

**IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO**

**OHIOANS FOR RAISING THE WAGE,
et al.,**

Plaintiffs, and

**OHIOANS FOR SECURE AND FAIR
ELECTIONS, et al.,**

Plaintiff-Intervenors,

v.

FRANK LAROSE,

Defendant.

Case No. 20 CV 002381

Judge David C. Young

INTERVENORS' MOTION FOR PRELIMINARY INJUNCTION

Intervenors Ohioans for Secure and Fair Elections, and the members of its committee, seek to put a voter-initiated issue on the November 2020 ballot; individual intervenors Susan Zeigler, Scott Campbell, Paul Moke, and Andre Washington seek to sign and/or circulate petitions to place the issue on the ballot. The coronavirus pandemic renders it impossible to meet the constitutional and statutory requirements to certify their initiative. Pursuant to Ohio Rule of Civil Procedure 65, Intervenors respectfully request that this Court issue a preliminary injunction to immediately enjoin the provisions of Ohio law that, as applied in this extraordinary situation, prohibit ballot access to Intervenors, and to order the Ohio Secretary of State to provide an alternative avenue for Intervenors to access the ballot. Intervenors move for relief under the First and Fourteenth Amendments to the U.S. Constitution and Articles I and II of the Ohio Constitution. A Brief in Support of Intervenors' Motion follows.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

The coronavirus pandemic is unprecedented. It is a public health nightmare almost beyond imagination, and certainly a disaster on a scale never contemplated by Ohio’s legal scheme that regulates ballot access. The petition-signature requirements of the state’s initiative process—which would require nearly 700,000 interpersonal encounters to attain—are now impossible to satisfy. In the face of these extraordinary circumstances, absent court intervention, Intervenorors will be denied the constitutional rights to place their proposed constitutional amendment on Ohio’s November 2020 ballot.

The coronavirus pandemic has converted Ohio’s framework that governs the route of a ballot initiative towards the ballot into an insurmountable barrier. For the scheme requires that proponents of a ballot initiative submit 442,958 valid signatures (which, in practice, requires obtaining one and a half times that number), in “ink,” “personally” witnessed by a petition circulator, and then submit their results to Defendant LaRose, the Secretary of State, by July 1. Intervenor-members of the Political Action Committee Ohioans for Secure and Fair Elections (“OSFE”) have been working on this issue campaign since fall 2019, have spent significant time and over \$500,000 so far, and have successfully complied with the state’s initial certification requirements to proceed. Intervenorors Sue Zeigler, Scott Campbell, Paul Moke, and Andre Washington are Ohio electors who believe in the issue and very much wish to circulate and/or sign petitions in support of it, and/or recruit others to circulate petitions, but because the coronavirus pandemic makes this activity impossibly dangerous for them and for others, they cannot.

The coronavirus pandemic swept the globe, and into Ohio, in the middle of Intervenorors’ efforts to secure ballot access. To avoid contracting potentially lethal illness themselves, and in compliance with recommendations and orders, Ohioans are largely staying home and avoiding

close proximity to others. But Ohio’s initiative and petition laws are premised upon face-to-face encounters: the door-to-door canvasser and the clipboard-holder at the local grocery store are the foundation of signature-gathering campaigns. Suddenly it has become impossible for Ohioans to come within 6 feet of one another without endangering themselves and the public. The thought of holding a pen or touching a paper that fellow petition-signers have touched—or even allowing another person to come into proximity to request a signature—has become repugnant and frightening, and in truth it could be dangerous. In this new reality, there is no possible way for Intervenor to satisfy Ohio’s initiative and petition laws in time to access the November ballot.

Ohio’s initiative laws contain no emergency valve to deal with any, much less this, unforeseeable situation and preserve the state and federal constitutional rights of Ohioans to put an initiative on the ballot or associate with others who share their political views. According to Defendant LaRose, he “is not free to modify or to refuse to enforce the explicit constitutional and statutory requirements for initiative petition signature gathering, even in the current crisis.” Correspondence between Secretary of State’s office and OSFE Campaign Director, Mar. 26, 2020, attached as Ex. A. As Defendant LaRose has acknowledged, while some of the requirements could be changed by the General Assembly, “some of the requirements to which you are referring are in Ohio’s Constitution which the legislature cannot change on its own.” *Id.* To avoid imminent exclusion from the ballot, Intervenor seeks an injunction from this Court to hold the now-burdensome initiative laws unconstitutional as applied in this most extraordinary of situations to their attempt to secure a place on the November, 2020 ballot. Intervenor asks this Court to provide an alternative path to the ballot, one that permits them an opportunity to attain ballot access.

