Case No. 20-3526

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Chad Thompson, et al.,	:	
	:	
Plaintiffs-Appellees	:	**On Appeal from the**
	:	**United States District Court for**
v.	:	**the Southern District of Ohio**
	:	
Governor of Ohio, Mike DeWine, et al.,	:	**Case No. 2:20-cv-2129**
	:	
Defendants-Appellants	:	
	:	
Ohioans for Secure and Fair Elections, et al.,	:	
	:	
Intervenors-Appellees	:	

MERIT BRIEF OF AMICI CURIAE, OHIO MANUFACTURERS' ASSOCIATION; OHIO CHAMBER OF COMMERCE; NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN OHIO; OHIO FARM BUREAU FEDERATION; OHIO COUNCIL OF RETAIL MERCHANTS; AND OHIO BUSINESS ROUNDTABLE IN SUPPORT OF APPELLANTS AND SEEKING REVERSAL OF DISTRICT COURT

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STATEMENT OF INTEREST OF AMICI CURIAE

A. Identity and Interest of Amici

The Ohio Manufacturers' Association ("OMA") is a statewide nonprofit trade association whose membership consists of over 1,400 manufacturing companies. The OMA aims to enhance the competitiveness of manufacturers and improve living standards of Ohioans by shaping a legislative and regulatory environment conducive to economic growth in Ohio.

The Ohio Chamber of Commerce ("Chamber") is Ohio's largest and most diverse business-advocacy organization. The Chamber represents members of virtually every industry throughout Ohio, including retail, transportation, manufacturing, healthcare, and others. The Chamber works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate.

The National Federation of Independent Business in Ohio ("NFIB") is an association with more than 22,000 members, making it the State's largest association dedicated exclusively to serving the interests of small and independent business owners. NFIB members typically employ 25 or fewer people and record annual revenue of $1 million or less.

The Ohio Farm Bureau Federation is Ohio's largest general farm organization, representing members in all of Ohio's 88 counties. The Farm Bureau's grassroots

structure places its members at the helm of developing policy to advance agriculture and strengthen communities at the local, state, and national level. The Farm Bureau's members run the gamut from large to small businesses, from crop production to energy development, from livestock production to food processing, and everything in between. The Farm Bureau advocates for these members to ensure a strong economy and better future for all of Ohio.

The Ohio Council of Retail Merchants ("Council"), founded in 1922, is a statewide trade association that includes over 7,000 member companies, ranging from large department stores, supermarkets, and drug store chains, to independently owned retail businesses. The Council promotes and supports legislation and initiatives that pave a positive path for Ohio's retail community.

The Ohio Business Roundtable ("OBRT") was founded for one sole purpose: to improve Ohio's business climate. Since its inception, the OBRT has worked with Ohio's governors and legislative leaders to make Ohio more business-friendly and more competitive both nationally and internationally. OBRT members — the Chief Executive Officers of many of Ohio's largest, most successful businesses — have helped bring about momentous change to Ohio's economic landscape. It is the belief of OBRT members that any changes to laws regulating the mechanics of the petition and initiative process belong to the Ohio General Assembly and the citizens of Ohio.

Amici believe it is imperative to protect the integrity of Ohio's elections, and one way of doing this is by enforcing state laws governing the process of getting measures onto the ballot. Amici have a strong interest in this matter because they are often engaged in the initiative process, especially when their members are impacted by out-of-state interests seeking to change Ohio law. They urge this Court to reverse the District Court's injunction thus ensuring the integrity of the ballot-initiative process and avoiding a unilateral court-legislated initiative process where there is no meaningful oversight or accountability.[1]

B. Statement Regarding Preparation of Brief

This brief was not authored in whole or in part by counsel for any party to this appeal, nor did any party or party's counsel contribute money that was intended to fund the preparation or submission of this brief. No person, other than amici curiae (including their members), contributed money that was intended to fund preparation or submission of this brief.

LAW AND ARGUMENT

A. Introduction

Appellees filed this action asserting that, due to the pandemic, they cannot collect the number of signatures required to support their initiatives getting on the

[1] Amici curiae filed a motion for leave to file this brief under Rule 29 of the Federal Rules of Appellate Procedure.

