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

Susan Beiersdorfer *et al.*,	No. 4:19-cv-00260
Plaintiffs,	The Honorable Benita Y. Pearson
v.	
Frank LaRose *et al.*,	*Oral Argument requested*
Defendants.	

PLAINTIFFS' OPPOSITION TO DEFENDANTS MAHONING COUNTY BOARD OF ELECTIONS MEMBERS DAVID BETRAS, MARK E. MUNROE, ROBERT WASKO, AND TRACEY S. WINBUSH'S MOTION TO DISMISS

May 24, 2019

Table of Contents

Table of Authorities....................iii

SUMMARY OF ARGUMENT....................1

BACKGROUND....................1

ARGUMENT....................6

I. This Court Has Subject Matter Jurisdiction....................6

A. Plaintiffs Have Standing to Pursue Facial and As-Applied Claims Against Mahoning County Defendants....................6

B. Plaintiffs' Claims Are Ripe and Not Moot....................10

II. Plaintiffs As-Applied Claims Against Mahoning County Defendants Do Not Constitute a Collateral Attack on Ohio Supreme Court Decisions....................14

A. Previous Ohio Supreme Court Decisions Do Not Have Preclusive Effect....................14

B. The *Rooker-Feldman* Doctrine Does Not Apply....................16

III. The *Pullman* Abstention Doctrine Does Not Apply....................18

IV. Plaintiffs' Claim for Violation of the Separation of Powers Doctrine (Count 8) is Not Barred by the Eleventh Amendment and the Doctrine of Sovereign Immunity. 19

V. Plaintiffs Have Stated Claims Against Mahoning County Defendants....................20

CONCLUSION....................20

Certificate of Memorandum Length....................22

Certificate of Service....................23

Table of Authorities

Cases

Am. Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992)..7

Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289 (1979)................7-8, 10-11, 19

Carras v. Williams, 807 F.2d 1286 (6th Cir. 1986)..13

Exxon Mobil Corp v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005)..............................17

Flak, see *State ex rel. Flak v. Betras*

Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe,
578 F.3d 753 (8th Cir. 2009)..15

Green Party of Tennessee v. Hargett, 767 F.3d 533 (6th Cir. 2014)...................................9

Hood v. Keller, 341 F.3d 593 (6th Cir. 2003)...18

Jones v. Coleman, 848 F.3d 744 (6th Cir. 2017)..18

Khumprakob, see *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*

Kiser v. Reitz, 765 F.3d 601 (6th Cir. 2014)..6-8, 10-11

Kumprakob, see *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*

Libertarian Party of Kentucky v. Grimes, 194 F. Supp. 3d 568 (E.D. Ky. 2016)................9

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)..6

McCormick v. Braverman, 451 F.3d 382 (6th Cir. 2006)..17

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005)...15

Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984)...................................15

Miller v. Blackwell, 348 F. Supp. 2d 916 (S.D. Ohio 2004)...9

Miller v. Brown, 462 F.3d 312 (4th Cir. 2006)...8

Nat'l Rifle Ass'n of Am. v. Magaw, 132 F.3d 272 (6th Cir. 1997)................................10, 12

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995).................8

Nye v. Ohio Bd. of Examiners of Architects,
2006-Ohio-948, 165 Ohio App. 3d 502, 847 N.E.2d 46...14

O'Nesti v. DeBartolo Realty Corp.,
2007-Ohio-1102, 113 Ohio St. 3d 59, 862 N.E.2d 803..15

Pic-A-State Pa., Inc. v. Reno, 76 F.3d 1294 (3d Cir. 1996)..11

Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)..................13

Speer v. City of Oregon, 847 F.2d 310 (6th Cir. 1988)..13

State ex rel. Abernathy v. Lucas Cty. Bd. of Elections, 2019-Ohio-201............................13

State ex rel. BSW Dev. Group v. Dayton, 83 Ohio St.3d 338, 699 N.E.2d 1271 (1998)....16

State ex rel. Flak v. Betras,
152 Ohio St.3d 244, 95 N.E.3d 329, 2017-Ohio-8109.....................................4, 14, 16-17

State ex rel. Jacquemin v. Union Cty. Bd. of Elections,
147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759..14

State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections,
2018-Ohio-1602, 153 Ohio St. 3d 581, 583, 109 N.E.3d 1184...............................5, 14-17

State ex rel. Maxcy v. Saferin, 2018-Ohio-4035...13, 16

State ex rel. Waters v. Spaeth, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452..........14

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)....................10

United Steelworkers, Local 2116 v. Cyclops Corp., 860 F.2d 189 (6th Cir. 1988)............12

VanHarken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997)..18

Statutes

28 U.S.C. § 1738..14

Ohio Rev. Code § 307.95..1

Ohio Rev. Code § 3501.11..1

Ohio Rev. Code § 3501.38...1, 19

Ohio Rev. Code § 3501.39..1

Ohio Rev. Code § 3503.24..9

Plaintiffs hereby oppose Defendants David Betras, Mark E. Munroe, Robert Wasko, and Tracey S. Winbush's Motion to Dismiss and Memorandum in Support. (ECF Nos. 22-23.)