I. STATEMENT OF FACTS

The goal of Ohioans for Secure and Fair Elections is to place a proposed state constitutional amendment on the November 3, 2020 ballot that would protect and expand the voting rights of Ohioans, and ensure that voting in Ohio elections remains secure. Since the fall of 2019, OSFE has been building and advancing its campaign in support of this issue and it has already fulfilled the requirements for ballot access up to the point of circulating petitions to meet the petition signature requirement. Affidavit of Antonia Webb, attached as Ex. B at ¶ 4-5.¹ OSFE has spent in excess of \$500,000 on its campaign. *Id.* at ¶ 19. Between December 2019 and February 2020, OSFE gathered over 1,000 signatures from qualified electors in Ohio in support of its proposed amendment, and the Attorney General certified it. In February the Ohio Ballot Board attempted to split the proposed amendment into separate propositions, and OSFE filed emergency litigation to attempt to keep its measure unified. Regardless of whether its measure is ultimately kept whole or split, the campaign intends to proceed to put either the whole or the separated parts of its voting protection measure on the ballot. If circumstances were normal, as soon as the Ohio Supreme Court rules on the single issue question (the case is expedited, was fully briefed on March 19, and is awaiting decision), the campaign would begin gathering signatures immediately. *Id.* at ¶ 6, 8.

Sue Ziegler, Scott Campbell, Paul Moke, and Andre Washington are Ohioans who care deeply about the voting rights reforms that OSFE seeks to place into their state's constitution, and they have planned to support the ballot measure.

Ms. Zeigler is a resident of Avon Lake, Ohio who has followed the OSFE campaign and wants to sign its petition. But she now needs to remain at home in self-isolation—she has even

¹ To avoid contact with others, Ms. Webb executed her affidavit by printing it at her home, driving to a notary's home, sliding it under their door, and having them notarize it through the window, scan it, and send it to her.

stopped her regular volunteer work as a hospice worker to avoid transmitting or contracting the virus, and she would be afraid to “touch a petition circulator’s pen or paper even with the proverbial ten foot pole.” Zeigler Affidavit, attached as Ex. C at ¶ 8.²

Mr. Campbell is a resident of Cleveland Heights, Ohio who is passionate about voting rights and ballot access in Ohio. After learning about the OSFE petition, he wanted to sign it to advance a cause he cares about. But because of the coronavirus, he needs to stay at home and avoid contact with others, and if a petition circulator came to his door, he would not feel safe signing the petition. Campbell Declaration, attached as Ex. D at ¶ 13.³

Mr. Moke is a resident of Wilmington, Ohio who wants to circulate the OSFE petition. Mr. Moke is a law and political science professor who has devoted much of his professional focus on supporting voting rights. Despite his deep desire to circulate petitions to pass OSFE’s ballot initiative and recruit others to do the same, Mr. Moke will not, due to his fear of contracting coronavirus and his conviction that he must adhere to public health recommendations to stay at home. Moke Affidavit, attached as Ex. E at ¶ 17, 19.⁴

Mr. Washington is a Delaware, Ohio resident and lifelong voting rights advocate. He is the President of the Ohio A. Philip Randolph Institute, a statewide voting rights organizing group, as well as an officer of the Ohio Conference of the NAACP. With both groups, and in all of his spare time, he devotes himself to mobilizing his community around voting rights reform. He had intended to circulate petitions himself, and also to recruit and organize members of his organizations to circulate petitions. But because of the pandemic, he will neither be able to

² Ms. Zeigler was able to execute her affidavit through a videoconference with a remote notary.

³ Mr. Campbell was not able to access any notary without compromising his safety, or access the technology necessary to secure an electronic notarization, so he submits a declaration signed under penalty of perjury. *See* Ex. D at ¶ 16.

