

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division**

Susan Beiersdorfer *et al.*,

Plaintiffs,

v.

Frank LaRose *et al.*,

Defendants.

No. 4:19-cv-00260

The Honorable Benita Y. Pearson

**Plaintiffs' Opposition to Defendant
Lucas County Board of Elections'
Motion for Judgment on the
Pleadings**

Oral Argument requested

**PLAINTIFFS' OPPOSITION TO DEFENDANT LUCAS COUNTY BOARD OF
ELECTIONS' MOTION FOR JUDGMENT ON THE PLEADINGS**

April 21, 2019

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Plaintiffs hereby oppose Defendant Lucas County Board of Elections' Motion for Judgment on the Pleadings. (ECF No. 5, hereinafter "MJOP.")

BACKGROUND

The people's right to propose and enact laws by popular vote lies at the heart of our democracy. The thirteen Plaintiffs in this case are residents of various Ohio counties and municipalities. (Compl. ¶¶ 14-26.) Plaintiffs have, collectively, spent thousands of hours navigating Ohio election laws and the arbitrary practices of Ohio election officials, only to be denied placement of their proposed measures onto the ballot and, or alternatively, to be confronted with costly and time consuming litigation to force placement of proposed measures onto the ballot. Plaintiffs' Complaint sets forth, in detail, the Ohio election laws at issue (Compl. ¶¶ 44-67), and explains the state judiciary's role in Ohio's unconstitutional ballot access scheme. (Compl. ¶¶68-71.)

Defendants have violated Plaintiffs' constitutional rights, in most cases repeatedly, by preventing, or otherwise severely burdening, their access to the ballot. This case challenges Ohio's ballot access scheme to the extent it allows unconstitutional pre-enactment review of proposed ballot measures by election officials and the judiciary in violation of the people's core political rights and separation of powers. (Compl. ¶1.) Plaintiffs' challenge is two-fold:

(1) Plaintiffs challenge the constitutionality of portions of Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3) that authorize local boards of elections and the Secretary of State to scrutinize the subject matter and content of ballot initiatives; and

(2) Plaintiffs challenge the Ohio state judiciary's interference with the citizen lawmaking process: by deferring to election officials' substantive, content-based review; by interjecting itself into the citizen lawmaking process pre-enactment; and by issuing advisory opinions on the

validity of proposed measures pre-enactment. Plaintiffs will continue to suffer deprivation of their constitutional rights absent a Court order enjoining application of unconstitutional provisions of Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3), enjoining Defendants' unconstitutional conduct, and enjoining content-based pre-enactment review by election officials and the judiciary. (Compl. ¶ 13.)

ARGUMENT

Defendant Lucas County Board of Elections (hereinafter "Lucas BOE") attempts to obtain judgment in its favor by oversimplifying the important constitutional issues presented in this case. Lucas BOE argues that because other courts in other instances, have found statutes and procedures pertaining to the review of proposed ballot measures pre-election to be constitutional, this Court should find the same with regard to Ohio's ballot access scheme. This is completely without merit.

First, states have widely varying laws pertaining to ballot access and in considering the constitutionality of a state's ballot access scheme the court must look at the particulars of that scheme. Plaintiffs' challenge specific constitutional defects in Ohio's ballot access scheme particular to Ohio's election laws and the discretion afforded Ohio election officials and the state judiciary under that scheme. Whether or not a court has found ballot access schemes in other states to be constitutional has no bearing on the specific issues before this Court.

Second, the scope of Plaintiffs' challenge to Ohio's ballot access scheme is an issue of first impression in this Circuit. Plaintiffs are not aware of any Sixth Circuit Court of Appeals decision that has considered the constitutionality of Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3), in particular, or of content-based pre-enactment review by election officials and the judiciary, in general, on the grounds alleged in Plaintiffs' Complaint.¹

¹ Plaintiffs recognize that other circuits are split on some issues regarding the First Amendment and pre-enactment judicial review of proposed measures. *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (First Amendment applies to subject matter restrictions); *Marijuana Policy*