SUMMARY OF ARGUMENT

Plaintiffs sue Defendants David Betras, Mark E. Munroe, Robert Wasko, and Tracey S. Winbush in their official capacities as members of the Mahoning County Board of Elections (hereinafter, "Mahoning County Defendants"). Mahoning County Defendants' Memorandum in Support of Motion to Dismiss generally addresses only the "as applied" allegations against Mahoning County Defendants, and otherwise incorporates the arguments made by the Ohio Attorney General on behalf of the Defendant Ohio Secretary of State as to Plaintiffs' facial challenges. (ECF No. 23, Memorandum in Support of Motion to Dismiss (hereinafter "Memo"), at 2.) Plaintiffs, accordingly, incorporate their Opposition to Defendant Ohio Secretary of State's Motion to Dismiss and in this Opposition address only the specific arguments made by the Mahoning County Defendants.

This Court has subject matter jurisdiction. The Eleventh Amendment and sovereign immunity, and preclusion principles, do not apply to prevent this Court from addressing the important constitutional issues raised by this Complaint. Plaintiffs have stated claims against Mahoning County Defendants, and Defendants' Motion to Dismiss should be denied.

BACKGROUND

In this case of first impression in the Sixth Circuit, 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. Plaintiffs are residents of Ohio who have suffered and 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.)

Two Plaintiffs are Mahoning County residents who, having repeatedly attempted to place measures on the ballot, suffer from violations of their constitutional rights. Plaintiff Susan Beiersdorfer resides in Youngstown, Mahoning County, Ohio. Plaintiff Beiersdorfer has been since 2013, and continues to be, involved in proposed city charter amendment initiatives by such actions as collecting signatures, serving on petition committees, and participating in lawsuits to challenge the unlawful actions of state election officials. (Compl. ¶ 14.) Plaintiff Dario Hunter resides in Youngstown, Mahoning County, Ohio. Plaintiff Hunter has been since 2016, and continues to be, actively involved in proposed city charter amendment initiatives by such actions as collecting signatures, participating in campaigns, and serving on petition committees. (*Id.*, ¶ 15.)

Paragraphs 108-130 of the Complaint detail Plaintiffs' repeated efforts to place proposed charter amendments on the ballot only to face "repeated unconstitutional review by election officials and arbitrary and inconsistent results by both election officials and the Ohio courts." (Compl. ¶ 110.) Pre-enactment litigation results in unlawful content-based review of proposed charter amendments and imposes prior restraints on initiative proponents' free speech rights. (Compl. ¶ 122.) It is only by creating a bright line rule which eliminates all substantive, content-based review that the right to initiative will be consistently safeguarded for all Ohioans. (Compl. ¶ 119.)

In 2011, citizens formed the grassroots organization that became Frackfree Mahoning Valley, of which Plaintiffs Beiersdorfer and Hunter are members. (Compl. ¶ 108.) Frackfree Mahoning Valley is a group of residents who came together out of concern for their community

and environment. (*Id.*) Its mission is to protect the health and safety of the citizens of Youngstown, Ohio by amending the home rule city charter with a Citizens' Bill of Rights to protect drinking water, homes and air quality in order to put permanent protections in for public health and safety so citizens can protect their drinking water, their air and their land. (*Id.*) Plaintiffs Beiersdorfer and Hunter, and other residents who are part of Frackfree Mahoning Valley, have attempted to exercise the right to initiative by preparing and collecting signatures for proposed amendments to the Youngstown Municipal Charter. (Compl. ¶ 109.) The proposed charter amendments have addressed such issues as community rights, a ban on horizontal hydraulic fracturing (fracking) for oil and gas, the right to clean water, and the right to free and fair elections. (*Id.*) As a result of unconstitutional pre-election review, members of Frackfree Mahoning Valley have been forced to file lawsuits in state court challenging election officials' actions several times since 2013. (Compl. ¶ 111.) Plaintiffs Beiersdorfer and Hunter have each been involved in these lawsuits. (*Id.*)

In 2017, Plaintiffs Beiersdorfer and Hunter, along with other members of the petition committee, were again forced to file lawsuits challenging Defendant Mahoning BOE's unlawful pre-election review of the Youngstown Drinking Water Protection Bill of Rights and the People's Bill of Rights for Fair Elections and Access to Local Government. (Compl. ¶ 112.) Defendant Mahoning BOE unlawfully reviewed the substance of the proposed charter amendments and concluded that they exceeded Youngstown's legislative power by creating new cause of actions, which was only one portion of the proposed charter amendment. (Compl. ¶ 113.) In refusing to place the proposed initiatives on the ballot, the Mahoning BOE relied on the election law amendments made by House Bill 463. (Compl. ¶ 114.) Plaintiffs Beiersdorfer and Hunter participated in the ensuing mandamus action in state court challenging the Mahoning BOE's unlawful pre-election review of the Youngstown Drinking Water Protection Bill of Rights and the