November 2020 ballot. They contend that Ohio's neutral laws, applied to all ballot initiatives, are unconstitutional as applied to them because those laws purportedly violate their First Amendment right to engage in political speech. Yet no speech has been prohibited or curtailed. And no violation of the First Amendment can exist absent state action prohibiting speech. Here, the alleged offensive state action is merely the routine enforcement of Ohio's election laws. In an effort to ease the effects of the current pandemic on the petition circulation process, the District Court disregarded Ohio's longstanding constitutional requirements for citizen-initiated lawmaking and instead judicially legislated a novel and untested method of electronic signature collection without any real oversight or accountability. This is exactly the opposite of the predictability and stability that serves Ohioans — including Ohio's business community — well. The District Court's usurpation of state law threatens the core values of federalism and state sovereignty.

"[T]he right to initiate legislation is a wholly state-created right[.]" *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). The U.S. Constitution does not require states to create an initiative procedure, and there is no federal constitutional right to place a proposed law or constitutional amendment initiated by petition on the ballot. *See id.* at 295; *see also Morgan v. White*, No. 20 C 2189, 2020 WL 2526484, *5 (N.D. Ill. May 18, 2020) , *aff'd*, No. 20-1801, 2020 WL 3818059 (7th Cir. July 8, 2020) (citing *Jones v. Markiewz-Qualkinbush*, 892

F.3d 935, 937 (7th Cir. 2018)). In short, initiatives and referenda are not compelled by the U.S. Constitution, but instead are left to the people of each State to decide whether and how to permit lawmaking by popular action. *See also John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring).

Ohio, like several other states, has provided for the right of initiative and referendum in its Constitution. While the initiative power is reserved to the people of this state, the Ohio Constitution contemplates statutes that facilitate the people's exercise of that power by "ensur[ing] the integrity of and confidence in the process." *In re Protest Filed with the Franklin Cty. Bd. of Elec. by Citizens for the Merit Selection of Judges, Inc.*, 551 N.E.2d 150, 154 (Ohio 1990); *see also* Ohio Const., Art. II, §1g (allowing laws to "facilitate" the statewide-initiative process).

Adherence to the mechanical requirements set forth in the Ohio Constitution (and those enacted by the General Assembly) is vital to maintaining the integrity of Ohio's initiative process. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 191 (1999) ("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"); *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2016) (citing *Buckley*) (same). To safeguard the integrity of the initiative process, Ohio courts — including the Supreme Court of Ohio — have required strict compliance with applicable laws unless a statute expressly states otherwise. *See*

State ex rel. Vickers v. Summit County Council, 97 Ohio St.3d 204, 2002-Ohio-5583, 777 N.E.2d 830, ¶ 32. These laws, including Ohio's constitutional provisions governing initiative petitions, have served Ohio well and should not be disregarded or rewritten for expediency. Yet that is exactly what the District Court did.

In recent years, out-of-state interests have pushed a variety of constitutional amendments and other ballot initiatives in Ohio to serve their own purposes. With its relatively low signature threshold for obtaining ballot access and tight timelines for review and challenges (all of which favor petitioners), Ohio has become a magnet for petition efforts. Unfortunately, those circulating petitions for ballot initiatives do not always comply with Ohio laws and sometimes engage in questionable practices, thus introducing irregularities into the petition process.[2]

The Ohio Constitution not only provides the right to initiate laws but also provides the right to challenge the process by which signatures have been gathered to support the proposed ballot initiative. The primary way to ensure that questionable practices and irregularities in the circulation process do not result in a statewide petition improperly getting to the ballot is to file a challenge to the petition or signatures as set forth in the Ohio Constitution. Ensuring that the proposed ballot

[2] For example, two years ago, the Supreme Court of Ohio invalidated a statewide initiative petition because the circulation process failed to comply with Ohio law. *Ohio Renal Association v. Kidney Dialysis Patient Protection Amendment Committee*, 154 Ohio St.3d 86, 2018-Ohio-3220, 111 N.E.3d 1139.

initiative is free from fraud and other irregularities is often left to private persons (including businesses and business organizations), such as amici, who exercise their constitutional right to challenge the proposed ballot initiative.

Amici ask this Court to reverse the District's Court's May 19, 2020 order because it completely rewrites Ohio election laws pertaining to initiative petitions. In doing so, the District Court's decision eliminates the right to challenge the petition, federalizes a state lawmaking process, disrupts the stability and predictability of Ohio's election laws, and opens the door wide for federal courts to embroil themselves in every aspect of state election laws.