Ohio residents have begun to challenge the fundamentally unfair and unconstitutional nature of Ohio's ballot access scheme. Recently the United States District Court for the Southern District of Ohio considered the relatively narrow question of whether Ohio's ballot initiative process deprived Ohioans of their right to participate in the initiative process without adequate procedural due process. The court held that "Ohio's regulatory scheme unreasonably infringes on Plaintiffs' First Amendment rights by allowing an executive board to determine disputed legal and even constitutional issues, thereby potentially blocking initiatives from the ballot, and then denying rejected petitioners a right to review." *Schmitt v. Husted*, 341 F. Supp. 3d 784, 792 (S.D. Ohio 2018), *order reinstated*, No. 2:18-CV-966, 2019 WL 517666 (S.D. Ohio Feb. 11, 2019) (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)). In ordering permanent injunctive relief, the Court held that Ohio's ballot initiative process violated the due process clause because it did not provide an adequate review process. *Schmitt*, 2019 WL 517666, at *5 (S.D. Ohio Feb. 11, 2019).

The *Schmitt* court did so under the indisputable proposition that because Ohio has created a ballot initiative process for its citizens, it "cannot restrict that process in a matter that violates the Constitution." *Id.* at * 4. While the significant constitutional questions raised in this case were not before the court in *Schmitt*, the decision illustrates federal courts' role in reviewing state ballot access schemes and provides reason for this Court to reject Lucas BOE's simplistic analysis.

Lucas BOE concedes that there are dramatic inconsistencies in the application of Ohio's election laws as well as in Ohio Supreme Court decisions interpreting those laws. (MJOP at 7; *see also* Compl. ¶¶ 108-230.) As a result of such inconsistencies, certain proposed measures are

Project v. United States, 304 F.3d 82 (D.C. Cir. 2002) (First Amendment does not apply); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (same); *see also, for review of the circuit court split*, Anna Skiba-Crafts, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305 (2009). The Sixth Circuit has allowed judicial review of proposed initiatives for the limited purpose of single-subject compliance. *Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F. 3d 443, 446 (6th Cir. 2018).

allowed onto the ballot, while other measures are not. (Compl. ¶¶ 108-230; *id.* ¶ 106 (quoting County Commissioners Association of Ohio Commissioners’ Handbook that: “Care should be taken in using this Chapter for definitive guidance because the case law and interpretations of these provisions are limited *and often contradictory.*” (emphasis added)).) This means, for instance, that a resident of one Ohio county might very well enjoy a greater right to legislate via initiative than a resident of another county.

Plaintiffs submit that a constitutional ballot access scheme must contain a bright line rule against substantive pre-election review of proposed measures by election officials and the judiciary. (Compl. ¶¶ 11, 107.) Otherwise, election officials have unfettered discretion to interfere with the people’s ability to exercise their right to direct democracy as secured by the Ohio Constitution. As discussed below, no Ohio ballot access scheme like the one challenged here has survived First Amendment scrutiny.²

It is important to emphasize that underlying Plaintiffs’ entire case is the importance of direct democracy as it relates to our system of governance and Plaintiffs’ fundamental, constitutional rights. In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003), the Supreme Court emphasized the importance of popular measures like initiatives and referenda:

In assessing the referendum as a “basic instrument of democratic government,” we have observed that “[p]rovisions for referendums demonstrate devotion to democracy,

² In fact, the Supreme Judicial Court of Maine has found that a similar ballot access scheme – vesting discretionary authority in election officials to determine the constitutionality of proposed measures pre-enactment – violated the First Amendment. *See Wyman v. Secretary of State*, 625 A.2d 307, 312 (Me. 1993) (“Because the petition process is protected by the first amendment and the Secretary has advanced no compelling interest in executive oversight of the content of the petition prior to its circulation for signature, his refusal to furnish the petition form based on the content of the proposed legislation impermissibly violated Wyman’s rights protected by the first amendment.”); *see also Herrington v. Cuevas*, 1997 WL 703392 * 9 (S.D.N.Y. 1997) (Sotomayor, J.) (reviewing New York’s law which allowed election clerks to decide whether a popular measure presented a proper subject and directing the parties to brief whether the law was content-based and subject to strict scrutiny).

not to bias, discrimination, or prejudice.” And our well established First Amendment admonition that “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” dovetails with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government.

Unfortunately, Ohio has deviated far from the guiding principles imposed by the Supreme Court in *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) – a case reviewing Ohio’s electoral scheme. The *Williams* Court explained “the interwoven strands of ‘liberty’ affected by ballot access restrictions”:

In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

Williams, 393 U.S., at 31 (also noting that “the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes”); *id.* at 41 (Harlan, J., concurring in the result) (“by denying the appellants any opportunity to participate in the procedure by which the President is selected, the State has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights”); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (“an election campaign is a means of disseminating ideas as well as attaining political office.... Overbroad restrictions on ballot access jeopardize this form of political expression.”).