Drinking Water Protection Bill of Rights, and the BOE's decision to keep these proposed measures off the ballot. (Compl. ¶ 115.) In *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 95 N.E.3d 329, 2017-Ohio-8109, a 4-3 ruling, the petition committee lost at the Ohio Supreme Court, because the court deferred to Defendant Mahoning BOE's substantive review of the proposed charter amendments and upheld its decisions under an abuse of discretion standard of review. (Compl. ¶ 116.) In contrast, the Ohio Supreme Court reached the opposite result for a substantially similar ballot initiative advanced that same year in the City of Bowling Green. (Compl. ¶ 117.) In that case, the Wood County BOE voted to place a bill of rights with similar language on the ballot, unlike the Mahoning BOE which voted to keep the measure off the ballot. (*Id.*) Another party challenged the board of election's determination, but the Ohio Supreme Court upheld it, largely because it afforded deference to the board of election's decision. (*Id.*) As a result, the people in Bowling Green enjoyed a greater right to initiative than the people in Youngstown. (Compl. ¶ 118.)

In the few instances in which Plaintiffs as proponents of proposed charter amendments have succeeded in getting a court order requiring placement of the proposed initiative on the ballot, their right to initiative has still been compromised. (Compl. ¶ 120.) The broad discretion afforded by unlawful content-based review results in arbitrary and inconsistent criteria applied by the Mahoning BOE in reviewing proposed charter amendments. (Compl. ¶ 121.) Initiative proponents are subjected to an inadequate and unfair process, as part of which, even after spending hundreds of hours gathering signatures, whether a measure will be placed on the ballot is entirely unpredictable. (*Id.*) Even in the rare circumstances where initiative proponents ultimately prevail in mandamus actions, the expense and delay as a result of pre-enactment litigation interferes with direct democracy, political speech, and ballot access. (Compl. ¶ 122.)

On April 24, 2018, for instance, while the petition committee ultimately prevailed in its

mandamus action, the Ohio Supreme Court did not order placement of the charter amendment onto the ballot until just two weeks before the election. *See State ex rel. Khumprakob v. Mahoning County Board of Elections*, 2018-Ohio-1602, 2018-0404. (Compl. ¶ 123.) By that time, election officials had already printed thousands of ballots without the proposed charter amendment on them. (Compl. ¶ 123.) Nor did initiative proponents have sufficient time to campaign against heavily funded opposition interests. (*Id.*) The measure lost by a narrow margin, 3,649 to 2,928. (*Id.*) The April 2018 scenario illustrates the detrimental impact that occurs when substantive pre-enactment review by election officials necessitates court action. (Compl. ¶ 124.) The resulting delay and expense effectively deprives Plaintiffs of their right to meaningful ballot access. (*Id.*) The same problematic delay also occurs with any type of content-based review by the judiciary. (Compl. ¶ 125.)

Later in 2018, Plaintiff Beiersdorfer again served on the petition committee for the proposed Drinking Water Protection Bill of Rights. (Compl. ¶ 126.) Plaintiffs Beiersdorfer and Hunter both again collected signatures for this proposed charter amendment that contained the exact same language as the April 2018 measure. (*Id.*) Plaintiffs spent a significant amount of time and resources. (*Id.*) The BOE waited until nearly the last possible day to certify it for placement on the ballot. (Compl. ¶ 127.) The group was successful in placing the proposed charter amendment on the November 2018 ballot only because of the court case they had fought and won earlier that year. (*Id.*)

Plaintiffs realize that any future initiatives are highly unlikely to be placed on the ballot, particularly without expending significant resources to defend them. At best, it is highly uncertain whether a future initiative will be placed on the ballot because there are no consistent rules or processes. (Compl. ¶ 128.)

ARGUMENT

I. This Court Has Subject Matter Jurisdiction

A. Plaintiffs Have Standing to Pursue Facial and As-Applied Claims Against Mahoning County Defendants.

To establish standing a plaintiff must allege three elements: (1) that they have suffered an "injury in fact," (2) that there is a "causal connection between the injury and the conduct complained of," and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted)).

The Mahoning County Plaintiffs satisfy all three elements of standing. First, Plaintiffs have suffered a concrete and particularized injury. Plaintiffs do not, as Defendants suggest, make a generalized grievance (Memo at 5), but rather, spend twelve paragraphs describing how they have been harmed by Ohio's unlawful ballot access scheme and how they continue to be harmed in light of the significant expenditure of resources necessary to challenge Defendants' unlawful actions, and since any future initiatives are highly unlikely to be placed on the ballot. As Plaintiffs allege, Defendants' past illegal conduct continues to cause present adverse effects. Such present adverse effects are sufficient to show a concrete and particularized injury.

By unlawfully keeping proposed measures off the ballot, Defendants' actions continue to have a severe deterrent effect upon Plaintiffs. Plaintiffs are deterred, and their First Amendment core political speech rights chilled, when faced with the very real and immediate need to put significant resources toward gathering signatures for proposed measures to only then be forced to put even more resources toward defending proposed ballot measures in court in an effort to get them on the ballot. Defendants have continuously subjected Plaintiffs to an unfair, arbitrary, and

unconstitutional process designed to deprive them of ballot access. Having endured over six years of such conduct, Plaintiffs have every reason to believe that such unlawful conduct will continue absent court intervention. *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992) ("whether plaintiffs have standing to challenge the Act's post-conviction use forfeiture provisions depends on how likely it is that the government will attempt to use these provisions against them —that is, on the threat of enforcement").

