
**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NO. 20-3557**

BEIERSDORFER, ET AL.,

Plaintiffs – Appellants,

and

DARIO HUNTER,

Plaintiff,

v.

LAROSE, ET AL.,

Defendants – Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION (4:19-cv00260)

**AMICUS BRIEF OF AFFILIATED CONSTRUCTION TRADES OF OHIO,
AMERICAN PETROLEUM INSTITUTE, OHIO CHAMBER OF
COMMERCE, AND OHIO OIL AND GAS ASSOCIATION IN SUPPORT
OF AFFIRMANCE OF TRIAL COURT’S DECISIONS**

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Dated: December 1, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Case Number: 20-3557 Case Name: Beiersdorfer et al. v. LaRose et al.

Name of counsel: Syed Ahmadul Huda

Pursuant to 6th Cir. R. 26.1, American Petroleum Institute
Name of Party

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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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Porter, Wright, Morris & Arthur, LLP

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Case Number: 20-3557 Case Name: Beiersdorfer et al. v. LaRose et al.

Name of counsel: Syed Ahmadul Huda

Pursuant to 6th Cir. R. 26.1, Ohio Oil & Gas Association
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S/ Syed Ahmadul Huda
Porter, Wright, Morris & Arthur, LLP

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Case Number: 20-3557 Case Name: Beiersdorfer et al. v. LaRose et al.

Name of counsel: Syed Ahmadul Huda

Pursuant to 6th Cir. R. 26.1, Affiliated Construction Trades Ohio Foundation
Name of Party

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S/ Syed Ahmadul Huda
Porter, Wright, Morris & Arthur, LLP

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Case Number: 20-3557 Case Name: Beiersdorfer et al. v. LaRose et al.

Name of counsel: Syed Ahmadul Huda

Pursuant to 6th Cir. R. 26.1, Ohio Chamber of Commerce
Name of Party

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/S/ Syed Ahmadul Huda

Porter, Wright, Morris & Arthur, LLP

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I. STATEMENT OF THE INTEREST OF AMICI CURIAE

Amicus Curiae Affiliated Construction Trades of Ohio (“ACT Ohio”) was created by the Ohio State Building & Construction Trades Council (“OSBCTC”) to facilitate economic and industrial development and promote industry best practices for Ohio’s public and private construction projects. Members of the OSBCTC have built numerous oil and natural gas generation facilities and transmission pipelines statewide resulting in thousands of jobs and millions of work hours for its members. Additionally, the OSBCTC and ACT Ohio affiliated crafts engage daily in maintenance support of the production and refining of crude oil and natural gas. ACT Ohio works on behalf of fourteen regional councils, one hundred thirty-seven local affiliates, and close to 94,000 of the most highly skilled, highly trained construction workers in this State. ACT Ohio is funded by union construction workers who believe it is their duty to protect the State’s construction industry and the many working families it supports.

Amicus curiae American Petroleum Institute (“API”) (<https://www.api.org/>), doing business in Ohio through its Columbus offices as API-Ohio, is the primary national trade association of America’s technology-driven oil and natural gas industry. API’s over 600 members are involved in all segments of the industry, including the exploration, production, refining, shipping, and transportation of crude oil and natural gas. In Ohio alone, over 262,000 jobs are supported by the industry,

which also provides more than \$14.7 billion in labor income and nearly \$38 billion in value added to the State's economy.¹ API-Ohio members have invested billions of dollars in Ohio's oil and natural gas industry. Together with its member companies, API-Ohio is committed to ensuring a strong, viable oil and natural gas industry capable of meeting the energy needs of our Nation and Ohio in a safe and environmentally responsible manner.

Amicus curiae Ohio Chamber of Commerce ("the Ohio Chamber"), founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization representing businesses ranging in size from small, sole proprietorships to some of the largest U.S. companies. It works to promote and protect the interests of its more than 8,000 business members while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper.