In returning to the core values at stake, Plaintiffs also ask the Court to consider how interference with the initiative process directly impeads the right to vote. While no court has found that ballot access restrictions unconstitutionally interfere with core political speech as expressed by the act of voting, Plaintiffs submit that the connection between the exercise of direct democracy through initiative petitions and the exercise of the fundamental right to vote is

undeniable.³

I. Plaintiffs Have Stated Claims for Violation of the First Amendment.

Plaintiffs' Complaint contains five First Amendment based counts: facial and as-applied counts concerning both content-based restrictions and prior restraints (four counts total), and a count on assembly and petition rights.

In the first four counts, Plaintiffs allege that "Defendants' enforcement of Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3), as authoritatively construed by the Ohio Supreme Court, and of Ohio's ballot access scheme, which allows content-based, substantive pre-enactment review of proposed ballot measures by election officials and the judiciary," violates the First and Fourteenth Amendments, facially and as-applied. (Compl. ¶¶ 235, 241, 247, 253.) Plaintiffs further allege that they are severely burdened by Ohio's ballot

³ In *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296–97 (6th Cir. 1993), plaintiffs' claimed that Michigan's ballot access procedures denied them the right to vote, arguing that the act of signing a petition to get an initiative placed on the ballot is entitled to the same protection as voting. In considering the issue, the court noted: "The Supreme Court has held in a number of opinions that the right to vote is a fundamental right, *see, e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969); *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964); however, the plaintiffs do not cite to us nor does our research identify any decision of the Supreme Court or a lower federal court holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote." *See also Jones v. Husted*, No. 2:16-CV-438, 2016 WL 3453658, at *4 (S.D. Ohio June 20, 2016) ("As a general matter, Plaintiffs do not have a constitutional right for the initiative to appear on any ballot, far less any particular ballot."). Plaintiffs' argument in this case is different. Plaintiffs submit that the right to vote is implicated because Ohio's arbitrary and unconstitutional procedures employed to keep proposed measures off of the ballot deprive all voting residents of the right to vote on the proposed measure. Defendants' interference with the fundamental right to vote is compounded by the fact that Defendants are keeping proposed measures off the ballot based on their content. Limiting what measures a voter can vote on implicates and interferences with the fundamental right to vote. Plaintiffs' position is further supported by their argument that there is a fundamental right to local community self-government that includes the right to direct democracy. Under this right, the fact that there is, for instance, "no fundamental constitutional right to call a local referendum," *Taxpayers United for Assessment Cuts*, 994 F.2d at 296–97, is not dispositive. The right to vote on measures proposed by the people flows from the right to direct democracy.

access scheme, which allows content-based, substantive pre-enactment review of proposed ballot measures by election officials and the judiciary. And that such review constitutes unlawful content-based restriction and prior restraint that interferes with core political speech and petition for redress of grievances, violates voters' fundamental right to vote, and inhibits citizens from reforming or altering their current form of government. (Compl. ¶¶ 231-254.) In Count 5, Plaintiffs allege that they "are severely burdened by Ohio's ballot access scheme, which prevents their ability to associate for political change by allowing executive and judicial officials to veto their duly-qualified proposed charters, charter amendments, and ordinance initiatives from appearing on the ballot." (Compl. ¶ 258.) Plaintiffs' Complaint contains detailed factual allegations explaining how this is so. (Compl. ¶¶ 108-230.)

Lucas BOE makes no effort to distinguish between Plaintiffs' various First Amendment allegations. Lucas BOE then cites a number of cases for the general proposition that the First Amendment does not, itself, protect the right to make law. (MJOP at 10.) Such cases are inapposite because Plaintiffs do not make such an argument here. Rather, Plaintiffs' case is premised upon the fact that the state initiative process provides a uniquely provocative and effective method of spurring and hosting public debate on an issue of importance to the proponents of the proposed initiative. *See City of Cuyahoga Falls*, 538 U.S. at 196 (quotation *supra* at 7-8).

The process involved in proposing legislation by means of initiative involves core political speech, such that in the area of citizen initiative lawmaking "the importance of First Amendment protections is at its zenith" and the state's burden to justify restrictions on that process is "well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988) (overturning state's prohibition on using paid petition circulators). Thus, while the right to pass legislation through initiative or referendum is a state-created right not guaranteed or required by the U.S.