B. Ohio's Neutral Procedures for Qualifying Initiative Petitions for the Ballot Do Not Implicate the First Amendment

The people of Ohio have expressly provided neutral and generally applicable procedures for invoking the initiative process in the Ohio Constitution. The three procedural requirements involved here are: (1) the requirement that each signature must be written in ink (Ohio Const., Art. II, § 1g), (2) the requirement that the petition circulator must witness each signature (Ohio Const., Art. II, § 1g), and (3) the requirement that initiative proponents of a constitutional amendment must submit the signatures to the Secretary of State ("Secretary") 125 days before the next succeeding regular or general election (Ohio Const., Art. II, § 1a), which was July 1,

2020, for the statewide initiative petitions.[3] The "ink" and "witness" requirements have been included in the Ohio Constitution since 1912, when Ohio first included the right of initiative and referendum in its constitution.[4] *See* Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 311 (2016); http://www.supremecourtofohio.gov/LegalResources/LawLibrary/resources/appendix.pdf (text of 1912 amendments to the Ohio Constitution). The deadline for filing signatures 125 days before the election was included in the Ohio Constitution in 2008.[5] Notably, unlike virtually all other states, Ohio has no required time limit within which signatures supporting a ballot initiative must be obtained.[6] *See id.* at 311.

As noted above, the U.S. Constitution has nothing to say about the propriety or wisdom of these procedures. "[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *See, e.g.*,

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[3] The deadline for initiative proponents of a municipal ordinance is 110 days before the election. Ohio Const., Art. II, § 1a and Ohio Rev. Code Ann. § 731.28.

[4] From 1912 until June 1978, circulators had to "witness" the signatures by completing an affidavit stating that the signatures were made in their presence.

[5] Before the 2008 amendment, the deadline was 90 days before the next succeeding regular or general election. In addition to providing a new deadline for submitting signatures to the Secretary, the 2008 amendments to Ohio Const., Art. II, §1g provided the right to challenge signatures and petitions in the Supreme Court of Ohio. The amendments also granted the Supreme Court of Ohio exclusive original jurisdiction over all such challenges.

[6] For instance, in Illinois, there is an 18-month window within which initiative proponents may gather signatures for a statewide ballot. *See Morgan v. White*, No. 20 C 2189, 2020 WL 2526484, *2 (N.D. Ill. May 18, 2020) (citations omitted).

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n., 135 S.Ct. 2652, 2673 (2015). This is especially true when it comes to state election procedures. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently."). Yet the District Court ignored this fundamental principle and subjected Ohio's mechanical procedures governing initiative petitions to constitutional review under the First Amendment. The District Court was wrong to do so because lawmaking by initiative is legislative activity, not expressive activity under the First Amendment and, thus, the First Amendment is not implicated. In holding as it did, the District Court erroneously imputed federal constitutional significance to a state legislative process.

There should be no doubt that lawmaking by initiative is legislative activity in Ohio. The Ohio Constitution includes the right of initiative and referendum in Article II of the Ohio Constitution, and Article II covers the *legislature* and *legislative* activities. Because the First Amendment does not apply to the lawmaking process, it does not apply to state laws regulating the mechanics of the initiative process (including those at issue here). Other circuits have recognized that when someone proposes a new law (in this case a constitutional amendment) by initiative, they are engaging in legislative activity — not expressive activity protected by the

First Amendment. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc) ("Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise."); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) ("[A]lthough the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject.")

The laws enjoined by the District Court — the "ink," "witness," and filing-deadline requirements — do not implicate speech in any way. Because they do not regulate *who* can speak (such as only unpaid circulators) (*see Meyer v. Grant*, 486 U.S. 414, 426-27(1988)), *how* to speak (such as with name badges) (*see Walker*, 450 F.3d at 1099), or the content of speech; they do not restrict core political speech and thus should not be subject to First Amendment review. Further, there is no contention here that the initiative-mechanics laws at issue discriminate against any particular point of view. *See* Op., Doc #44, PAGEID #659.

At bottom, proponents of the ballot initiatives were free to say whatever they wanted to whomever they wanted about the petitions they were circulating, regardless of the initiative-mechanics laws at issue.

Because core political speech is not prohibited or implicated in any way by the laws at issue, they do not implicate the First Amendment.