This is not a case where it is difficult to determine whether Defendants *will* continue to engage in unlawful substantive review under Ohio's ballot access scheme. Defendants have done so every single time they have had the opportunity. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979) (union faced "a credible threat" of prosecution because its members inevitably would violate the statute as the union interpreted it.); *Kiser v. Reitz*, 765 F.3d 601, 608 (6th Cir. 2014) ("Because the Board has not yet enforced its regulations in a disciplinary action against Kiser, he cannot demonstrate past injury. However, Kiser has alleged a credible threat of future prosecution sufficient to demonstrate that he is suffering an injury in fact.").

The Supreme Court's opinion in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 301 (1979) is directly on point. In *Babbitt*, the United Farmworkers National Union ("UFW") and individual farmworkers challenged the constitutionality of provisions in the Arizona Agricultural Employment Act regulating procedures for the election of employee bargaining representatives. Plaintiffs brought constitutional objections on first amendment freedom of association grounds against statutory provisions which allegedly (1) prolonged the election process beyond seasonal employment peaks, by which time many agricultural employees had dispersed, and, (2) unduly restricted the class of employees eligible to vote. *Id.* at 294. In *Babbit*, the court found that plaintiffs had standing to challenge election procedures even though (unlike the Plaintiffs in this case) they had not invoked the election procedures in the past nor expressed

any intention of doing so in the future. *Id.* at 299. The Court explained that plaintiff-appellees did not need to participate in an election since it would not assist its "resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all." *Id.* at 300-301. The Court's explanation as to why plaintiffs-appellees had standing to challenge the election procedures applies with even greater force in this case:

> Though waiting until appellees invoke unsuccessfully the statutory election procedures would remove any doubt about the existence of concrete injury resulting from application of the election provision, little could be done to remedy the injury incurred in the particular election. Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment. *Justiciability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election*. There is value in adjudicating election challenges notwithstanding the lapse of a particular election because the construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated *before* an election is held.

Id. (first emphasis added) (citations and quotations omitted). Circuit courts of appeals have similarly found that plaintiffs had standing to challenge election procedures without needing to be in the midst of a campaign or election. *See Miller v. Brown*, 462 F.3d 312, 317–18 (4th Cir. 2006) ("Because campaign planning decisions have to be made months, or even years, in advance of the election to be effective, the plaintiffs' alleged injuries are actual and threatened."); *New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1500–01 (10th Cir. 1995) (finding injury from the mere existence of a New Mexico statute relating to campaign expenditures that caused congressman to engage in fundraising differently than he otherwise would have, even though the congressman had not yet announced his intention to run for office). There is also no doubt that Plaintiffs are subject to a "credible threat of prosecution" under Ohio's ballot access scheme. *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014) ("A threat of future enforcement may be "credible" when the same conduct has drawn enforcement actions or threats of enforcement in the

past."); *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) ("Because the 2.5% signature requirement directly affects the plaintiffs' ability to associate and campaign for political office, they maintain standing to challenge Tennessee's new ballot-access scheme [regardless of qualifying for ballot access in an upcoming election]."). Plaintiffs, therefore, who are most certainly experiencing the adverse effects of Defendants' actions, satisfy the first prong of the standing inquiry.

For similar reasons, the second element for standing is also satisfied. The injury suffered by Mahoning County Plaintiffs relates to the conduct of Mahoning County Defendants. Mahoning County Defendants argue that "there is no plausible scenario" in which they are responsible for the injury to Plaintiffs because they are simply following "state election law as interpreted by the Ohio Secretary of State, and applicable case law." (Memo at 5.) The irony here is that Defendants' argument is premised on the erroneous idea that Ohio election statutes and case law contains clear, objective standards that can simply be followed, with no subjective discretion vested in election officials, such as members of the Mahoning County Board of Elections. Yet, the exact opposite is true, and that unlawful discretion vested in, *and exercised by*, election officials is at the heart of Plaintiffs' Complaint. *Miller v. Blackwell*, 348 F. Supp. 2d 916, 920 (S.D. Ohio 2004), held:

> Plaintiff Voters have standing to bring this case against Defendant Blackwell because he has issued a directive to the County Boards of Elections to issue notice and conduct hearings in a manner that implicates and likely infringes upon their rights to vote and their rights to due process. By the same token, Plaintiff Voters have standing to bring this case against Defendant County Boards of Elections because they are the entities implementing the procedures that likely infringe upon Plaintiff Voters' constitutional rights. *See* Ohio Rev. Code § 3503.24.