⁴ Mr. Moke was able to execute his affidavit through a videoconference with a remote notary.

circulate his own petition, nor does he feel it ethical, or even possible, to ask his membership to do so, due to the health and safety concerns. Washington Affidavit, attached as Ex. F at ¶14-18.⁵

The coronavirus pandemic struck just as Intervenors are poised to begin the collection of the approximately 675,000 signatures required, as a practical matter, to put their proposed amendment on the ballot. *See* Ex. B at ¶ 4, 7. But the epidemic has precluded the person-to-person contact that Ohio's signature requirements require. In the face of the epidemic, the key guidance issued by the World Health Organization, the Center for Disease Control, state and local governments, health experts, and scientists has been for every person to maintain social distance, to avoid gatherings, to stay at home, and isolate those who have symptoms by avoiding contact with others at all costs. Ohio issued a stay-home order that banned gatherings and ordered the closure of non-essential businesses and public places, including restaurants, shops, and playgrounds. Nonessential businesses and classrooms have all switched to remote work; and public events, including festivals and Ohio's primary election, were delayed, made remote, or both. Even this Court has largely closed its doors to the public, immediately staying or extending deadlines, and adapting to use remote and electronic measures to communicate and handle necessary business. *See, e.g.* Admin. Order 3-20-20 *available at* [https://www.fccourts.org/gen/WebFront.nsf/wp/1EF64456482678828525852A00587522/\\$FILE/Admin%20Order%203-20-20%20Court%20Operations.pdf](https://www.fccourts.org/gen/WebFront.nsf/wp/1EF64456482678828525852A00587522/$FILE/Admin%20Order%203-20-20%20Court%20Operations.pdf)

Despite this radically changed reality, Ohio's petition and initiative laws remain. To circulate a petition to place a proposed amendment onto the ballot, Ohio's constitution and statutes comprise a framework of rules that necessitates in person, face-to-face signature

⁵ Mr. Washington was able to execute his affidavit through a videoconference with a remote notary.

gathering—without exception. For example, the law requires: signature gathering of at least 10% of the total vote cast for governor in the last gubernatorial election, *see* Ohio Const. Art. II § 1a; R.C. 3519.14; that the signatures gathered include at least 5% of the most recent vote for governor in at least 44 of Ohio’s 88 counties; *see* Ohio Const. Art. II § 1g; R.C. 3519.14; that these signatures are affixed *in ink*, *see* Ohio Const. Art. II § 1g; R.C. 3501.38(B); that the signatures may not be made by proxy, R.C. 3501.38; Ohio Const. Art. II § 1g; and that the signatures be *personally witnessed* and attested by the petition’s circulator. Ohio Const. Art. II § 1g.

The signature collection scheme required to support a ballot measure campaign is simply not possible in the coronavirus pandemic. Even in normal circumstances, the signature-collection and certification requirements Ohio imposes are arduous: petition circulation among so many electors, over a wide geographic spread in a several-month timeline requires significant time and labor. *See* Ex. B. at ¶ 14-17. Petition circulators depend on mass gatherings to interact with individuals and spread their message: they need to walk through a college green, stand outside a public library, and set up tables at festivals. They can perform their function only if they have the ability to interact with others. Ohio’s ballot access system, one that requires a high number of signatures to be obtained before July 1, and requires that these be personally witnessed and in ink, has become untenable. Compliance with Ohio’s petition and initiative law during the pandemic is impossible.

Of course this unprecedented pandemic has interfered with elections and petitions in other states as well. Other jurisdictions have also had to preserve and protect peoples’ rights in unprecedented ways. On March 25, a Virginia state court suspended that state’s numeric signature requirement, allowing a Republican senate candidate ballot access because petition circulation was

impossible. Order, attached as Ex. G. On March 26, Utah’s governor suspended that state’s requirement for in-person signature gathering for all ballot initiatives and allowed petition circulators to collect signatures online, instead. Order, attached as Ex. H. But here in Ohio, our Secretary of State told Intervenors on March 26 that while he “can appreciate that the current situation has impacted your organization’s signature gathering for the proposed amendments,” his position is that he, and even the Ohio legislature, lack the authority to change Ohio’s petition requirements “on its own.” Ex. A. Intervenors filed their Complaint and Motion to Intervene on March 30, 2020, and file this Motion. Relief is now in the hands of the judiciary.

II. STANDARD OF REVIEW

On a motion for a preliminary injunction, this Court balances four factors: “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.” *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass’n*, 110 F.3d 318, 322 (6th Cir. 1997). The balance here favors a preliminary injunction.

III. ARGUMENT

A. Intervenors Are Likely to Succeed on The Merits of Their Claims

Intervenors challenge the Ohio petition and initiative laws summarized above, which, as applied to them in these exceptional circumstances, constitute a ban on their access to the ballot and their ability to meaningfully associate with others in support of their ballot proposal. Without any provision to accommodate a reality where petition circulators and potential signatories must remain isolated indoors, Ohio’s laws make the ability to propose an amendment by initiative

merely theoretical--and unattainable. This implicates Intervenor's core First and Fourteenth Amendment rights to access the ballot, freedom of speech, and freedom of association.