C. The Laws at Issue Pass Constitutional Muster

Even though the well-established laws at issue should not be subject to the First Amendment, the District Court was required to engage in such analysis under this Court's precedent. *See Thompson v. DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) ("[O]ur precedent dictates that we evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework."). [7]

Under the *Anderson-Burdick* test used by this Court, a court considering a First Amendment challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seek to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the context to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quotation marks omitted); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). As this Court

[7] Recently, some Sixth Circuit judges have questioned whether the Court should continue to apply *Anderson-Burdick* to test lawmaking procedures against the First Amendment. *See Schmitt v. LaRose*, 933 F.3d 628, 643, 649 (6th Cir. 2019) (Bush, J., concurring in part and in the judgment) ("It is arguable that Ohio's legislative authority statutes do not regulate "speech" within the meaning of the First Amendment at all because they concern only election mechanics. * * * Thus, based on the logic of *Walker*, I question whether the election-mechanics statutes at issue are even within the purview of the First Amendment."); *see also Daunt v. Benson*, 956 F.3d 396, 423–24 (6th Cir. 2020) (Readler, J., concurring in the judgment).

determined in its decision granting a stay of the District Court's preliminary-injunction order, even under the *Anderson-Burdick* test, the laws at issue likely pass constitutional muster as applied to Appellees. *Thompson v. DeWine*, 959 F.3d 804, 811 (6th Cir. 2020) (rejecting the District Court's finding of a severe burden because "Ohio requires the same from Plaintiffs now as it does during non-pandemic times.").

The District Court erroneously relied on *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553 (6th Cir. May 5, 2020), in finding that the "the signature requirements for local initiatives and constitutional amendments severely burden Plaintiffs' First Amendment rights *as applied here*." *See* Op., Doc #44, PAGEID #660 (emphasis in original). It was wrong to rely on *Esshaki* because it is distinguishable on several grounds, and it was wrong to find that the mechanical requirements at issue severely burden Appellees' First Amendment rights.

1. *Esshaki* is distinguishable

First, *Esshaki* involved a *candidate* attempting to be placed on the ballot — not an initiative. Ballot access for candidates and political parties is markedly different than qualifying initiative measures to be on the ballot, which is the issue here. Candidate elections are fundamental to operating a republican government and the ballot is the means by which voters elect the candidates whom they desire to represent them. Accordingly, burdens on candidates' ballot access directly implicates voters' First Amendment rights. *See Burdick v. Takushi*, 504 U.S. 428,

434 (1992) (states may not "unreasonably interfere with the rights of voters to associate and have candidates of their choice placed on the ballot."); *see also Munro v. Socialists Workers Party*, 479 U.S. 189, 193 (1986) ("Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes as well as the rights of qualified voters to cast their votes effectively"); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) (restrictions on candidates' and political parties' ballot access can endanger "rights of political association and free speech").

In contrast, and as stated above, state-initiative ballot processes are not protected rights under the federal constitution. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) ("[T]he right to initiate legislation is a wholly state-created right, [and] we believe that the state may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation.").

Second, in *Esshaki*, the time for obtaining signatures to appear as a candidate on the ballot expired while Michigan's "stay at home order" was still in effect, which "abruptly prohibit[ed]" signature gathering about 30 days before the deadline. *See Thompson v. DeWine*, 959 F.3d 804, 809 (6th Cir. 2020) (noting that "Michigan abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures they had gathered to that

point"). In contrast, when the District Court issued its May 19, 2020 ruling in this case, Appellees still had more than six weeks to obtain the requisite signatures by July 1, 2020.[8]

Third, unlike the orders in Michigan, Ohio's stay-at-home orders always permitted First Amendment activity to continue. *Id*. at 809–10. ("Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders"). Michigan, on the other hand, only informally indicated that it would not enforce its orders against those engaged in protected activity (*i.e.*, in FAQs on its website) and "that promise is not the same as putting the restriction in the order itself." *Id*.

