See* Director's

Order: In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020.¹

That primary election was converted into an absentee vote (by mail) conducted over the course of several weeks and concluded on April 28, 2020. *See* Ohio Secretary of State Directive 2020-07.²

Weeks before Ohio's primary was canceled, world, national and local leaders began taking emergency steps to close public gatherings, shutter public accommodations, force people to physically distance themselves from one another, and require that they stay home. The World Health Organization (WHO) on January 30, 2020, for example, declared a Public Health Emergency of International Concern. Compl. at ¶ 36. On January 31, 2020, the President of the United States suspended entry into the United States of foreign nationals who had traveled to China. *See* Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus.³

On January 31, 2020, the Director of the National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention (CDC) announced that COVID-19 had spread to the United States. *See* Press Release: CDC Confirms Person-to-Person Spread of New Coronavirus in the United States.⁴

¹ https://coronavirus.ohio.gov/wps/wcm/connect/gov/7c8309f8-9f28-4793-9198-05968d01a640/Order+to+Close+Polling+locations+3-16-2020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-7c8309f8-9f28-4793-9198-05968d01a640-n5829UP.

² <https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-07pdf.pdf>.

³ <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>.

⁴ <https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html>.

Defendant DeWine on March 9, 2020 declared a state of emergency in Ohio. *See* Executive Order 2020-01D.⁵ One week before that, on March 3, 2020, Defendant DeWine announced that the Arnold Sports Festival, a large gathering of athletes and spectators in downtown Columbus, be closed to spectators. *See* Shawn Lanier, *Arnold Sports Festival cancels convention due to coronavirus, will allow athletes to compete*, NBCI.COM, March 3, 2020.⁶ On March 13, 2020, the Columbus Metropolitan Library, one of the largest public libraries in the State, closed its branches. *See* Press Release: Columbus Metropolitan Library to close in response to COVID-19 coronavirus, March 13, 2020.⁷

Parades and public events were canceled throughout Ohio at this same time, including the Mid-American Conference Men's and Women's Basketball tournament in Cleveland, Ohio, the Columbus International Auto Show in Columbus, Ohio, and St. Patrick's Day parades throughout the State. *See generally* Mark Ferenchik, *Coronavirus: What's closed, canceled in Columbus area*, COLUMBUS DISPATCH, March 12, 2020.⁸

On March 13, 2020, the President of the United States declared a national emergency retroactive to March 1, 2020. *See* Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.⁹ Beginning with the Ohio State University on or about March 9, 2020, *see* OHIO STATE SUSPENDS CLASSES UNTIL MARCH

⁵ <https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d>.

⁶ <https://www.nbc4i.com/news/local-news/dewine-ginther-set-press-conference-on-arnold-classic/>.

⁷ <https://www.columbuslibrary.org/press/columbus-metropolitan-library-close-response-covid-19-coronavirus>.

⁸ <https://www.dispatch.com/news/20200312/coronavirus-whats-closed-canceled-in-columbus-area>.

⁹ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

30 DUE TO CORONAVIRUS OUTBREAK, THE LANTERN, March 9, 2020,¹⁰ colleges and universities throughout Ohio began closing their physical facilities and remaining closed until unknown future dates.

On March 12, 2020, Defendants DeWine and Acton began ordering mandatory closings throughout Ohio, including all private and public schools (grades K through 12). *See News Release: Governor DeWine Announces School Closures.*¹¹ These orders also banned, with limited exceptions, all gatherings of 100 or more persons. *See Director's Order: In re: Order to Limit and/or Prohibit Mass Gatherings in Ohio.*¹² On March 17, 2020, Defendants DeWine and Acton extended their ban on mass gatherings to include gatherings of 50 or more persons, and also banned most recreational activities in Ohio. *See Director's Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings in Ohio.*¹³

On March 15, 2020, Defendants DeWine and Acton closed all restaurants, liquor stores and eating establishments and limited them to carry-out service only. *See Director's Order: In re: Order Limiting the Sale of Food and Beverages, Liquor, Beer and Wine, to Carry-out and*

¹⁰ <https://www.thelantern.com/2020/03/ohio-state-suspends-classes-until-march-30-due-to-coronavirus-outbreak/>.