See also Libertarian Party of Kentucky v. Grimes, 194 F. Supp. 3d 568, 573–74 (E.D. Ky. 2016) (injury fairly traceable to defendant election officials who were tasked with administering election law). Mahoning County Defendants play a key role in applying Ohio's election laws in an unconstitutional manner, thereby violating Plaintiffs' constitutional rights. The fact that the

election laws themselves are unconstitutional does not insulate Defendants from liability. Moreover, even if the election laws themselves were not unconstitutional, Plaintiffs allege that Defendants enforce and apply them in an unconstitutional manner. (Compl. ¶¶ 237-242, 249-254.) Indeed, the threatened enforcement of Ohio's election laws hinders Plaintiffs' exercise of their core political speech rights. *See Kiser v. Reitz*, 765 F.3d 601, 610 (6th Cir. 2014) ("He has also alleged a causal connection between his injury and the allegedly unconstitutional regulations—it is the threatened enforcement of the regulations that chills his truthful advertisement of his services."). Defendants' act of engaging in content-based, substantive pre-enactment review of proposed measures injures Plaintiffs, and the causation element is satisfied.

Finally, Plaintiffs satisfy the third element – a favorable decision will redress their injury. As supported by the U.S. Supreme Court's *Babbit* decision and the Circuit Court of Appeals case law discussed above, Plaintiffs do not need to have an active ballot measure petition for their injuries to be redressed. Defendants' argument would require Plaintiffs to continuously participate in Ohio's ballot access scheme, despite its unconstitutionality, and to then file a court action, and attempt to obtain a result, in time for an upcoming election. *Babbit* holds the exact opposite. The relief sought by Plaintiffs will redress their injuries because it will allow them to advance proposed measures free from unconstitutional constraints. A bright line rule will eliminate Mahoning County Defendants' ability to engage in substantive, content-based review and will ensure that measures reach the ballot before any unconstitutional pre-enactment review.

B. Plaintiffs' Claims Are Ripe and Not Moot.

Plaintiffs' claims are ripe for the same reasons that they have alleged an injury in fact. The Supreme Court has stated that the basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) (citing *Thomas v. Union Carbide*

Agricultural Products Co., 473 U.S. 568, 580 (1985)). The disagreement, here, is not abstract; rather, it is concretely defined by Plaintiffs' multiple years of interaction with Ohio's ballot access scheme.

As the *Babbitt* court held, ripeness depends less on "past injury" than on "the prospect" of this legal issue's "occurrence in an impending or future election." *Id.* at 300 n. 12. In *Babbitt*, because plaintiffs believed that the challenged procedures made their participation in the election process futile, they completely refused to participate in the election. *Id.* at 300. The *Babbitt* court rejected the argument that plaintiffs' claims were not ripe due to their failure to participate. Writing for a unanimous court, Justice White declared:

> [Plaintiffs] admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future. But, as we see it, appellees' reluctance in this respect does not defeat the justiciability of their challenge in view of the nature of their claim.

Id. at 299. As the Court explained,

> [t]he basic inquiry in determining ripeness is whether the "conflicting contentions of the parties ... present a real substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."

Id. at 298 (citations omitted). *See also Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) ("In the context of a free-speech overbreadth challenge like this one, [however,] a relaxed ripeness standard applies to steer clear of the risk that the law 'may cause others not before the court to refrain from constitutionally protected speech or protection.") (quotes and citations omitted). *Cf. Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1299 (3d Cir. 1996) ("courts have found sufficient adversity between parties to create a justiciable controversy when suit is brought by the only plaintiff subject to regulation by an enactment.").

Here, as in *Babbitt*, there is nothing "hypothetical or abstract" about the dispute between the parties. Rather, the years Plaintiffs have spent introducing proposed ballot measures only to be

confronted with arbitrary and inconsistent results by Defendant election officials and the Ohio judiciary serves to clearly define the issues while giving light to the magnitude of the problem. Defendants cite *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997) for factors courts consider in pre-enforcement review of statutes. (Memo at 6.)[1] Because Defendants have, in fact, enforced Ohio's unlawful ballot access scheme against Plaintiffs for many years, this case is unlike one in which the plaintiff challenges a statute that has never before been enforced against him. Nevertheless, even if the factors relevant to pre-enforcement review were to apply, each factor weighs in Plaintiffs' favor. As the *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997) court observed: "courts have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a statute." That is precisely the case here. Plaintiffs Beiersdorfer and Hunter, consistent ballot measure proponents, are subject to Ohio's unlawful regulatory burdens.