Thus, Appellees have never have been prohibited by the State from collecting signatures. That the traditional methods of collecting signatures may have been more difficult because of the pandemic does not mean that Appellees had no, or virtually no, access to the ballot. This is particularly true when Appellees could have begun their ballot initiative activity at any time; they did not need to wait until 2020

[8] When the initiative process was first included in the Ohio Constitution in 1912, there were no social-media platforms, electronic communications, or quick and easy means of traversing the state by automobile. Yet proponents of initiative petitions had only 35 more days than proponents today to meet the same minimum threshold of signatures (10% of those voting in last gubernatorial election and 5% from at least 44 counties). Then and now, there has never been a finite period of time within which signatures must be obtained to support a petition. Under the Ohio Constitution, the construct has always been that if there are not enough signatures to submit by the deadline, proponents can continue to collect signatures and submit them for a later election.

to start the process. Nor were they entitled to have their measures on the November 2020 ballot simply because they desired to get before the voters in 2020. *See Jones v. Husted*, No. 2:16-cv-438, 2016 WL 3453658, at *4 (S.D. Ohio June 20, 2016) (petitioners "do not have a constitutional right for the initiative to appear on any ballot, far less any particular ballot."). Thus, there was no need to grant extraordinary relief to Appellees, who (1) had plenty of time before the pandemic to circulate, (2) were never precluded by the State from collecting signatures, (3) had six weeks to meet the statewide deadline as of the date of the District Court's decision, and (4) could continue to collect signatures and place the measure on the ballot in 2021 if they did not have sufficient signatures as of July 1, 2020.

2. There is no state action that constitutes a severe burden

In order for there to be a severe burden on the First Amendment right to speech, as the District Court held, *state action* must exclude or virtually exclude the initiative from the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780, 792–93 (1983). As alleged by Appellees, the state action that implicates the First Amendment is the enforcement of the "ink" and "witness" requirements and the filing deadlines in the face of the pandemic — not the stay-at-home orders. *See* Op., Doc #44, PAGEID #653. These requirements have been part of Ohio's constitutional and electoral landscape for over a century and are integral to insuring the integrity of the initiative process. Like similar statutes in other jurisdictions, they "reflect a considered

judgment, which has stood the test of time about how best to prevent electoral fraud and promote civic engagement. The public has a strong interest in the continued adherence to such requirements, even during challenging times." *Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658, 2020 WL 1905747, *16 (D. Ariz. April 17, 2020) (analyzing similar requirements under Arizona's constitution and denying the TRO where proponents argued that it was too difficult to obtain signatures in support of the initiative during the novel coronavirus pandemic.)

Any inhibition on Appellees' petition circulation is a result of the pandemic — not state action prohibiting political speech. Plus, had Appellees started the circulation process sooner, they may have gathered enough signatures to submit to the Secretary regardless of the pandemic.[9] There is nothing in the federal constitution that requires state officials to excuse compliance with neutral, generally-applicable election laws simply because extrinsic circumstances have made it more

[9] In Arizona, some campaigns that started their collection efforts early and worked diligently were able to comply with neutral, generally applicable state laws governing the mechanics of the initiative process, notwithstanding the pandemic. *See* https://kvoa.com/news/top-stories/2020/07/03/arizona-voters-could-see-measure-that-aims-to-legalize-recreational-marijuana-in-november/ (noting that four ballot initiatives in Arizona submitted signatures to the Secretary of State on July 2, 2020.) *See also, Arizonans for Fair Elections v. Hobbs*, No. CV-20-00658, 2020 WL 1905747, *10–11 (D. Ariz. April 17, 2020) ("It was *Plaintiffs' choice* — not the State's – to procrastinate and dither away time that might later become critical [to obtaining signatures in support of a ballot initiative].")

difficult to exercise a right conferred by state law. *See Bambanek v. White*, 3:20-CV-3107, 2020 WL 2123951, at *2 (C.D. Ill. May 1, 2020) (declining to revise Illinois ballot-access requirements for initiatives in light of the pandemic; *Morgan v. White*, No. 20-1801, 2020 WL 3818059 (7th Cir. July 8, 2020) (noting that because ballot initiatives are wholly a matter of state law, if "the Governor's orders, coupled with the signature requirements [are] equivalent to a decision to skip all referenda for the 2020 election cycle, there is no federal problem.").

Further, there is a critical difference between the ballot-measure process itself and speech or expressive activity involved in circulating a petition. While the latter falls within the ambit of the First Amendment, the mechanics of qualifying for the ballot do not. *See, e.g., Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) ("[N]ot every procedural limit on election-related conduct automatically runs afoul of the First Amendment. The challenged *law* must restrict political discussion or burden the exchange of ideas." (emphasis in original)). The laws at issue do nothing to limit speech or expressive activity. They simply guard against fraud and other irregularities and permit the Secretary, county boards of election, and challengers the opportunity to determine — after all signatures have been submitted and, thus, all communications with electors have occurred — whether the issue should be permitted to go the ballot.