Constitution, if a state chooses to confer the right of initiative and referendum to its citizens, it is “obligated to do so in a manner consistent with the Constitution.” *Meyer*, 486 U.S. at 420; *see also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) (“[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution”); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (applying First Amendment to invalidate restrictions on circulation of initiatives); *Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F.3d 443, 446 (6th Cir. 2018) (applying First Amendment to Ohio’s single-subject requirement for initiatives).

Plaintiffs’ allegations require the Court to consider: specific provisions of Ohio’s election laws, application of those provisions by Ohio election officials, and the manner in which the Ohio judiciary interferes with the initiative process. Without a bright line rule against any pre-enactment review of a proposed initiative’s content by election officials or the judiciary, Ohio’s process violates core political rights and yields unconstitutionally inconsistent results. (Compl. ¶ 11.)

A. Plaintiffs Have Stated Facial and As-Applied Content-Based Challenges.

Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A) (3), as authoritatively construed by the Ohio Supreme Court, and Ohio’s ballot access scheme, which includes substantive pre-enactment judicial review, violates the First Amendment’s prohibition against content-based restrictions on core political speech. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const., Amend. 1. Under that Clause, a government, including a municipal government vested with state authority, “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Reed v. Town of Gilbert, Ariz.*,
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135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

In *Meyer v. Grant*, 486 U.S. 414, 422 (1988), the Court recognized that the state cannot restrict exercise of the initiative procedure so as to unduly burden First Amendment rights, concluding that petition circulation is “core political speech” for which First Amendment protection is “at its zenith.” See also *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186 (1999) (“[p]etition circulation ... is 'core political speech'”). Consequently, pre-election review of the substance of initiative proposals is subject to strict scrutiny.

Ohio’s election laws delegate to election officials’ discretion to make content-based decisions about which initiatives go on Ohio’s ballots. A law is content-based where it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A) (3) are content-based because they expressly permit Defendants to review the substance of proposed initiatives to determine such issues as whether the proposed initiative is within a county’s or municipality’s “authority to act” or “initiative power” or is “valid,” and whether the content and substance of the petition conforms with the requirements of the Ohio Constitution. Pre-enactment review by Ohio election officials and the Ohio judiciary relies on content because none of these determinations could be made without review and analysis of the measure’s content. Indeed, under Ohio’s ballot access scheme, election officials are rendering opinions about the law. Such legal decision-making is necessarily subject-based and content-based. See *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001) (upholding ruling in *Velasquez v. Legal Services Corp.*,
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164 F.3d 757, 769 (2d Cir. 1999), that legal argumentation is view-point based).

In contrast, content-neutral statutes involve concrete, objective standards that constrain the discretion of government officials and that “do not have the effect of suppressing, or greatly restricting access to, lawful speech.” *Morscott, Inc. v. City of Cleveland*, 781 F. Supp. 500, 503 (N.D. Ohio 1990). An example of a content neutral standard is Ohio Rev. Code § 3501.38 that contains technical requirements governing the form and processing of initiative petitions. Such technical requirements include the fact that each signer must be a registered elector, signatures must be affixed in ink, and the circulator must sign a statement under penalty of election falsification. (Compl. ¶¶ 63-64.) In contrast, the statutes Plaintiffs challenge are not content neutral – they do not involve concrete, objective standards that would limit officials’ discretion.

Lucas BOE argues that the fact that Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3) apply to all petitions makes them content-neutral. (MJOP at 11.) The absurd result of such reasoning would be that equal application of an unconstitutional law could somehow make it constitutional. Lucas BOE cites *Comm. To Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, 885 F.3d 443, 446-447 (6th Cir. 2018) for the general proposition that a ballot restriction is not content-based where it “applies to all petitions, irrespective of the substantive message the petition seeks to communicate.” That general proposition and the reasoning of *Ohio Ballot Board* do not apply to this case. First, the Ohio statutes at issue do not apply “irrespective of the substantive message the petition seeks to communicate.” Rather, they are applied *based* on the petition’s substantive message. Under Ohio’s ballot access scheme, election officials are afforded the unlawful discretion to review the content of a proposed measure, and to further engage in a complex legal analysis as to whether that measure would be constitutional, if enacted, all in advance of an election, a vote, and (possible) passage of the measure. (See, e.g., Compl. ¶ 137.) Second, in *Ohio Ballot Board*, the Court

considered the narrow question of whether Ohio’s single subject rule was constitutional. In doing so, the Court found that the single subject rule was content-neutral because it was cabined by a single, content-neutral, concrete standard -- that is whether the initiative contained a single subject. *Id.* at 448. The single subject rule is in stark contrast to Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3) which invite election officials, and the judiciary, to engage in highly subjective, content-based inquiries of proposed measures.⁴