First, Plaintiffs will continue to suffer hardship if court review is denied. In arguing this is not the case, Defendants point to a single instance in which Plaintiffs were finally able to place a proposed measure on the ballot without election officials exercising their unlawful pre-enactment review because Plaintiffs had already prevailed in a court action involving an identical measure earlier that year. (Memo at 7.) This, of course, is not the bright line rule remedy that Plaintiffs

1 *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997):

> This court has stated that ripeness requires us to weigh several factors in deciding whether to address the issues presented for review. *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir.1988). We must address the hardship to the parties if judicial relief is denied at the pre-enforcement stage in the proceedings. Id. at 195. We must examine the "likelihood that the harm alleged by plaintiffs will ever come to pass." *Id.* at 194. And we must consider whether the case is fit for judicial resolution at the pre-enforcement stage, which requires a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims. *Id.* at 195.

seek. Nor does the Ohio Supreme Court's decision in *State ex rel. Maxcy v. Saferin*, Ohio Sup. Ct. 18-1242, 2018 Ohio LEXIS 2362, ¶ 19 (2018) remedy Plaintiffs' grievances. While the *Maxcy* court made clear that – with regard to proposed municipal charter amendments only – the board simply fulfills a "ministerial" role in placing the proposal on the ballot once the relevant legislative authority issues the required ordinance, a few months later, the Ohio Supreme Court reaffirmed this holding but left open the possibility of what would amount to unconstitutional, substantive review of proposed measures by the *municipal legislative body*, as opposed to the board of elections. *State ex rel. Abernathy v. Lucas Cty. Bd. of Elections*, 2019-Ohio-201. The relief sought in this case is much broader, and on different constitutional grounds, than afforded by these recent Ohio Supreme Court election cases arising in mandamus.

Second, as discussed above, Defendants' unlawful actions continue to harm Plaintiffs by creating significant hurdles to ballot access. Third, the factual record, which includes years of Plaintiffs' interaction with Ohio's ballot access scheme, is more than sufficiently developed to adjudicate the claims.

Plaintiffs' claims are, therefore, ripe and, for these same reasons, Plaintiffs' claims are not moot.[2]

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2 Defendants cite *Speer v. City of Oregon*, 847 F.2d 310, 311 (6th Cir. 1988) (Memo at 8); however, that case is inapposite, and in fact, illustrates why the mootness doctrine does not apply. In that case, the plaintiff sought specific relief as to a particular election – for her name to be placed on the ballot. Plaintiffs, here, seek a bright line rule applicable to all proposed ballot measures for all elections. They do not seek specific relief as to a particular election. The *Speer* Court said:

> "Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986). In the instant case, plaintiff sought to have her name placed on the ballot for an election that occurred in September 1987. If we cannot now effect the requested relief, any opinion that this court might render on the underlying dispute would be merely advisory, for plaintiff may no longer have any legally cognizable interest in the outcome. *See Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969).

II. Plaintiffs As-Applied Claims Against Mahoning County Defendants Do Not Constitute a Collateral Attack on Ohio Supreme Court Decisions

A. Previous Ohio Supreme Court Decisions Do Not Have Preclusive Effect.

Defendants argue that the Ohio Supreme Court's decisions in *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 95 N.E.3d 329, 2017-Ohio-8109 and *State ex rel. Khumprakob v. Mahoning County Board of Elections*, 2018-Ohio-1602, 2018-0404 have preclusive effect as to Plaintiffs' claims in this case and invoke 28 U.S.C. § 1738, arguing that the Ohio Supreme Court opinions are entitled to full faith and credit. (Memo at 9.) Defendants' arguments are not well taken.

First, both *Flak* and *Khumprakob* arose in the mandamus context. To be entitled to a writ of mandamus, a relator must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13. When reviewing a decision of a county board of elections, the standard is whether the board engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions. *State ex rel. Jacquemin v. Union Cty. Bd. of Elections*, 147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759, ¶ 9. The present case calls for an entirely different standard of review, rendering it impossible for these decisions to have any preclusive effect since Plaintiffs did not have a full and fair opportunity to litigate.[3]

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3 To the extent Defendants invoke issue preclusion (collateral estoppel), that doctrine does not apply for similar reasons – Plaintiffs did not have an adequate opportunity to obtain a full and fair adjudication in the mandamus proceedings. *See Nye v. Ohio Bd. of Examiners of Architects*, 2006-Ohio-948, ¶ 20, 165 Ohio App. 3d 502, 509–10, 847 N.E.2d 46, 51–52 ("collateral estoppel will not bar the relitigation of an otherwise precluded issue if "[t]here is a clear and convincing need for a new determination of the issue * * * because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or * * * because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.") (citation omitted).

Further, the claims in this case are much broader than the subject matter of *Flak* or *Kumprakob*. *See O'Nesti v. DeBartolo Realty Corp.*, 2007-Ohio-1102, ¶ 6, 113 Ohio St. 3d 59, 61, 862 N.E.2d 803 ("Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action.").[4] Those cases challenged Mahoning Board of Election officials' decisions to keep particular proposed measures off the ballot. This case challenges the constitutionality of Ohio's entire ballot access scheme for measures proposed via citizen petition. Plaintiffs could not have brought such claims in the narrow context of an election mandamus proceeding pertaining to a particular measure and a particular election.