¹¹ <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/announces-school-closures>.

¹² https://coronavirus.ohio.gov/wps/wcm/connect/gov/b815ab52-a571-4e65-9077-32468779671a/ODH+Order+to+Limit+and+Prohibit+Mass+Gatherings%2C+3.12.20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-b815ab52-a571-4e65-9077-32468779671a-n6IAHNT.

¹³ https://coronavirus.ohio.gov/wps/wcm/connect/gov/dd504af3-ae2c-4d2e-b2bd-02c1a3beed89/Director%27s+Order+Amended+Mass+Gathering+3.17.20+%281%29.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-dd504af3-ae2c-4d2e-b2bd-02c1a3beed89-n5829IL.

Delivery Only.¹⁴ On March 19, 2020, Defendants DeWine and Acton closed all barber shops, hair salons, day spas, tattoo parlors, and similar places of business. *See* Director's Order.¹⁵ On March 22, 2020, Defendants DeWine and Acton ordered that everyone in Ohio "stay at home or at their place of residence" unless subject to a specific exception for providing or receiving "essential" services, maintain at least a six foot social distance between themselves and others outside "a single household or living unit," and avoid altogether gatherings of ten or more people. *See* Director's Stay at Home Order: Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity.¹⁶

Defendants' emergency orders are presently in effect throughout Ohio, and there is no indication that they will be repealed or significantly altered in the immediate future. Even should Ohio begin re-opening its economy on May 1, 2020 as some news reports have indicated will occur in some States, it is doubtful that Ohio will rescind its prohibitions on gatherings and close personal contact between unrelated individuals.

Ohio Circulation and Signature Collection Requirements for Local Initiatives and Referenda

Ohio, like many States, recognizes the right of its citizens to use popular democratic measures to make law at both the local and state-wide levels. Relevant to local elections and this

¹⁴ https://coronavirus.ohio.gov/wps/wcm/connect/gov/aa5aa123-c6c9-4e95-8a0d-bc77409c7296/Health+Director+Order+Limit+Food%2C+Alcohol+Sales+to+Carry+Out+Delivery+Only.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-aa5aa123-c6c9-4e95-8a0d-bc77409c7296-n58291W.

¹⁵ https://coronavirus.ohio.gov/wps/wcm/connect/gov/273f5e4f-823b-4ed1-a119-7e7c6851f45a/Director%27s+Order+closing+hair+salons+nail+salons+barber+shops+3-19-2020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-273f5e4f-823b-4ed1-a119-7e7c6851f45a-n582aXd.

¹⁶ <https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf>.

case, § 731.28 of the Ohio Revised Code provides that "[o]rdinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation by the general assembly may be proposed by initiative petition." These local initiatives, meanwhile, must be supported by voters' signatures that are gathered and witnessed in-person by circulators who can attest to their validity.

The process of petitioning for local measures begins with the filing of the "proposed ordinance measure" as an initiative or referendum "before circulating such petition ... with the city auditor or the village clerk." O.R.C. § 731.32. Following this first filing of the proposed ordinance with the city auditor or the village clerk, circulators of initiative petitions may begin collecting supporting signatures by circulating among voters "a full and correct copy of the title and text of the proposed ordinance or other measure," O.R.C. § 731.31, and having voters sign their names in ink in support of the proposed ordinance measure's inclusion on the local ballot.

Under § 731.31, "[e]ach signer of any such petition must be an elector of the municipal corporation in which the election, upon the ordinance or measure proposed by such initiative petition, or the ordinance or measure referred to by such referendum petition, is to be held." *Id.* The signatures collected to support these initiatives "shall be governed in all other respects by the rules set forth in section 3501.38 of the Revised Code." O.R.C. § 731.31. Section 3501.38(B) of the Ohio Revised Code provides that "[s]ignatures shall be affixed in ink," and "[e]ach signer may also print the signer's name, so as to clearly identify the signer's signature." Further, it is the responsibility of "each signer" to "place on the petition after the signer's name the date of signing and the location of the signer's voting residence, including the street and number if in a municipal corporation or the rural route number, post office address, or township if outside a municipal

corporation." *Id.* Consequently, Ohio law presently requires the collection of so-called "wet" signatures.