1. Ohio's petition requirements severely burden Intervenor's ballot access, freedom of speech, and freedom of association rights.

First, Ohio's constitution has enshrined a right to initiative, and once a state creates such a right, it may not restrict it in a way that unduly burdens First Amendment rights. *See Meyer v. Grant*, 486 U.S. 414, 424-28, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *see also 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."). In Ohio, "the people's right to the use of the initiative and referendum is one of the most essential safeguards to representative government." *State ex rel. Nolan v. Clendenning*, 93 Ohio St. 264, 277-278, 112 N.E. 1029 (1915). The initiative right must be "liberally construed to effectuate the rights" of Ohioans. *State ex rel. Hodges v. Taft*, 64 Ohio St. 3d 1, 5, 591 N.E.2d 1186 (1992). Second, as the circulation of petitions involves "both the expression of a desire for political change and a discussion of the merits of the proposed change," it is "core political speech." *Meyer*, 486 U.S. at 421-22. Third, Intervenor has a related First Amendment right of association under the federal constitution that protects the "circulation of petitions in support of ballot initiatives." *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 722 (M.D. Tenn. 2019) (citing *Meyer*, 486 U.S. at 414 and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999)); *cf. Cal. Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) ("[T]he Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs[.]'" (citations omitted). The First Amendment "requires...vigil[ance]"

in the protection of the circulation of petitions and similar associative conduct. *Hargett*, 400 F. Supp. 3d at 723 (citing *Buckley*, 525 U.S. at 192).

“The rights of political association and free speech” that are implicated here “occupy a ... hallowed place in the constitutional pantheon.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) (citing *Cal. Democratic Party*, 530 U.S. at 574). These rights are at “the core of the protection afforded by the First Amendment.” *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).

The burden on Intervenor’s core rights presented here is severe: “[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot.” *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016); *see also Williams v. Rhodes*, 393 U.S. 23, 24, 35, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (striking “series of election laws,” including requirement that minor political parties file a petition signed by the number of voters equal to fifteen percent of the votes cast in the preceding gubernatorial election, because it “made it virtually impossible” for any party other than the Republican Party and Democratic Party to gain ballot access). Such severe burdens should be subject to strict scrutiny. *Cf. Cal. Democratic Party*, 530 U.S. at 582 (severe burdens on associational rights trigger strict scrutiny). At a minimum, the unprecedented circumstances and the resulting effect on petition gathering should trigger heightened scrutiny. Courts including the United States Supreme Court, the Sixth Circuit and federal district courts in Ohio have found that heightened scrutiny applies to regulations that “significantly inhibit communication with voters about proposed political change.” *Buckley*, 525 U.S. at 192; *see also Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592-93 (6th Cir. 2012) (applying heightened to equal protection challenge to elections regulations); *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (same).

Here, Intervenors are faced not with a mere regulation of *how they may* access the ballot, but what amounts to a *ban* on ballot access, and on their related speech and association rights. Petition circulators cannot obtain in-person, ink signatures outside of their immediate households, and signers cannot sign petitions outside of their immediate households. Nor can supporters mobilize like-minded people to do these things. Public gatherings and in-person contact are already suspended, and Ohio’s infection curve is only on its upslope and predicted to peak weeks before the deadline for collecting signatures. OSFE has no hope of meeting Ohio’s requirements. As applied to Intervenors in these unprecedented and extreme circumstances, the challenged legal scheme completely “restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.” *Meyer*, 486 U.S. at 424. *A complete prohibition on the exercise of a First Amendment right* cannot survive. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 135 S.Ct. 2218, 2229-30, 192 L.Ed.2d 236 (2015).

2. Ohio’s petition requirements are not tailored to meet *any* State interest.

By contrast, Defendant has no compelling interest—indeed, no interest at all—in a total prohibition of Intervenors’ ability to associate or access the ballot, which is what maintaining the current legal framework amounts to. Similarly, a legal scheme that creates such a ban without any exception cannot be narrowly tailored to serve any interest. The state’s typical interests in “enact[ing] reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder,” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); and in “protect[ing] the integrity and reliability of the initiative process,” *Buckley*, 525 U.S. at 191 are actually *undermined* here, where disorder already abounds, and where without relief, there will be no campaigns to regulate. The current regime cannot be considered sufficiently tailored to meet these interests.