Amicus curiae the Ohio Oil and Gas Association ("OOGA") is a statewide trade association with more than 1,300 members who are engaged in all aspects of

¹ American Petroleum Institute, Natural Gas and Oil Fuel Ohio, https://www.api.org/-/media/Files/Policy/Jobs/Economics-Nat-Gas-Oil/API_OilEconomy_%20Ohio.pdf?la=en&hash=2B198F6DD0908702462D12F9F57D3C8A0922D0E5 (last visited Nov. 25, 2020).

the exploration, development, and production of oil and natural gas in this state. Its membership includes small independent producers and major energy companies, as well as Ohio contractors, service and supply companies, manufacturers, utilities, accountants, insurers, engineers, and landowners. OOGA's mission is to protect, promote, foster, and advance the common interest of those engaged in all aspects of the Ohio crude oil and natural gas producing industry. OOGA occasionally participates as *amicus curiae* in cases involving important legal issues concerning the Ohio oil and gas industry, including ballot initiatives like those at issue here. *See, e.g., State ex rel. Twitchell v. Saferin*, 155 Ohio St. 3d 52, 2018-Ohio-3829, 119 N.E.3d 365 (2018) .

Amici curiae are deeply concerned about this lawsuit because the initiatives that Plaintiffs have sought to place on the ballots in seven different Ohio counties include limitations or outright bans on many of the lawful activities that members of *amici curiae* either participate in or support. If this Court holds that the initiatives should be (or should have been) submitted to the electorate, and if the initiatives are ultimately passed, *amici curiae* and their members will suffer serious, immediate, and substantial effects.

For the following reasons, and for the reasons explained in the Appellees' briefs, this Court should affirm the three separate district court's decisions that

dismissed Plaintiffs' claims in their entirety. *See* August 30, 2019 Order, R. 69; December 31, 2019 Order, R.77; April 30, 2020 Order, R. 87.²

II. SUMMARY OF ARGUMENT

As early as 2015, Plaintiffs have engaged in concerted efforts to place certain initiatives on the ballots in seven different Ohio counties—Franklin, Mahoning, Meigs, Lucas, Portage, Athens, and Medina. Those initiatives proposed prohibitions on oil and gas extraction, hydraulic fracturing, or the siting of natural gas pipelines, among other lawful activities. In almost all cases, the county Boards of Election (“BoEs”), as well as the Ohio Secretary of State (the “Secretary”), invalidated the petitions on the basis that they were not within the initiative power.³ Unsatisfied with the decisions of the BoEs, Plaintiffs filed writs of mandamus with the Supreme Court of Ohio, asking the Court to order the BoEs accept these initiatives. With some exceptions, the Supreme of Ohio denied these writs.

At the heart of this lawsuit is Plaintiffs' challenge to H.B. 463, a bill enacted by the General Assembly in 2017 and that confers on BoEs broader powers.

² All parties to this appeal have consented to amici curiae's filing of this amicus brief. Fed. R. App. 29 (a)(2).

³ When used, “BoE” shall refer to the individual defendants named in their official capacities in this case. And to the extent amici curiae refer to specific plaintiffs, they will refer to them by reference to the county that rejected their initiative (*e.g.*, “Mahoning County Plaintiffs”).

Plaintiffs claim that H.B. 463 is the basis for the rejection of their initiatives even though the Supreme Court of Ohio *never* relied on the bill in the denial of their writs.

In this lawsuit, Plaintiffs have alleged, among other things, that H.B. 463 violates their federal constitutional rights, including rights protected by the First Amendment, the Ninth Amendment, and the Fourteenth Amendment. Faced with either Rule 12(b)(6) or Rule 12(c) motions filed by the BoEs and the Secretary, the district court correctly rejected Plaintiffs' obvious attempts to dress up their state-based purported injuries as federal ones.

As an initial matter, Plaintiffs' First Amendment challenge (Counts I-II) largely fails because Plaintiffs do not have an unfettered right to place on a ballot any proposal regardless of subject matter. They did not have such a right even *before* passage of the 2017 bill of which they now complain. Even if they did have such a right, the right is clearly outweighed by Ohio's interest in avoiding ballot overcrowding and safeguarding the integrity of the initiative process. Nor does Plaintiffs' "prior restraint" challenge survive for the simple reason that Plaintiffs remain free to speak about any of their initiatives in any other forum (Counts III-IV). Plaintiffs did not properly brief their right-to-associate claim under the First Amendment, and that claim is thus waived; in any case, it is similarly meritless (Count V). Plaintiffs also try to couch their right to "local, community self-government" as one protected by the due-process clause (Count VI) or the Ninth

Amendment (Count VII)—a remarkable proposition completely untethered to the constitutional text or binding case law. Finally, the separation-of-powers claim under Ohio law (Count VIII) rests on Plaintiffs’ argument that H.B. 463’s authorization of the BoE to review initiatives usurps (state) judicial authority. Regardless of the merits of this claim, this Court cannot address it because of the Eleventh Amendment’s bar on pendent state claims against state actors. At its core, this lawsuit invites this Court to manage and supervise matters of state and local government. This Court should reject that invitation, as the district court properly did.