Because the provisions of Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3) at issue do not contain workable or constitutionally sufficient standards for placement of proposed measures on the ballot, a facial challenge is appropriate. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 760 (1988). That said, Plaintiffs, in Count 2, have also made an as-applied challenge as to the Lucas BOE and all Defendants, and asserted facts in support. (Compl. ¶¶ 142-155.)⁵ Plaintiffs have identified specific instances in which Defendant Lucas BOE has acted arbitrarily and in violation of Plaintiffs’ constitutional rights in preventing the placement of proposed measures on the ballot or otherwise forcing Plaintiffs to engage in prolonged litigation with inadequate due process.

In sum, because Ohio’s ballot access scheme requires election officials and the judiciary to look to content, the burden is on Defendants to justify the law and their actions under strict

4 Lucas BOE also cites to *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002), presumably for the proposition that the Court should not apply the principles of *Meyer* and *Buckley* to the context of substantive, content based pre-enactment review. (MJOP at 11-12.) *MPP* addressed an entirely different issue – whether the legislature can withdraw a subject from the initiative process altogether. The *MPP* case, unlike here, did not involve pre-enactment review by state election officials or the judiciary that allows inquiry into the substance of proposed measures in order to make subjective determinations as to the qualification of measures for the ballot.

5 As the Supreme Court has recognized, the lack of objective standards blurs the line between facial and as-applied challenges, because the absence of express objective standards, makes it difficult to distinguish between an “illegitimate abuse of censorial power” and objective legitimate grounds for government officials’ actions. *See City of Lakewood*, 486 U.S. at 758 (“[T]he absence of express standards makes it difficult to distinguish, ‘as applied,’ between a licensor’s legitimate denial of a permit and its illegitimate abuse of censorial power.”).

scrutiny. Defendants must demonstrate that the law is absolutely necessary to achieve a compelling interest. As Plaintiffs will show, Defendants cannot meet that test. There is no compelling justification for allowing a handful of election officials to direct or determine the fate of a proposed measure supported by thousands of signatures with their own opinions as to the constitutionality of a measure. Nor is there a compelling justification to allow the state judiciary to issue an advisory opinion on a measure yet to be enacted.⁶

Because Plaintiffs have stated facial and as-applied challenges against Defendants for enforcing content-based restrictions under the First Amendment, Lucas BOE's motion as to Counts 1 and 2 should be denied.

B. Plaintiffs Have Stated Facial and As-Applied Prior Restraint Challenges.

Under the reasoning of *Meyer* and *Buckley* as discussed above, Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3), as authoritatively construed by the Ohio Supreme Court, and Ohio's ballot access scheme, which includes substantive, pre-enactment judicial review, violates the First Amendment's prohibition against prior restraint of core political speech. Proposed measures and the political campaigning around them are core political speech, placing proposed measures on the ballot and advocating for them is expressive activity, and Defendants' actions to restrict placement of proposed measures on the ballot – and

⁶ Alternatively, even if considered content-neutral for purposes of First Amendment review, the same alleged facts support claims against Defendants for enacting and implementing an unconstitutional ballot access scheme. Where “a constitutional challenge to an election regulation calls [upon the court] to resolve a dispute concerning . . . competing interests,” courts apply the *Anderson-Burdick* framework, “an analysis arising from the Supreme Court's holdings in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626–27 (6th Cir. 2016). While not presently at issue in light of the standard for review applicable to a motion for judgment on the pleadings, Plaintiffs point out that under the *Anderson–Burdick* framework, Ohio's “severe restrictions” on their constitutional rights could still survive only if “narrowly drawn to advance a state interest of compelling importance.” A determination as to whether Ohio's ballot access scheme is content-based is not dispositive of Plaintiffs' First Amendment claims, and certainly not grounds for granting Lucas BOE's motion for judgment on the pleadings.

thus cut-off as irrelevant the political discussions and campaigning that would result from a duly-qualified measure appearing on the ballot – is unlawful prior restraint.