Moreover, the state cannot possibly maintain an interest in enforcing the current ballot access requirements—which would steepen the disease spread’s curve—and is something the state is in fact trying to prevent. Given the pandemic, it is in no party’s interest to have petition circulators out at public locations or knocking on doors to achieve wet signatures. Requiring circulators to engage in petition gathering as though this crisis had not upended all of the relevant circumstances only creates more “campaign-related disorder” and make the process less reliable. Allowing the current regime to go on unmodified will lead to the confusion of thousands of Ohioans and the frustration of their rights. There are far better means sufficiently tailored to the moment at hand for the State to employ—including implementing the relief Intervenor’s are seeking.

3. Given the extraordinary situation, the Court’s modification of the signatory requirements is the only means by which Intervenor’s rights can be protected.

When the “Ohio General Assembly has failed to prescribe constitutional ballot access requirements,” or “where a state has unconstitutionally prevented a party or candidate from accessing the ballot,” the federal courts must devise a remedy. *Libertarian Party of Ohio v. Brunner*, 567 F.Supp.2d 1006, 1015 (S.D. Ohio 2008) (taking judicial notice of “requisite community support” to place minor party on ballot when Ohio elections regulations foreclosed ballot access). In the context of elections emergencies such as this, “[w]hen state laws are inadequate or no applicable laws exist, courts are often asked to step in on a largely ad hoc basis as a constitutional matter and craft remedies out of whole cloth.” Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L.J. 545, 550 (2018).

There is precedent in the state and federal courts for modifying signature requirements, time limits, and other regulations to allow ballot access where it would otherwise be impossible. *See, e.g. State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 236–37, 631 N.E.2d 582 (1994), *opinion clarified*, 69 Ohio St. 3d 1208, 632 N.E.2d 907 (1994) (extending the period for signature gathering by 90 days for a petition for referendum); *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 54 (same); *see also State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St. 3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 62 (recognizing “exten[sion of] the constitutional deadline” for submitting a petition is an appropriate remedy); *cf. Blackwell*, 462 F.3d at 595 (“moving the filing deadline” for petition was appropriate remedy in party ballot access case); *Brunner*, 567 F.Supp.2d at 1015-16 (placing party on ballot was appropriate remedy in party ballot access case).

And in the context of emergency situations affecting ballot access and voting rights more broadly, it is even more critical for courts to provide relief. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016). In *Scott*, the court extended voter registration deadlines after Hurricane Matthew made it impossible for voters to register within the statutory timeframe. In that case, the regular elections laws, while constitutionally permissible in regular circumstances, could not survive when a natural disaster converted them into as-applied severe burdens on the voting right. *See id.* (“Hurricane Matthew not only forced many of those voters to evacuate the state, but also foreclosed the only methods of registering to vote: in person or by mail. Because those aspiring eligible voters could not register, they could not vote in the upcoming election. As a result, Florida's statutory framework completely disenfranchises thousands of voters, and amounts to a severe burden on the right to vote.”) In fact, relying on *Scott*, just days ago, a Virginia court provided relief to a party in Intervenor’s situation: the court

found it was impossible for a would-be Republican senate candidate to gather more signatures to get onto the November ballot, and so it enjoined the signature requirement. Ex. G. In Utah the state provided similar relief by executive measure, and that state is allowing remote, electronic signature gathering. Ex. H.

Where state executives have not acted to preserve voting and other First Amendment rights during times of emergency, the state and federal courts have had to do so. *See, e.g. Georgia Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (extending period for voter registration after hurricane; “[w]hat is clear to the Court, [], is that granting the extension would have been the right thing to do. The Court does not discount that the extension would present some administrative difficulty. However, those administrative hurdles pale in comparison to the physical, emotional, and financial strain Chatham County residents faced in the aftermath of Hurricane Matthew”); *State v. Marcotte*, 148 Me. 45, 53–54, 89 A.2d 308 (1952) (upholding the validity of delayed election because of extraordinary storm; “[t]here was a storm of such unusual proportions and such unexpected violence that it might well be considered that there was no election due to ‘an act of God.’”); Order, *Ertel v. Essex Cty. Bd. Of Elections*, N.J. Super. Ct. Law Div. (Nov. 7, 2012) at ¶4-5 *available at* https://www.aclu-nj.org/download_file/view_inline/1002/841 (ordering state elections officials to expand acceptance of late requests for absentee ballots, in addition to the administrative voting rights expansions state elections officials had made, in the election immediately following Hurricane Sandy); *see also Obama for America v. Cuyahoga County Board of Elections*, N.D. Ohio No. 1:08-cv-562 (Mar. 4, 2008) (same day action to keep polls open an extra 1.5 hours because of bad weather and ballot shortage; injunction granted as to Cuyahoga County); *Ohio Democratic Party v. Cuyahoga County Board of Elections*, N.D. Ohio No. 1:06-cv-2692 (Nov. 7, 2006)

(same day action to keep polls open an extra 1.5 hours because of reports that polling locations had opened late and had faulty equipment; injunction granted as to 16 individual polling places).