Section 3501.38(E) of the Ohio Revised Code in addition states that the circulator of an initiative petition "shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code." In addition to wet signature collection, the signature and its collection must accordingly be in-person and actually witnessed by the circulator. *Id.*

Section 731.28 of the Ohio Revised Code provides that an "initiative petition must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation." The number of required signatures therefore varies with the municipality. In small villages the number of required signatures can reach into hundreds. In larger cities, the number can range into thousands. In either case, the collected signatures must all be personally collected and witnessed, a feat that cannot be accomplished under Defendants' emergency orders and the present reality that exists in Ohio.

Once a circulator has personally gathered and witnessed the wet signatures, they are submitted to "the city auditor or village clerk, ... [who then] shall, after ten days, transmit a certified copy of the text of the proposed ordinance or measure to the board of elections." O.R.C. § 731.28. Upon receipt, "[t]he board shall examine all signatures on the petition to determine the

number of electors of the municipal corporation who signed the petition." *Id.* "[W]ithin ten days," these petition and signatures are then returned to the "auditor or clerk ... with a statement attesting to the number of such electors who signed the petition." *Id.*

After the proposed measure and supporting signatures are reviewed and returned by the local board of elections to the city auditor or village clerk, the latter has a ministerial duty to certify to the board the sufficiency of the initiative by 4 pm on the day that occurs ninety days before the next election. *State ex rel. Harris v. Rubino*, 155 Ohio St.3d 123, 127, 119 N.E.3d 1238, 1243 (2018). For Ohio's November 3, 2020 election, this date falls on August 5, 2020.

In order to comply with this time line and have an initiative placed on a local November 3, 2020 election ballot, an initiative accordingly must be submitted with sufficient supporting signatures to the city auditor or village clerk no later than at least twenty days before August 5, 2020. *See generally Rubino*, 155 Ohio St.3d at 127, 119 N.E.3d at 1243 ("The statute thus sets out the following procedure: (1) petitioners submit the municipal initiative petition to the city auditor, (2) the auditor holds the petition for 10 days, (3) the auditor transmits the petition to the board of elections to determine the number of valid signatures, (4) the board certifies the number of valid signatures and returns the petition to the auditor [within ten days, *see* O.R.C. § 731.28], (5) the auditor certifies to the board the validity and sufficiency of the petition, and (6) the board submits the petition to the electors at the next election occurring 90 days after the auditor's certification."). For the November 3, 2020 general election ballot, this translates into approximately July 15, 2020.

Because of the presence of the COVID-19 pandemic in Ohio, Ohio's restrictions on businesses, its prohibitions on gatherings, its requirement of distancing, and its mandatory stay at

home order, it is literally impossible for people outside the same family unit to approach others in order to collect the signatures needed to support popular measures proposed for Ohio's November 2020 election ballot. And even if it were legal to move within six feet of another person, that person would likely not permit it. Further, petition circulators (including Plaintiffs) rely heavily on public events and gatherings, such as sporting events, festivals, parades, conferences, concerts, rallies, and primary elections (including the canceled March 17, 2020 primary election) to collect signatures. Many of these events have already been canceled in Ohio, and it seems a foregone conclusion that they and others will not be permitted in the near future.

Because circulators cannot begin collecting signatures supporting a popular measure until after that measure has been drafted and placed on file with the relevant city auditor or village clerk, *see* O.R.C. § 731.32, signature collection in support of popular measures is confined to the period between that first formal filing and approximately 110 days before the day of the election. For most initiatives, this means circulators have only four or five months to collect signatures. Plaintiffs, for example, filed with Jacksonville and Timble officials their initiatives on February 27, 2020, Compl. at ¶ 8, expecting to use the March 17, 2020 primary election traffic to collect signatures. They also assumed they would have all of March, April, May, and June to collect signatures. Those expectations were defeated by the pandemic, the cancellation of the primary election, and the closing of the State.