The term “prior restraint” describes administrative and judicial orders that block expressive activity before it occurs. *Alexander v. United States*, 509 U.S. 544, 550 (1993). Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). Laws that impose a prior restraint on free speech have been disfavored by the courts as tantamount to censorship and thought control. See *Near v. Minnesota*, 283 U.S. 697, 713 (1931). “Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citations omitted); see also *City of Lakewood*, 486 U.S. at 757-60 (collecting cases).

Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A) (3) do not contain objective standards and thus the “danger [of prior restraint causing parties to censor their own speech] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.” *City of Lakewood*, 486 U.S. at 757-60. Ohio election officials are engaging in the exact conduct that the First Amendment forbids. Election officials are, without standards, determining who may speak – in the form of placing a proposed measure on the ballot. Election officials may unlawfully censor certain viewpoints, by determining that one measure is not “valid,” while finding that another measure is valid. Compounding the problem is the fact that the election officials’ substantive determination involves a complex legal analysis. A complex legal analysis is not amenable to objective standards. *Id.* at 763 (“we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who

may not be based upon the content of the speech or viewpoint of the speaker.” (citations omitted)). The result, as alleged in Plaintiffs’ Complaint, is an inconsistent and arbitrary application of Ohio election laws in violation of Plaintiffs’ constitutional rights. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1990) (“A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.” (citations and quotations omitted)).

In the *Schmitt* case (discussed *supra* at 6), the United States District Court for the Southern District of Ohio found a constitutional violation to the extent Ohio’s election laws do not provide adequate procedural safeguards. The allegations in Plaintiffs’ Complaint here go to an even more fundamental issue: Whether election officials and the judiciary can ever be given discretion to engage in any type of content-based review to keep a measure off of the ballot pre-enactment. Plaintiffs submit that the only constitutionally permissible answer is “No”.

Because Plaintiffs have stated facial and as-applied challenges against Defendants for enforcing prior restraint, Lucas BOE’s motion as to Counts 3 and 4 should be denied.

C. Plaintiffs Have Stated First Amendment Assembly and Petition Clause Constitutional Challenges.

Ohio Rev. Code §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A) (3), as authoritatively construed by the Ohio Supreme Court, and Ohio’s ballot access scheme, which includes substantive, pre-enactment judicial review prevents Plaintiffs’ ability to associate for political change and to petition for redress of grievances by allowing executive and judicial officials to veto their duly-qualified proposed charters, charter amendments, and ordinance initiatives from appearing on the ballot. Lucas BOE does not meaningfully address or otherwise oppose these claims in its motion to dismiss.

The Sixth Circuit, relying on Supreme Court case law, has held that regulations that severely burden ballot access violate the people's assembly right unless the regulation is narrowly tailored to achieve a compelling government purpose. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); additional citations omitted). The Court in *Libertarian Party* held that an Ohio statute that required minor parties to qualify their candidates months in advance of the primary election violated the people's assembly right because the early qualification requirements hindered minor party's "opportunity to garner voters and win the right to govern." *Id.* at 586. The court noted that:

The key factor in determining the level of scrutiny to apply is the importance of the associational right burdened. Restrictions that do not affect a political party's ability to perform its primary functions – organizing and developing, recruiting supporters, choosing a candidate, and voting for that candidate in a general election - have not been held to impose a severe burden.

Id. at 587. The court applied strict scrutiny because the early qualification

statutes at issue in this case do not merely affect the rights of the [plaintiffs] to associate with non-members or select certain candidates to be its standard-bearer. Certainly, both of these interests are implicated, but Ohio's regulations limit a far more important function of the political party – its ability to appear on the general election ballot.

Id. at 588. The state argued in defense of the ballot access regulations that the plaintiffs were still free to recruit new members and engage in political speech, even if the plaintiffs' political party did not have any candidates on the ballot. *See id.* at 591. The court appropriately found this argument unpersuasive, noting that

the rights left unimpeded by the Ohio regulations are not the ones most central to the goals of a political party. Recruiting members and engaging in political speech are important rights, but a political party's aims are far higher. The LPO does not aspire simply to assemble in public meeting places and engage in speech activities that further their beliefs. Certainly, this is a cherished First Amendment right and one that is jealously guarded. But the *goal* of a political party and its supporters is to govern.