D. The District Court's Decision Usurps Ohio's Sovereign Authority Over its Lawmaking Process

The District Court enjoined the "ink" and "witness" requirements that have been fundamental to Ohio's initiative process for more than a century. In their stead, the District Court ordered the State to "accept electronically-signed and witnessed petitions" and further ordered the parties to meet to iron out any "technical" or "security" issues that the injunction left unresolved. Op., Doc #44, PageID #675–76. The District Court ordered this relief despite the fact that Ohio has never permitted electronic signature gathering in support of initiatives, referenda, or candidate petitions.

The District Court also extended the deadline by which the requisite signatures must be submitted to the Secretary without any regard for the domino effect this would have on other deadlines — including the constitutional right to challenge the signatures and petition — which are carefully crafted to ensure that election officials have sufficient time to prepare the ballot (which must be mailed to military and overseas voters no later than 45 days before the election). By extending the filing deadline to July 31, 2020, the District Court obliterated the constitutional right to challenge any fraud or irregularities in the petition-circulating process because the constitutional deadline to challenge was also July 31, 2020. *See* Ohio Const., Art. II, § 1g ("Any challenge to a petition or signature on a petition shall be filed not later than ninety-five days before the day of the election.")

Instead of applying the tried and true laws that are the crux of the *State's internal lawmaking* functions and that have governed the mechanics of initiative petitions over time, the District Court unilaterally (1) imposed a mandate to create a new process and platform for collecting and verifying electronic signatures "on the fly," and (2) destroyed the right to challenge irregularities that should keep an improperly supported initiative from the ballot. In doing so, the District Court interjected itself into the State's sovereign affairs. The Ohio General Assembly or the Ohio electorate have the authority to make these sweeping changes to Ohio election laws — not a federal district court. As this Court recognized when granting the stay in this case, "By unilaterally modifying the Ohio Constitution's ballot initiative regulations, the district court usurped this authority from Ohio electors." *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (also stating that "the federal Constitution provides States — not federal judges — the ability to choose among many permissible options when designing elections.").

Other federal courts likewise have recognized the potential danger to principles of federalism and state sovereignty borne of a federal court's improper entanglement in the administration of a state's lawmaking process. In a case involving "ink" and "witness" requirements similar to Ohio's, the District Court of Arizona declined to suspend such requirements in part due to similar concerns:

> Plaintiffs are effectively asking a federal court to make a guess about an unsettled question of state law and then, based on that guess,

> overturn a century-old state-law election rule. This outcome would be distressing from a federalism perspective.

Arizonans for Fair Elections v. Hobbs, No. CV-20-00658, 2020 WL 19055747, *16 (D. Ariz. April 17, 2020); *see also Morgan v. White*, No. 20-1801, 2020 WL 3818059, *2 (7th Cir. July 8, 2020) (declining to enjoin referendum and initiative signature requirements despite governor's stay-at-home order and adding that even if those factors combine "to skip all referenda for the 2020 election cycle, there is no federal problem.") The same is true here.

The District Court stated that its decision was borne of "these particular circumstances" (*i.e.*, the COVID-19 pandemic). *See* Op., Doc #44, PAGEID #673. But under the District Court's decision, *any mechanical requirement* that a petitioner asserts makes it more difficult to place an initiative on the ballot — even if it does not restrict speech or expressive conduct — would trigger First Amendment protections. The effect is to federalize a state lawmaking process. When this happens, no one can rely on the state election laws as written because, with the stroke of a pen, a single federal judge can rewrite them. Rather than promote ballot integrity and predictability in applying the rule of law, this will create law by judicial fiat. Ohioans deserve more from their lawmaking and election processes.

CONCLUSION

For all of the reasons set forth here and in the State's Merit Brief, the District Court's decision and order should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Brief* complies with the type-volume requirements and contains 5503 words. *See* Fed. R. App. P. 29(a)(5) and 32(a)(7)(B).

/s/ Anne Marie Sferra
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES** was filed with the Clerk of Courts using the ECF system, which will send notification of such filing to all attorneys of record on July 24, 2020.

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