Plaintiffs also seek to file additional popular measures decriminalizing marijuana possession throughout Ohio. Plaintiffs, however, are precluded from collecting the needed signatures by the combination of the pandemic, Defendants' emergency orders, and Ohio's in-

person, witnessed, wet signature requirements. Something in this mix must give in order for democracy to proceed in Ohio, and it does not appear that something will be the pandemic.

Argument

“When a district court is asked to issue a preliminary injunction, it ... balances four factors ...: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.” *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995).¹⁷ Balancing these four factors, Plaintiffs are entitled to emergency relief.

I. Plaintiffs are Likely to Prevail on the Merits.

A. Making it Impossible to Collect Signatures In Order to Qualify Ballot Initiatives Violates the First and Fourteenth Amendments.

States are not required to recognize popular democracy. Once they do, however, it is clear that the processes they employ to place initiatives and referenda on ballots are fully governed by the First and Fourteenth Amendments. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) (“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”). Popular democracy is no different from representative democracy in this regard. After all, States need not directly elect the vast majority of their representative officials -- including governors, Department heads, and even presidential electors -

¹⁷ Although procedures differ, the substantive standard for issuing a temporary restraining order is essentially the same. *See Bryant v. Matviessen*, 904 F. Supp.2d 1034, 1042 (E.D. Cal. 2012).

- but once they choose to do so those election procedures are governed by the First and Fourteenth Amendments. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Ballot initiatives implicate “core political speech.” *Meyer v. Grant*, 486 U.S. 414, 22 (1988). “First Amendment protections” are accordingly “at [their] zenith” and “exacting scrutiny” is required. *Id.* at 425, 420. For citizens in nearly half the states in the Union, ballot initiatives are “basic instruments of democratic government.” *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003).

In *Meyer*, 486 U.S. 414, for example, the Supreme Court invalidated a Colorado law that banned paying circulators who were collecting signatures to support initiatives. In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), it invalidated Colorado laws requiring that initiative-petition circulators be registered voters, requiring that they wear identification badges, and that the proponents of the initiatives report the names and addresses of all their paid circulators. These cases leave no doubt that the processes used to certify initiatives and referenda are subject to full First and Fourteenth Amendment scrutiny. Further, they indicate that First and Fourteenth Amendment ballot access precedents for candidates are equally applicable in the context of placing initiatives on ballots. The Sixth Circuit, for its part, has recognized the holding in these cases and has thus applied First and Fourteenth Amendment restrictions to the processes that States like Ohio use to regulate initiatives. *See, e.g., Austin*, 994 F.2d at 296-97; *Schmitt*, 933 F.3d 628.

The extraordinary circumstances from which this case arises make it a relatively easy one to decide in terms of the need for relief. Under Ohio law as it now exists, Plaintiffs have no lawful procedure by which they may qualify their initiatives for Ohio's November 3, 2020 general

election ballot. Thus, Plaintiffs are entitled to some form of relief. Plaintiffs believe that this relief should include, given their past success in placing their decriminalization initiatives on local ballots, an order directing Defendant-LaRose to place their pending initiatives and those that they propose to file on local ballots without the need for additional supporting signatures.

This relief is justified because Ohio law, as modified by Defendants' orders and the current crisis, cannot withstand constitutional scrutiny under the analytic framework the Supreme Court set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Using that analysis, the Sixth Circuit ruled in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2006), that Ohio's signature collection mechanism for political parties placed a severe burden on their First Amendment rights that could not be justified by any compelling concern. The same result is necessarily true here where Ohio's signature collection requirement under current circumstances makes it impossible to qualify initiatives for the ballot.