Significantly, the preclusion doctrines do not apply to an issue the court did not reach or where the finding was not essential to a judgment or was mere *dicta*. *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005) (Under Ohio law, issue preclusion did not bar former police officer from pursuing civil rights claim that his Fifth Amendment *Garrity* rights were violated when his compelled statements from second interview in departmental investigation into misuse of police scanners were used to prosecute him for perjury and obstruction, notwithstanding state appellate court's additional finding, in vacating officer's convictions on basis that use of statements violated department's contractual grant of immunity, that use of statements did not violate his Fifth Amendment *Garrity* rights, where latter finding was not essential to judgment and was mere *dicta*.).[5]

4 Federal courts look to state law to determine the preclusive effect of a state court judgment, so long as the requirements of due process are met. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) ("federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

5 *See also Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753 (8th Cir. 2009) (Arkansas doctrine of claim preclusion did not bar claim in federal action raising Fourteenth Amendment challenge to Arkansas statute requiring school districts with fewer than 350 students to be annexed by another district, although Arkansas Supreme Court had addressed constitutionality of the statute in prior state action, where

It is impossible for *Flak* to have any preclusive effect as to the claims or issues before the Court in this case because the Ohio Supreme Court expressly declined to reach these issues. *State ex rel. Flak v. Betras*, 2017-Ohio-8109, 152 Ohio St. 3d 244, 248, 95 N.E.3d 329, 333, *abrogated by State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035 ("The dissenting opinion not only concludes that the BOE violated a clear legal duty but also would declare the recently enacted 2016 Sub.H.B. No. 463 ("H.B. 463"), effective April 6, 2017, unconstitutional. But we do not reach constitutional issues unless it is necessary to do so. *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 345, 699 N.E.2d 1271 (1998). Adherence to this principle seems particularly appropriate in this expedited election matter, with its short time frame for consideration, limited briefing, and lack of participation by the state, see R.C. 2721.12(A). Because the matter may be properly resolved under our pre-H.B. 463 caselaw, *we leave consideration of the constitutionality of the new enactment for another day*." (emphasis added)).

Similarly, in *Khumprakob,* the Ohio Supreme Court rested its decision on the narrow determination that "the board abused its discretion in finding that the measure exceeds Youngstown's legislative power." *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 2018-Ohio-1602, 153 Ohio St. 3d 581, 583, 109 N.E.3d 1184, 1186. The court did not reach any of the federal constitutional issues presented in this case.

For these reasons, *Flak* and *Khumprakob* do not have preclusive effect and the full faith and credit doctrine does not apply.

B. The *Rooker-Feldman* Doctrine Does Not Apply.

The *Rooker-Feldman* doctrine may apply where a party essentially invites a federal court

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overriding question in the state litigation was whether the state was in compliance with its obligation to provide an adequate and substantially equal education under the Arkansas Constitution, and Supreme Court declined to consider the constitutionality of the statute under the Fourteenth Amendment in that action).

to act as an appellate court in reviewing a prior state court judgment. Key to application of the *Rooker-Feldman* doctrine is that the "losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." *Exxon Mobil Corp v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005).

The *Rooker-Feldman* doctrine does not apply because Plaintiffs are not asking for this Court to review the Ohio Supreme Court's decision in *Flak* or *Khumprakob* or in any other Ohio case. This case is similar to *McCormick v. Braverman*, 451 F.3d 382, 392 (6th Cir. 2006) in which the Court rejected application of the *Rooker-Feldman* doctrine because plaintiff was not claiming "injuries caused by the state court judgments" *Id.* (citation and quotations omitted). The Court noted how the plaintiff:

> does not claim that the state court judgments, with respect to Mary's divorce and to the order of receivership, in and of themselves violate the federal Constitution or federal law, unlike the plaintiffs in *Rooker* and in *Feldman*. Instead, Plaintiff claims that certain Defendants acted illegally and that a state statute is unconstitutionally vague and overbroad.

Here, likewise, Plaintiffs do not complain of injury caused by any particular state court judgment or ask the court to review the particulars of any of these decisions. Rather, Plaintiffs, as Defendants note (Memo at 11-12), challenge the Ohio state judiciary's overall role in Ohio's ballot access scheme, alleging, among other things, that Ohio's ballot access scheme enables pre-enactment judicial review in violation of the First Amendment, and the right of local community self-government. Plaintiffs do not challenge each individual state court decision. Discussion of particular state court decisions serves only to provide context as to the unlawful effect of pre-enactment judicial review on the exercise of direct democracy.

Defendants also ignore that the allegations in Plaintiffs' Complaint go beyond the acts of the judiciary, challenging Ohio's election laws, and the boards of elections' application of such

laws. The *Rooker-Feldman* doctrine cannot apply to claims based on such allegations.

Finally, the remedy Plaintiffs seek is not to examine or overturn any particular Ohio court decision. It is for this Court to declare Ohio's ballot access scheme unconstitutional to the extent it allows substantive, content-based pre-enactment review by election officials and the judiciary. *See Hood v. Keller*, 341 F.3d 593, 598 (6th Cir. 2003) ("As Hood correctly observes, the complaint contains 'no demand to set aside the verdict or the state court ruling.' Instead, Hood seeks injunctive and declaratory relief prohibiting defendants-appellees from using 'preaching and/or handing out religious tracts' as a basis for 'enforcing or attempting to enforce' Ohio Administrative Code § 128–4. Because Hood does not seek to have the district court overturn his November 29, 2000, conviction in Franklin County Municipal Court, the *Rooker-Feldman* doctrine is inapplicable to this lawsuit."); *VanHarken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir. 1997) ("Insofar as the plaintiffs merely seek a declaration that the procedures under which the parking charges against them were, . . . , adjudicated are constitutionally inadequate, they are not barred by *Rooker-Feldman* because they are not challenging the judgment in any parking case."). To preclude federal court review in such circumstances would leave systemic policies and practices, developed by states and enforced by state judiciaries, wholly unchecked against the constraints of the federal constitution absent the rare opportunity for U.S. Supreme Court review.