As they have done in a number of mandamus proceedings before the Supreme Court of Ohio, amici curiae respectfully submit this brief, and urges this Court to affirm the trial court’s decisions. Amici curiae’s individual and corporate members cannot operate their businesses efficiently, predictably, and economically in a state where any proposal, regardless of subject matter, can reach the ballot. Nor do these individual and corporate members (and Ohioans) benefit from the uncertainty caused by Plaintiffs’ multiple state and federal lawsuits that border on the frivolous and that have persisted for several years. Quite simply, it is time to close the books on these lawsuits once and for all.⁴

⁴ The Community Environmental Legal Defense Fund (“CELDF”), a Pennsylvania-based group, assisted some of the Plaintiffs in drafting the initiatives at issue, and has publicly declared its “support[.]” of Plaintiffs in connection with this lawsuit.

III. STATEMENT OF FACTS

Amici curiae adopt the statement of facts as presented by the Appellees. For the sake of this Court’s convenience, amici curiae also set forth the following abbreviated factual background.

A. Ohio’s statutory scheme provides for the review of ballot initiatives by the BoE.

Ohio’s statutory scheme provides for the BoE’s review of initiatives. *See State ex rel. Bolzenius v. Preisse*, 155 Ohio St. 3d 45, 2018-Ohio-3708, 119 N.E. 3d 358 (2018) (describing background). Former Ohio Rev. Code § 3501.11(K) (now Ohio Rev. Code § 3501.11(K)(1)) confers powers on the BoE to “[r]eview, examine, and certify the sufficiency and validity of petitions . . .” Ohio Rev. Code § 3501.11(K)(1). In determining the “validity” of a petition, election officials determine whether the petition satisfies “statutory or constitutional prerequisites.” *State ex rel. McGinn v. Walker*, 87 N.E.3d 204, 151 Ohio St. 3d 199, 2017-Ohio-7714 (2017). For example, a petition may be constitutionally invalid if it does not

Censoring the Ballot: Civil Rights Appeal Filed to Defend Rights of Nature and Corporate Control Lawmaking in Ohio <https://celdf.org/2020/10/censoring-the-ballot/> (last visited Oct. 28, 2020); *see also id.* (noting that CELDF organizer has “worked with” Plaintiffs’ groups). *See also* Jackie Stewart, *Lifting the Curtain on the Pennsylvania Group behind Ohio’s ‘Local’ Anti-Fracking Campaigns*, *Energy in Depth* (July 21, 2015) (“It is by design that the CELDF remains behind the scenes, since its campaign is built on the illusion that individual communities are rising up.”), <https://www.energyindepth.org/lifting-the-curtain-on-the-pennsylvania-group-behind-ohios-local-anti-fracking-campaigns/> (last visited Oct. 28, 2020).

“set forth the form of government” as required by the Ohio Constitution. Ohio Const. Art. X, § 3; *see also State ex rel. City of Youngstown v. Mahoning County Bd. of Elections*, 144 Ohio St. 3d 239, 2015-Ohio-3761, N.E.3d 1229, 1231 (2015) (noting that BoEs may “determine whether a ballot measure falls within the scope of the constitutional power of referendum or initiative.”) (cited in *Preisse*).

On April 6, 2017, Ohio enacted H.B. 463, which conferred on the BoE more robust powers in the review of initiatives. *Preisse*, 119 N.E.3d at 361.⁵

For instance, in the case of a municipal-initiative petition, a BoE must determine whether the petition falls within the scope of a municipality’s “authority to enact via initiative,” including the limitations under Ohio Constitution, Article VIII, Sections 3 and 7. Ohio Rev. Code § 3501.38(M)(1)(a); *see* Ohio Const. Art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”); *id.* § 7 (noting that municipality may “adopt or amend” charter and may, subject to § 3,

⁵ H.B. 463 includes the enactment of the following relevant provisions: Ohio Rev. Code § 307.95(C); Ohio Rev. Code § 3501.11(K)(2); Ohio Rev. Code § 3501.38(M)(1); Ohio Rev. Code § 3501.39(A)(3). Plaintiffs mistakenly refer to Ohio Rev. Code § 307.95 (in its entirety) and Ohio Rev. Code § 3501.11(K)(1) as H.B. 463 provisions. Appellants Br. 2. But H.B. 463 amended in part Ohio Rev. Code § 307.95(B) and Ohio Rev. Code § 307.95(C), and Ohio Rev. Code § 3501.11(K)(1) is simply a recodified version of Ohio Rev. Code § 3501.11(K). In referring to “H.B. 463,” amici curiae refer to the bill as enacted, not as described by Plaintiffs.