When states fail to provide candidates and parties with a workable procedure by which they may qualify for the ballot, the Supreme Court and lower federal courts have not hesitated to remedy the defect by placing candidates and parties on the ballot by court order. The same must be true for popular measures, as indicated by the Supreme Court in cases like *Meyer* and *Buckley*.

In 1976, for instance, several States provided no procedure for independent candidates to qualify for the ballot. In each of those States, independent presidential candidate Eugene McCarthy sought relief in federal court, and without exception the courts, including the Supreme Court, ordered that he be placed on the ballot. *See McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J. in Chambers) (placing McCarthy on Texas ballot); *McCarthy v. Askew*, 540 F.2d 1254, 1255 (5th Cir. 1976) (*per curiam*) (affirming order placing McCarthy on Florida's ballot);

McCarthy v. Noel, 420 F. Supp. 799 (D. R.I. 1976) (placing McCarthy on Rhode Island ballot); *McCarthy v. Tribbitt*, 421 F. Supp. 1193 (D. Del. 1976) (placing McCarthy on Delaware ballot); *McCarthy v. Austin*, 423 F. Supp. 990 (W.D. Mich. 1976) (placing McCarthy on Michigan ballot). As Justice Powell observed in *McCarthy v. Briscoe*, 429 U.S. 1317, the Supreme Court had followed the same procedure in 1968 when it ordered that several candidates who successfully challenged the constitutionality of Ohio's ballot access laws be placed on its ballot. *See McCarthy v. Briscoe*, 429 U.S. 1317 (citing *Williams v. Rhodes*, 89 S. Ct. 1 (Stewart, J., in Chambers, 1968)).

To use examples from the Sixth Circuit, consider Michigan's 1980 election. Michigan had failed to remedy the defect identified by the Court in *Austin*, meaning it had no constitutionally acceptable procedure for placing independent presidential candidates on its ballot. *See Hall v. Austin*, 495 F. Supp. 782 (E.D. Mich. 1980). The Court accordingly ordered that the independent candidates be placed on Michigan's ballot without any need for signature collection. *See id.* at 791-92. The issue arose again in 1984, because the Michigan Legislature still had not enacted a procedure for independent candidates to qualify for the ballot. An independent candidate for the State Board of Education filed suit, the district court again declared Michigan's ballot access scheme unconstitutional, and the Secretary was ordered to place the candidate on the ballot. *See Goldman-Frankie v. Austin*, 727 F.2d 603, 607-08 (6th Cir. 1984).

This Court took that same approach in *Libertarian Party of Ohio v. Brunner*, 462 F. Supp. 2d 1006 (S.D. Ohio 2008), after finding Ohio's ballot requirement for political parties ruled unconstitutional in *Blackwell*, 462 F.3d 579, had not been corrected. Rather than fashion a new requirement with new dates and numbers of signatures, this Court ordered the Libertarian

Party onto the ballot: "where a state has unconstitutionally prevented a party or a candidate from accessing the ballot, "a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support." *Id.* at 1015 (quoting *McCarthy v. Briscoe*, 429 U.S. at 1323). "[T]he Court finds that the Libertarian Party has the requisite community support to be placed on the ballot in the state of Ohio." *Id.*

In a separate case, *Moore v. Brunner*, 2008 WL 3887639, *5 (S.D. Ohio 2008), this Court also ordered the Socialist Party onto Ohio's ballot: "*Goldman–Frankie* established that a showing of support need not be "compelling" but rather, "sufficient." The Court finds that the Socialist Party USA has the requisite community support to be placed on the ballot in the state of Ohio" *See also Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, *5 (S.D. Ohio 2014) ("*Brunner* remains good law ...and the evidence tends to show the LPO, OPG, and CPO have the requisite modicum of community support to warrant placement on the ballot as a matter of right under the First and Fourteenth Amendments").