The *Rooker-Feldman* doctrine is inapplicable. It is both necessary and appropriate for this Court to entertain Plaintiffs' constitutional claims as to Ohio's ballot access scheme.

III. The *Pullman* Abstention Doctrine Does Not Apply.

"[W]e echo the Supreme Court's strong aversion to the invocation of Pullman abstention when a state statute is being challenged on First Amendment grounds and when that statute is not obviously susceptible to a limiting construction." *Jones v. Coleman*, 848 F.3d 744, 752 (6th Cir. 2017). Here, the *Pullman* abstention doctrine does not apply. Plaintiffs challenge Ohio's ballot

access scheme, including Ohio election laws as drafted, as authoritatively construed by the Ohio Supreme Court, and as applied by election officials. (*See e.g.*, Compl. ¶¶ 232, 238). Paragraphs 43-67 of Plaintiffs' Complaint set forth each challenged law in detail. No construction of these statutes by the Ohio judiciary would avoid the necessity for federal constitutional adjudication.

First, the state laws are not unclear. To the contrary, they very clearly afford election officials unconstitutional substantive, content-based review. (*See e.g.*, Compl. ¶ 62 (describing how Section 3501.38(M)(1) expressly subjects petitions to content-based, substantive review). Second, there is nothing for the Ohio courts to *clarify* with regard to the election laws at issue.

What Defendants are really saying is that Plaintiffs should have sought review as to the constitutionality of Ohio's ballot access scheme in Ohio state court *before* bringing their federal constitutional claims to federal court. There is no such requirement that would so limit Plaintiffs' choice of how to safeguard their fundamental constitutional rights. Indeed, the U.S. Supreme Court in *Babbitt*, 442 U.S. at 306, rejected this notion in declining to abstain from reviewing plaintiffs' challenge:

> We think that a state-court construction of the provision governing election procedures would not obviate the need for decision of the constitutional issue or materially alter the question to be decided. As we shall discuss, our resolution of the question whether the statutory election procedures are affected with a First Amendment interest at all is dispositive of appellees' challenge. And insofar as it bears on that matter, the statute is pointedly clear. Accordingly, we perceive no basis for declining to decide appellees' challenge to the election procedures, notwithstanding the absence of a prior state-court adjudication.

IV. Plaintiffs' Claim for Violation of the Separation of Powers Doctrine (Count 8) is Not Barred by the Eleventh Amendment and the Doctrine of Sovereign Immunity.

Plaintiffs hereby incorporate their Opposition to Lucas BOE's Motion for Judgment on the Pleadings, which explains the basis for Plaintiffs' claim based on the separation of powers doctrine. (ECF No. 40 at 19-20.) For the reasons set forth therein, the Court should deny Defendants' motion to dismiss Count 8.

The separation of powers doctrine is a fundamental doctrine equally understood by state and federal courts. It is well within this Court's expertise to apply the separation of powers doctrine to the facts of this case. The separation of powers claim (Count 8) is designated as a state law claim only because Defendants are state officials. The Court may appropriately, and confidently, exercise supplemental jurisdiction over this claim.

V. Plaintiffs Have Stated Claims Against Mahoning County Defendants.

Defendants' arguments in support of its contention that Plaintiffs have failed to state a claim largely duplicate the arguments made by Defendants Lucas BOE and the Secretary of State. Plaintiffs' response to such arguments has been fully briefed in Plaintiffs' Opposition to Lucas BOE's Motion for Judgment on the Pleadings and Opposition to Defendant Secretary of State's Motion to Dismiss, and Plaintiffs hereby incorporate those arguments as if fully set forth herein. (ECF Nos. 40 and 45.)

Defendants also again attempt to excuse their participation in Ohio's unconstitutional ballot access scheme by claiming that they were merely following the unconstitutional statutes, and this somehow renders Plaintiffs' right to relief against Mahoning County Defendants "speculative." (Memo at 18.) This makes no sense. Plaintiffs allege that Mahoning County Defendants engage in unconstitutional review under Ohio election laws. As part of their relief, Plaintiffs seek to enjoin Defendants from this unlawful behavior. (Compl. at 62.) If Defendants had wanted to absolve themselves of responsibility, they could have refused to apply the unconstitutional laws.

CONCLUSION

The Court should deny the Mahoning County Defendants' Motion to Dismiss.

Respectfully submitted this Twenty-Fourth Day of May, 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: May 24, 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. The other parties are Filing Users and are served electronically with this document as of the date of filing by the Notice of Docket Activity.

Dated: May 24, 2019

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