“exercise thereunder all powers of local self-government.”) A BoE must accept an initiative unless it “falls outside the scope of authority to enact via initiative.” Ohio Rev. Code § 3501.39(A)(3) .

A similar procedure applies to county-charter petitions. If an initiative falls outside the initiative power, it is invalid. Ohio Rev. Code § 3501.11(K)(2); Ohio Const. Art. X, § 3 (noting that initiative right is “reserved” on all matters which “authorized to control by legislative action”); *see also* Ohio Rev. Code § 3501.38(M)(1) (b). A protest against the BoE’s findings may be filed with the Secretary, whose determination is final, or, alternatively, petitioners may demand that the BoE establish the validity or invalidity of the petition with the court of common pleas in the county. Ohio Rev. Code § 307.94-.95.

B. Plaintiffs try to place initiatives on the ballot that exceed Ohio’s statutory and constitutional limitations.

Before filing this federal lawsuit, Plaintiffs—as early as 2015—sought to place various initiatives on ballots that squarely fall outside Ohio’s initiative powers provided by the Ohio Constitution and statutes. These initiatives included prohibitions on oil and gas extraction, hydraulic fracturing, and so-called “natural gas mega-pipelines.” If voted upon, these initiatives could undermine the interests of amici curiae, their members, and the public at large. *See, e.g.*, Compl. R.1, ¶¶ 219, 222 (Portage County BoE rejecting petition that proposed banning of hydraulic fracturing); *id.* ¶¶ 133, 136 (Franklin County BoE rejecting petition that proposed,

among other things, prohibition on gas and oil extraction); *id.* ¶¶ 206, 207 (Medina County BoE rejecting petition that proposed banning “natural gas mega-pipelines”); *id.* ¶¶ 164, 185 (Athens and Meigs County BoEs rejecting petitions related to “community bill of rights” and hydraulic fracturing).⁶

In each case, the BoE refused to place these initiatives on the ballot because they failed to comply with Ohio’s statutory and constitutional limitations. *See id.* ¶¶ 133, 136, 164, 185, 206, 207, 219, 222. Faced with these rejections, Plaintiffs sought writs of mandamus in the Supreme Court of Ohio, seeking to compel the BoEs to place these initiatives on the ballots. The Supreme Court of Ohio ultimately denied these writs, relying on reasons entirely unrelated to H.B. 463. *Walker*, 87 N.E.3d at 209 (concluding the Medina BoE and Athens BoE petitions were invalid for other reasons under pre-H.B. 463 case law); *State ex rel. Coover v. Husted*, 70 N.E.3d 587, 590, 148 Ohio St. 3d 332, 2016-Ohio-5794 (2016) (holding that “there [was] no indication” that the state actors “attempted to thwart the principles of local self-

⁶ The Lucas and Mahoning BoEs rejected similar initiatives, but were ultimately either ordered or permitted to place these initiatives on the ballot. R.1, Compl. ¶ 154 (noting that a single protestor sought to keep the bill at issue off of the December 10, 2018 ballot, but alleging no other pending issues); *id.* ¶ 128 (noting that Mahoning BoE certified placement of initiative on ballot just in time for November 2018 election, but further noting that “any future initiatives are highly unlikely to be placed on the ballot”). For these reasons, amici curiae agree with the district court that the Mahoning County Plaintiffs lack Article III standing. *See* August 30, 2019 Order, R. 69 at Page ID# 625-29. Similarly, amici curiae contend that the Lucas County Plaintiffs lack Article III standing as well.

government” and further noting a reluctance to recognize a “fundamental right” to place the “specific proposals on the ballot.”) (Portage and Meigs BoEs) (pre-H.B. 463); *Preisse*, 119 N.E. 3d at 363 (analyzing under pre-H.B. 463 case law and further noting that “there is no evidence suggesting that the board members rejected the initiative petition based on the particular message relators sought to convey”) (Franklin BoE). To preserve their interests, amici curiae filed amicus briefs in these mandamus proceedings in support of the BoEs.

C. Plaintiffs now file this federal lawsuit after having their initiatives rejected by the BoEs, the Secretary, and the Supreme Court of Ohio.