Id. at 592. “The statutes at issue in this case affect the ability of a political party to appear on the ballot and thus to exercise its most fundamental of rights.” *Id.*

Here, Plaintiffs have sought and seek to put proposed charters, charter amendments, and ordinance initiatives on the ballot, but have been unable to do so because of Ohio’s ballot access regulations and Defendants’ actions. The *goal* of the initiative process is to put measures on the ballot, not merely to engage in the petitioning process. To qualify these measures, Plaintiffs have associated with others who share their policy objectives, and extensively canvassed their communities to gather the requisite number of qualifying signatures to secure ballot access. (Compl. ¶¶ 108-230). Thus, just like a political party, Plaintiffs have come together to achieve a particular goal that requires their measures appear on the ballot.

The Court should apply the reasoning of *Libertarian Party*. Notably, the Sixth Circuit ruled that requiring minor parties to qualify months before the primary was a severe burden on their fundamental right to associate. That regulation seems minimal compared to the regulations at issue in this case, which give executive and judicial officials the ability to veto duly-qualified initiatives from appearing on the ballot entirely. Preventing a duly-qualified measure from appearing on the ballot thwarts the goals of the measure’s proponents and all the people who signed the petitions, who associated together for the purpose of putting the measure on the ballot and having the opportunity “to exercise [their] most fundamental of rights.”

Plaintiffs have stated a claim for violation of their First Amendment rights to associate and to petition, and the Court should deny Defendants’ motion as to this claim. The burden lies on Defendants’ to demonstrate a compelling purpose in striking these measures from the ballot and showing that this ultimate infringement of the people’s fundamental right to associate is somehow narrowly tailored. Its motion fails even to try to do so.

II. Plaintiffs Have Stated a Fourteenth Amendment Substantive Due Process Claim.

Count 6 of Plaintiffs' Complaint alleges violation of the right of local community self-government pursuant to the substantive due process clause of the Fourteenth Amendment. (Compl. ¶¶ 261-270). Lucas BOE does not dispute that Plaintiffs have alleged all of the required elements for a substantive due process claim. Rather, Lucas BOE's argument is based on a misstatement as to the basis of Plaintiffs' claim, claiming only that it "is, in essence, the same as their First Amendment claim" (MJOP at 13.)

Plaintiffs recognize that substantive due process claims are generally disfavored where a more specific constitutional provision applies. Plaintiffs' substantive due process claim, however, is not the same as their First Amendment claims. To the contrary, Plaintiffs claim has an entirely distinct legal foundation – that is, the right of local community self-government. Plaintiffs assert that such a right is fundamental, and therefore, protected by the substantive due process clause. (Compl. ¶ 263); see *Marcum ex rel. C.V. v. Bd. of Educ. of Bloom-Carroll Local Sch. Dist.*, 727 F. Supp. 2d 657, 672–73 (S.D. Ohio 2010) ("The substantive component of the Due Process Clause protects 'fundamental rights otherwise not explicitly protected by the Bill of Rights' and serves 'as a limitation on official misconduct which, although not infringing on a fundamental right,' is so oppressive that it shocks the conscience." (quoting *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996))).

"Substantive due process, on the other hand, serves the goal of preventing "governmental power from being 'used for purposes of oppression,'" regardless of the fairness of the procedures used." *Howard v. Grinage*, 82 F.3d at 1349 (citations omitted); see also *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted). *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008), based on the fundamental right to vote, provides guidance to the Court on how to entertain a claim based on the fundamental unfairness of Ohio's ballot access scheme.

In *Brunner*, the Sixth Circuit recognized that fundamental unfairness may occur if a state uses non-uniform procedures that result in significant disenfranchisement and vote dilution. *Id.* at 478 (holding plaintiff’s “allegations, if true, could support a troubling picture of a system so devoid of standards and procedures as to violate substantive due process”); *see also Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635–37 (6th Cir. 2016), cert. denied, 137 S. Ct. 2265, 198 L. Ed. 2d 699 (2017) (“The Due Process Clause is implicated in ‘exceptional’ cases where a state’s voting system is ‘fundamentally unfair.’ *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010)” (quoting *League of Women Voters of Ohio*, 548 F.3d at 478)).