In this extraordinary situation, where the challenged elections laws will nullify Intervenor's constitutional rights, no government interest can justify a refusal to provide Intervenor *some* avenue to association and ballot access. In First Amendment cases "the likelihood of success on the merits often will be the determinative factor" in whether to grant a preliminary injunction. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). The Intervenor is likely to succeed.

B. The Intervenor Will Suffer Irreparable Harm Without the Ability to Get on This Ballot

"When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d at 436 (citation omitted); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (citation omitted).

Intervenor here face "exclusion from the ballot," the "hallmark of a severe burden" to their constitutional rights. *Grimes*, 835 F.3d at 574. Without some modification to the laws they challenge, as a practical matter they are totally disabled from exercising their rights to ballot access, or associating to circulate their petition in the any of the ways that Ohio's framework allows. In addition to the frustration of Intervenor's constitutional rights, they will suffer material consequences if their ballot measure campaign must suddenly halt. OSFE has already committed its staff and volunteer base's time and energy for months, not to mention over half a million dollars spent, to promote this issue in which all of its supporters deeply believe. Maintaining the current initiative and petition regulations without an emergency exception renders the OSFE Intervenor's

rights to ballot access and to association meaningless, wastes the time and money they spent on their campaign to date, and requires them to repeat the steps they have already taken—the collection of 1,000 signatures, certification by the Attorney General, review by the Ballot Board and resulting litigation before the Ohio Supreme Court, as well as massive staff organizing and training efforts—in an unknown future election when they may not have the resources to do so. The Intervenors who are would-be signers and circulators cannot wait until some later time, possibly never to come, to exercise their fundamental rights. Intervenors, believing that the election reforms proposed in their ballot measure are already overdue, strive to have their initiative placed before voters in 2020, and not in some future election, and they have invested time and funds accordingly.

C. The Public Interest and the Lack of Harm to Others Favor a Preliminary Injunction

“It is always in the public interest to prevent the violation of a party's constitutional rights.” *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (quotation omitted). The lack of an emergency exception to Ohio’s initiative and petition requirements, in these circumstances, acts as a total ban on Intervenors’ constitutionally-guaranteed rights.

Prior litigation in emergency situations also demonstrates that, in practice, emergency litigation of this type serves the public. For example, in New Jersey after an anthrax attack the court allowed absentee ballots to be counted after Election Day. *In re Holmes*, 346 N.J.Super 372, 378, 788 A.2d 291 (N.J. App. 2002). There the court found that the “rigid application of the rule that all ballots be received by the board by 8:00 P.M. of Election Day would unfairly deprive absentee voters of their franchise as a result of exceptional circumstances neither within their control nor which, in light of human experience, might reasonably be expected.” *Id.* at 378. Here,

not just Intervenors, but the public, has been universally impacted by this crisis, and would benefit from this Court's intervention to preserve the constitutional right to access the ballot.

In addition to the Intervenors themselves, there are thousands of Ohioans whose support for OSFE's ballot issue will be stifled without the Court's intervention. At least 1,000 members of the public have already supported this ballot initiative, and Intervenors had been mobilizing many more individuals and groups. Without a remedy, the right of initiative will be lost to all during this election cycle, because Ohio's laws are unconstitutional as applied to Intervenors and similarly situated groups under these novel circumstances.

The nature of Intervenors' request for relief is strictly limited and applies only to garnering access to the November 2020 ballot during the current coronavirus pandemic.

V. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court issue a preliminary injunction, pursuant to Ohio Rule of Civil Procedure 65, to enjoin Defendant from enforcing the above-listed initiative requirements as to Intervenors in advance of the November, 2020 election, and to further enjoin Defendant to provide Intervenors the alternative processes sought in their Complaint, to allow them to access the ballot in November 2020.

March 31, 2019

Respectfully submitted,

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Attorneys for Intervening Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2019, I filed a copy of the foregoing Motion and Brief in Support using the Court's Electronic Filing System, and that counsel for all parties received electronic notice through that system.

/s/ Freda J. Levenson
Freda J. Levenson