Having lost at the Supreme Court of Ohio, Plaintiffs have now sued the seven BoEs and the Secretary, lodging several constitutional challenges against H.B. 463. Specifically, Plaintiffs allege the following claims: a facial First Amendment claim (Count I); an as-applied First Amendment claim (Count II); a facial prior-restraint claim (Count III); an as-applied prior-restraint claim (Count IV); a right-to-associate claim (Count V); a substantive due-process claim under the Fourteenth Amendment (Count VI); a Ninth Amendment claim (Count VII); and a separation-of-powers claim under Ohio law (Count VIII).

Various BoEs and the Secretary either moved to dismiss or moved for judgment on the pleadings. The district court, in three separate decisions, granted the motions, dismissing the claims in their entirety. *See* August 30, 2019 Order, R. 69; December 31, 2019 Order, R.77; April 30, 2020 Order, R. 87. The Mahoning

BoE also moved for dismissal for lack of subject-matter jurisdiction, arguing that the Mahoning County Plaintiffs lacked standing. *See* August 30, 2019 Order, R. 69 at Page ID# 625-29. The district court agreed, granting the motion on that basis. *See id.*

IV. ARGUMENT

A. Plaintiffs' First Amendment claims based on H.B. 463's "content-based restrictions" fail as a matter of law (Counts I-II)

1. *H.B. 463 is content-neutral and nondiscriminatory, triggering application of the Anderson-Burdick balancing test.*

On its face, H.B. 463 places nondiscriminatory, content-neutral limitations on Plaintiffs. According to this Court, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Comm. to Impose Term Limits on the Supreme Court of Ohio v. Ohio Ballot Bd.*, 885 F.3d 443, 447 (6th Cir. 2018) (holding that Ohio's "single-subject rule," requiring initiative petitions to contain only "one proposed law or one constitutional amendment," was not content-based).⁷ H.B. 463's plain text has no limitations on any particular subject matter of a ballot initiative. It simply provides that any initiative must be within the "initiative power." *See, e.g.*, Ohio Rev. Code § 3501.11(K)(2); Ohio Rev. Code § 3501.38(M)(1). In other words, the

⁷ Although the Court uses the phrase "content-based," it is used in the context of meaning "content neutral." Any review of an initiative must inherently involve some subject matter consideration to determine if it is within the right granted, but such review must be content-neutral.

initiative must comport with limitations provided for in the Ohio Constitution. Ohio Const. Art. XVIII, § 3; Ohio Const. Art. X, § 3.

Because H.B. 463 is nondiscriminatory and content-neutral, this Court weighs the competing interests of the parties under the three-step *Anderson-Burdick* framework. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Under that framework, the Court *first* considers “the character and magnitude of the asserted injury to Plaintiffs’ First Amendment rights.” *Ohio Ballot Bd.*, 885 F.3d at 448. *Second*, the Court “identif[ies] and evaluate[s] the precise interests that [the state] Defendants have put forward” to justify H.B. 463. *Id.* *Third*, the Court “determine[s] the legitimacy and strength of each of those interests and consider[s] the extent to which those interests make it necessary to burden Plaintiffs’ rights.” *Id.* In weighing these interests, this Court has explained that “minimally burdensome and nondiscriminatory regulations are subject to a less-searching examination closer to rational basis and the State’s . . . interests are generally sufficient to justify the restrictions.” *Id.* Or, “intermediate” burdens are permitted if they are outweighed by the “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Thompson v. Dewine*, 976 F.3d 610, 616 (6th Cir. 2020). And “[w]hen the burden is severe”—which is not the case

here—“the state must narrowly draw the regulation to serve an interest of compelling importance.” *Id.* at 615 (internal quotation marks omitted).⁸

2. *Any of Plaintiffs’ purported First Amendment injuries are outweighed by Ohio’s justification for H.B. 463.*

a. *Plaintiffs have not suffered a First Amendment injury.*

As for the first step of the *Anderson-Burdick* framework, Plaintiffs have suffered no First Amendment injury, whether viewing H.B. 463 on its face (Count I) or as applied (Count II). On its face, H.B. 463 survives because Plaintiffs have no First Amendment right to place on the ballot any initiative, regardless of its subject matter. Were that the case, Plaintiffs could seek prohibitions on any otherwise lawful activity or try to enact laws that they are not entitled to enact. *See, e.g., State ex rel. Rhodes v. Bd. of Elections*, 12 Ohio St. 2d 4, 230 N.E.2d 347, 41 Ohio Op. 2d 2 (1967) (holding that BoE could not place initiative on ballot that required the “The President of the United States [to] bring all American troops home from Vietnam . . .”) Quite simply, Plaintiffs’ attempt to create a First Amendment