With regard to Count 6, the fundamental right at issue, is not, as in *Brunner*, the fundamental right to vote *per se*; rather, it is the fundamental right of local community self-government as asserted in Count 6 of Plaintiffs’ Complaint and summarized in paragraphs 88-94.⁷ Lucas BOE does not specifically address Plaintiffs’ argument in this regard. Indeed, no court has engaged in a substantive analysis as to whether there is an inherent, fundamental and constitutionally-based right held by the people to support the exercise of direct democracy.⁸

Lucas BOE did not separately address this claim in their Motion for Judgment on the Pleadings, and therefore this claim is not briefed before the Court in this response. If the Court considers this claim in jeopardy as a result of Lucas BOE’s motion, Plaintiffs request the opportunity to fully brief the issue.

⁷ Count 7, discussed below, is also based on the right of local community self-government.

⁸ While no court has engaged in an in depth legal analysis of the issue, a few courts, presented with arguments based on the right of local community self-government in different contexts, have summarily dismissed the idea, noting a lack of case precedent. *Penn. Gen. Energy Co. v. Grant Twp.*, 139 F. Supp. 3d 706 (2015); *SWEPI, LP v. Mora County, NM*, 81 F. Supp. 3d 1075 (2015). The issue of whether the people of Ohio have a right of local community self-government with regard to ballot initiatives is currently pending before the Ohio Court of Appeals, Fourth Appellate District, in *In re County Charter Proposal*, Ct. App. No. 18CA0030, Athens C.P. Ct. No. 17CI0145.

III. Plaintiffs Have Stated a Claim under the Ninth Amendment.

Count 7 of Plaintiffs' Complaint is based on the Ninth Amendment. The Ninth Amendment of the United States Constitution provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Plaintiffs allege that "[a]mong the implicit liberties preserved for the people and protected from government intrusion by the Ninth Amendment is the inherent and fundamental right of local, community self-government, including the exercise of that right as expressed through the exercise of direct democracy." See Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 935 (2008) ("Strict scrutiny is generally reserved for government actions that impinge upon protected rights. The text of the Ninth Amendment reminds us that maintaining an area of retained local autonomy is itself a right of the people.").

Plaintiffs recognize that courts have not generally recognized the Ninth Amendment as providing an independent cause of action. This case, however, is unique because, unlike in other cases where courts have not recognized a claim based on the Ninth Amendment, the right of local community self-government, as discussed above, is explicitly based on the retained rights by the people. As such, the Court should deny Lucas BOE's motion as to Count 7.

IV. Plaintiffs Have Stated a Claim for Violation of the Separation of Powers Doctrine Under Ohio Law.

Count 8 is based on Defendants' violation of the separation of powers doctrine. Under the separation of powers doctrine as articulated in Ohio law, "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981). The judiciary has both the power and the solemn duty to determine the constitutionality and validity of acts by other branches of the government and to ensure that the

boundaries between branches remain intact. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 462, 715 N.E.2d 1062 (1999).

Plaintiffs ask the Court to exercise supplemental jurisdiction over this claim under 28 U.S.C. § 1367. (Compl. ¶ 40.) Lucas BOE argues that Plaintiffs' claim is barred under the Eleventh Amendment because it is based on state law. (MJOP at 14-15.) However, none of the cases cited by Lucas BOE involved the separation of powers doctrine. The nature of Plaintiffs' claim is important because the separation of powers doctrine is less specific to state or federal law than it is a core tenant of our federal system of government, which relies on both vertical and horizontal separation of powers. In other words, the Eleventh Amendment's rationale for barring a federal court from considering state law claims does not apply.

As such, Lucas BOE's motion as to Count 8 should be denied. Alternatively, if the Court dismisses Count 8, it should note that it is done without prejudice to Plaintiffs filing the claim in state court.

Conclusion

The Court should deny Lucas BOE's Motion for Judgment on the Pleadings.

Respectfully submitted this Twenty-First Day of April, 2019.

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Certificate of Memorandum Length

Pursuant to Local Rule 7.1(f), this brief does not exceed 20 pages, as the Court recommended assigning this case to the standard track (ECF No. 12, at 3), and the case is still unassigned.

Dated: April 21, 2019.

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Certificate of Service

I certify that I electronically filed this document with the Clerk of the Court for the United States District Court for the Northern District of Ohio by using the Court's CM/ECF system on April 21, 2019.

The other parties are Filing Users and are served electronically by the Notice of Docket Activity.

Dated: April 21, 2019

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