Applying these principles here, although Ohio law prescribes procedures by which its citizens may place popular measures on local ballots, Ohio has in turn made it impossible for citizens to do so. This is no different than a State's granting to its citizens the right to run as a candidate for President but then making it impossible for them to do so. It is no different than creating a popular election mechanism for Presidential electors but then making it impossible for voters to cast their ballots. In all these situations, the First and Fourteenth Amendments are violated. In all these situations, a federal court is warranted in authorizing immediate relief. This

relief can take the form found in *McCarthy*, *Goldman-Frankie*, and *Brunner*, that is, directly placing the candidates or initiatives on the ballot, or it may take shape in a modified form.

Plaintiffs here have succeeded in the past in placing their marijuana decriminalization initiatives on local ballots. *See, e.g., Schmitt*, 933 F.3d 628 (describing Thompson's and Schmitt's circulation efforts for initiatives presented in Windham and Garrettsville, Ohio). They have therefore established a sufficient modicum of past support to justify an order directing that their pending initiatives be placed on local ballots without signatures for the November 3, 2020 election.

Should an alternative remedy be preferred, guidance can be found in Courts' and States' reactions to the current COVID-19 pandemic crisis. Several states, for instance, have either voluntarily or by judicial order drastically reduced the number of signatures required for a candidate to be placed on the ballot. *See, e.g., Eshaki v. Whitmer*, 2020 WL 1910154, at *12 (E.D. Mich., Apr. 20, 2020) (reducing the statutory signature requirement in Michigan by 50 percent); *Goldstein v. Sec'y of Commonwealth*, 2020 WL 1903931, at *9 (Mass., Apr. 17, 2020) (reducing the signature requirement in Massachusetts by 50 percent); N.Y. Exec. Order No. 202.2 (Mar. 14, 2020) (reducing the statutory signature requirement to 30 percent of previous number); H. 681, 2019–2020 Gen. Assemb., Adjourned Sess. (Vt. 2020) (suspending Vermont's statutory signature requirement entirely).

Along with reductions in the number of signatures, States have also switched to electronic signature collection mechanisms and extended deadlines. In Illinois, for example, it was ordered last week in *Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), that Illinois do all three: reduce its signature requirements for all candidates to 10 percent

of previous levels; extend the filing deadline from June 22, 2020 until August 7, 2020; and forego in-person, witnessed, wet and notarized signature collection processes in favor of the electronic dissemination and collection of supporting signatures. The Court also directly placed on Illinois's ballots the candidates of the Libertarian and Green Parties in contests where the two parties had previously established a modicum of support.

Chief Judge Pallmeyer in *Pritzker*, 2020 WL 1951687, at *4, explained:

Reducing the required number of signatures to 10 percent accommodates the fact that Plaintiffs have not been able to rely on their usual signature-gathering methods for the 2020 general election ballot because the window for collecting signatures in Illinois was slated to begin on March 24, 2020, after the stay-at-home order took effect.

Additionally, permitting candidates to submit physical or electronic copies of petitions accommodates the various practical barriers to collecting signatures at this time—due to the closure of most public places, Illinoisans may have limited access to the Internet or a printer, or may even be wary of opening mailed petitions.

(Citation omitted). She also described the electronic signature collection mechanisms developed in several states:

Other states have similarly permitted signature collection and petition submission in both electronic and physical formats. *See, e.g.*, Fla. Emergency R. 1SER20-2 (Apr. 2, 2020); N.J. Exec. Order Nos. 105, 120 (Mar. 19, 2020, Apr. 8, 2020); Utah Exec. Order No. 2020-8 (Mar. 26, 2020). The court recognizes that the state will be burdened by extending the signature-gathering deadline, but finds this hardship outweighed by the significant difficulties that would be experienced by campaigns trying to implement a new signature-gathering process while complying with even the modified statutory requirements in such a short amount of time. In particular, the court notes that even after some restrictions are lifted, until a vaccine is available, voters are likely to continue practicing social distancing and avoiding any physical hand contact with other persons or objects.

Id.