⁸ The Secretary has moved this Court to hear this appeal *en banc* in the first instance. In support, the Secretary argues that the First Amendment challenge should not be reviewed under the *Anderson-Burdick* framework given the decisions of other circuits. This Court has twice confirmed that the *Anderson-Burdick* framework applies to First Amendment challenges, and amici curiae apply that standard here. *See also Dewine*, 976 F.3d at 615 n.4 (noting that it will apply *Anderson-Burdick* framework until the question is taken up *en banc*); *Thompson v. DeWine*, 959 F.3d 804, 808 n.2 (6th Cir. 2020) (same). Accordingly, amici curiae take no position on the Secretary’s motion.

violation out of whole cloth is misplaced.

Nor does Plaintiffs' as-applied First Amendment challenge survive either. "The hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574, 577 (6th Cir. 2016). But given that the right of initiative derives from state law rather than the First Amendment, Plaintiffs cannot seriously claim to have been excluded from the ballot in violation of the First Amendment when their initiative exceeds the scope of the state right. *See id.* All they must do is ensure that their initiatives fall within the "initiative power" as determined by the Ohio Constitution and statutory scheme. *See, e.g.*, Ohio Rev. Code §§ 3501.11(K)(2); 3501.38(M)(1). These limitations apply equally to all Ohioans, and Plaintiffs have by no means been more burdened than anyone else. More problematically, Plaintiffs cannot even demonstrate that H.B. 463 is the source of any claimed injury. *See, e.g.*, *New York Civil Service Comm'n v. Snead*, 425 U.S. 457 (1976) (holding that employee lacked standing in constitutional challenge to statute because it was not applied to her). After all, the Supreme Court of Ohio denied Plaintiffs' writs for mandamus by expressly relying on *pre*-H.B. 463 case law and never decided how H.B. 463 applied to any of the ballot initiatives. *Walker*, 87 N.E.3d at 209 (analyzing under *pre*-H.B. 463 case law); *Coover*, 70 N.E.3d at 591 (decided before date H.B. 463 was enacted); *Preisse*, 119 N.E.3d at 362 (analyzing under *pre*-H.B. 463 case law). Simply put, Plaintiffs' as-

applied challenge fails because H.B. 463 has never been applied to them. To the extent Plaintiffs rely on pre-H.B. 463 provisions in their challenge (Ohio Rev. Code §§ 307.95; 3501.11(K)(1)), the Supreme Court of Ohio’s denial of the writ was not based on Plaintiffs’ claimed speech rights; to the contrary—they merely related to whether an initiative satisfied the “threshold requirements” provided for under Ohio’s Constitution and statutory scheme. *See Coover*, 70 N.E.3d at 591 (determining whether initiative contained “information” required by Ohio Constitution). *See, e.g., Walker*, 87 N.E.3d at 209 (same); *Preisse*, 119 N.E.3d at 363 (holding that proposed ordinance improperly created new causes of action).

b. Any claimed First Amendment rights are outweighed by Ohio’s interests.

As for the second and third steps of the *Anderson-Burdick* framework, Ohio’s interests in enacting H.B. 463 (and the other challenged pre-H.B. 463 provisions) outweigh Plaintiffs’ claimed First Amendment rights, regardless of whether Plaintiffs’ claimed burden is “minimal” or “intermediate.” The district court correctly noted Ohio’s “significant interests in protecting the integrity and reliability of the initiative process, ensuring voter confidence in the electoral process, and avoiding the overcrowding of ballot.” August 30, 2019, R. 69, Page ID # 635-36 (noting Ohio’s “strong” interest in “ensuring the fair and honest operation of its elections” and “avoid[ing] overcrowding ballots with initiatives that constitute a legal nullity”); *see also* December 31, 2019 Order, R. 77, Page ID # 923; April 30,

2020 Order, R. 87, Page ID # 1070. This Court has similarly held that Ohio has an interest in “ensur[ing] that only ballot-eligible initiatives go to the voters,” and “[k]eeping unauthorized issues off the ballot reduces the odds that an initiative is later held invalid.” *Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019)

And here, Ohio especially has an interest in keeping these contested initiatives off the ballot where the Supreme Court of Ohio has noted that issues related to oil and gas production fall within the province of the General Assembly that has enacted the relevant legislation. Specifically, the state supreme court has noted that a municipality cannot “discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state has permitted under [Ohio statutes].” *State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St. 3d 271, 2015-Ohio-485, 37 N.E.3d 128, 138 (2015) (plurality opinion); *see also* Ohio Rev. Code § 1509 (regulating oil and gas wells and production operations in Ohio). It then makes little sense to have citizens in a patchwork of counties submit these initiatives to the electorate if they are later held to be invalid and outside the initiative power. *See Schmitt*, 933 F.3d at 641. If Plaintiffs were serious about the subjects of these initiatives, their recourse lies in the General Assembly. Legislative proceedings, after all, typically involve committee studies, multiple hearings in a public forum, and robust public debate that results in more practical solutions. Such a result inures to the benefit of all Ohioans, and not just the residents of a particular county. *See*

generally American Petroleum Institute, *America's Progress at Risk: An Economic Analysis of a Ban on Fracking and Federal Leasing for Natural Gas and Oil Development* (identifying consequences of ban on hydraulic fracturing, including reduction of GDP by \$ 1.2 trillion by 2022 and 7.5 million job losses).⁹

At bottom, Plaintiffs' purported First Amendment rights are outweighed by Ohio's interests "in avoiding ballot overcrowding and safeguarding the integrity of the initiative process." *Schmitt*, 933 F.3d at 642; *see also* August 30, 2019, R. 69, Page ID # 635-36; December 31, 2019 Order, R. 77, Page ID # 923; April 30, 2020 Order, R. 87, Page ID # 1070.

B. H.B. 463 does not constitute a prior restraint on activity (Counts III-IV).

Plaintiffs cannot credibly argue that H.B. 463 constitutes a "prior restraint" on their rights. "A prior restraint is any law forbidding certain communications when issued in advance of the time that such communications are to occur." *Schmitt*, 933 F.3d at 637 (internal quotation marks omitted). "The fundamental objection to systems of prior restraint is that they create a risk of government censorship of

⁹ American Petroleum Institute, *America's Progress at Risk: An Economic Analysis of a Ban on Fracking and Federal Leasing for Natural Gas and Oil Development* (2020), <https://www.api.org/-/media/Files/Oil-and-Natural-Gas/Hydraulic-Fracturing/2020/fracking-ban-study-americas-progress-at-risk.pdf?la=en&hash=13423D13150A5594442D84D507F6EAB04A231246> (last visited Oct. 27, 2020).

expressive activity.” *Id.* at 638. In *Schmitt*, the plaintiffs argued that some of H.B. 463’s provisions improperly delegated authority to boards of elections to review proposed initiatives before an election, thereby qualifying as a “prior restraint;” the plaintiffs further argued that Ohio must provide de novo judicial review of a board’s decisions. *Id.* This Court rejected these arguments, holding that the statutes “do not directly restrict core expressive conduct.” *Id.* They merely “regulate the process by which initiative legislation is put before the electorate” and are “a step removed from the communicative aspect of core political speech.” *Id.* Indeed, under both pre-H.B. 463 and H.B. 463 provisions, Plaintiffs remain completely free to speak about the contents of any of their initiatives in other forums, and they also remain free to introduce bills in the General Assembly that could seek the same prohibitions they advocate but on a statewide level. At bottom, this Court has already determined that there is no “risk of government censorship of expressive activity.” *See id.* In any event, and as mentioned above in Section IV.A.2, Plaintiffs’ as-applied challenge fails because they cannot show that H.B. 463, as applied, even restrained their conduct in any way. *Walker*, 87 N.E.3d at 209; *Coover*, 70 N.E.3d at 591; *Preisse*, 119 N.E.3d at 362.

C. Plaintiffs’ right-to-associate claim is waived and is also meritless (Count V).

Plaintiffs’ passing references to the right-to-associate claim renders that claim waived. *See* Appellants Br. 24; *see also McPherson v. Kelsey*, 125 F.3d 989, 995

(6th Cir. 1997) (“Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”). At any rate, the claim fails on the merits. The “right to associate” protects activities protected by the First Amendment—“speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Marcum v. McWhorter*, 308 F.3d 635, 639 (6th Cir. 2002). This right, like the Plaintiffs’ First Amendment rights (*see* Section IV.A.), is not without limits, and is subject to the *Anderson-Burdick* framework. *See Jolivette v. Husted*, 694 F.3d 760, 767 (6th Cir. 2012) . Even if Plaintiffs’ First Amendment right to associate is somehow burdened by H.B. 463—an argument they have effectively waived—it is still clearly outweighed by Ohio’s interests “in avoiding ballot overcrowding and safeguarding the integrity of the initiative process.” *Schmitt*, 933 F.3d at 642; *see* August 30, 2019, R. 69, Page ID # 635-36; December 31, 2019 Order, R. 77, Page ID # 923; April 30, 2020 Order, R. 87, Page ID # 1070; *see also* Section IV.A.2.