Chief Judge Pallmeyer's rationale applies equally here. Plaintiffs request that at bare minimum, should the Court choose not to directly order their initiatives on local ballots, Ohio's required number of signatures be reduced to 10% of the prior level. Ohio's in-person, witnessed,

and wet signature requirements, meanwhile, should be enjoined. Ohio, like Illinois, should be ordered to accept electronically collected signatures without wet signatures and that have not been personally witnessed by circulators. Ohio's deadline, like that in Illinois, should be extended for approximately six weeks in order to allow initiative sponsors the time needed to adjust their tried and true signature collection practices to the pandemic's conditions. The key, of course, is to insure that people remain safe while allowing Ohio's democratic processes to continue.

B. Imposing New Restrictions in the Middle of an Election Contradicts Basic Principles of Fair Notice in Violation of Due Process.

The First Amendment expresses a strong aversion to retroactive legislation:

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. ... Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; ...When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

Federal Communications Commission v. Fox Television Stations, 567 U.S. 239, 253-54 (2012) (emphasis added).

Applying this principle, this Court in *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569 (S.D. Ohio 201), ruled that Ohio's changes to its election laws in the midst of the 2013-14 election cycle violated the Due Process Clause. There, Ohio had in November 2013 passed a law that altered the process for minor parties to access the general election ballot in 2014. The Court concluded that this belated change in procedure interfered with "Plaintiffs' legitimate expectation that, having complied with the process that was (and remains) in place, they would have the opportunity to reap the political benefits of participating in the primary." *Id.* at *7. "The Ohio Legislature moved the proverbial goalpost in the midst of the game. Stripping

Plaintiffs of the opportunity to participate in the 2014 primary in these circumstances would be patently unfair." *Id.*

Likewise here. The pandemic and Ohio's emergency shutdown have "moved the proverbial goalpost in the midst of the game." It is patently unfair to now expect Plaintiffs to somehow attempt to comply with both Ohio's in-person signature requirement by mid-July and abide by Ohio's new distancing and shelter rules. Indeed, it is impossible.

II. Plaintiffs Are Experiencing Irreparable Harm.

Plaintiffs are threatened with continuing irreparable injury. Any impediment placed on First Amendment rights, even for brief periods, causes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Although Ohio is not required under the federal Constitution to utilize initiatives and referenda, once it does the First Amendment applies to those processes. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("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").

III. Defendants Will Suffer No Injury.

Defendants will suffer no identifiable injury should the Court either order Plaintiffs' initiatives onto local ballots or modify Ohio's in-person signature collection requirements for the November 3, 2020 election. And even if they did, as pointed out by the Court in *Pritzker*, 2020 WL 1951687, at *4, "this hardship [is] outweighed by the significant difficulties that would be

experienced by campaigns trying to implement a new signature-gathering process while complying with even the modified statutory requirements in such a short amount of time."

IV. The Public Will Benefit.

Preliminary relief will benefit the public because it will help people's confidence in Ohio's democratic systems. The last thing Ohioans need in these extraordinary times is the collapse of their established political system. Just as the casting of votes remains critical to Ohio's future, so does the ability to cast a vote for change. Forcing a forfeiture of that valuable right would only compound the crisis.

V. No Monetary Security is Required.

The Sixth Circuit has observed that security is not mandatory under Rule 65(c) and can be dispensed with in the discretion of the court. *See Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). Security is regularly dispensed with in election cases. *See, e.g., Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, *11 (S.D. Ohio 2014). No security is needed in this case as it threatens no financial harm to Defendants or Ohio.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move the Court to **GRANT** the preliminary relief requested.

Respectfully submitted,

/s/ Mark R. Brown

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org
Pro hac vice pending

Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that this Motion and a copy of the Verified Complaint were electronically served by e-mail delivery on Defendants through their attorney, Julie Pfeiffer, Associate Assistant Attorney General – Constitutional Offices, Office of Ohio Attorney General Dave Yost, 30 East Broad Street, Columbus, OH 43215, julie.pfeiffer@OhioAttorneyGeneral.gov, this 27th day of April 2020.

/s/ Mark R. Brown

Mark R. Brown