D. Plaintiffs’ substantive due-process claim and Ninth Amendment claim fail as a matter of law (Counts VI-VII).

1. *The substantive due-process claim does not confer a right to “local, community self-government.” (Count VI)*

Running out of options, Plaintiffs claim that H.B. 463 violates substantive due process. Substantive due-process claims fall into two categories: “(1) deprivations of a particular constitutional guarantee; and (2) actions that shock the conscience.”

EJS Props., LLC v. City of Toledo, 698 F.3d 845, 861 (6th Cir. 2012). In interpreting (1), this Court has recently held that the deprivation must be of “a liberty or property interest.” *Siefert v. Hamilton Cty.*, 951 F.3d 753, 766 (6th Cir. 2020). If a defendant state’s actions do not fall into either category, the action is subject to rational review. *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997). Under that deferential standard, Plaintiffs “bear the burden to show that [a state’s] decision was not rationally related to a legitimate state interest.” *Id.*

With these standards applied, Plaintiffs cannot allege a violation of the due-process clause. As for (1), Plaintiffs have not cited any authority—from either this Court or the Supreme Court—that holds that a right to “local, community self-government” can in any way be described as a “liberty” or “property” interest protected by the due-process clause. *See, e.g., Guertin v. Michigan*, 912 F.3d 907, 921-922 (6th Cir. 2019) (acknowledging that the Constitution did not guarantee a right to live in a “contaminant-free, healthy environment”). On this basis alone, the claim fails. Nor should this Court acknowledge such a right. Otherwise, federal courts would end up supervising and resolving matters of purely state and local law, undermining well-entrenched notions of comity and federalism. *See also Jahn v. Farnsworth*, 617 F. Appx. 453, 462 (6th Cir. 2015) (noting that the Supreme Court “remains reluctant to expand this relatively limited category of rights that are considered substantive due process rights”). As for (2), it goes without saying that

Ohio's actions in enacting H.B. 463 does not "shock the conscience." *See, e.g., Siefert*, 951 F.3d at 766 (acknowledging "intentional harm" shocks the conscience). Finally, H.B. 463 easily survives rational review because of the serious interests "in avoiding ballot overcrowding and safeguarding the integrity of the initiative process." *Schmitt*, 933 F.3d at 642; *see* August 30, 2019, R. 69, Page ID # 635-36; December 31, 2019 Order, R. 77, Page ID # 923; April 30, 2020 Order, R. 87, Page ID # 1070; *see also* Section IV.A.2.

Each of the cases that Plaintiffs rely on fails to persuade otherwise. In *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008), this Court held that the clause may be implicated if a voting system is "so unfair as to deny or severely burden Ohioans' fundamental right to vote," which is not the case here. Appellants Br. 34. Nor are the federal-district or Sixth Circuit decisions Plaintiffs cite remotely on point. Appellants Br. 33-35 (citing various cases). Plaintiffs also cite a decision from the Supreme Court of Ohio for the proposition the right to "local, community self-government" was rooted in Ohio law, "secured" by the Declaration of Independence, and captured in the Ohio Constitution. Appellants Br. 35 (citing *Federal Gas & Fuel Co. v. Columbus* 96 Ohio St. 530, 118 N.E. 103 (1917)). But Plaintiffs have failed to cite a single federal case supporting their claim that their purported right is protected by the U.S. Constitution. If anything, Plaintiffs' reliance on *Federal Gas* and other state-court decisions only confirms that state law (if any

law) supplies the source of any right here, and Plaintiffs have already asked the Supreme Court of Ohio many times to vindicate those purported rights—an invitation that has been repeatedly declined. *See, e.g., Coover*, 70 N.E.3d at 591; *Preisse*, 119 N.E.3d at 364; *Walker*, 87 N.E.3d at 209.

In sum, Plaintiffs’ substantive due-process claim fails.

2. *The Ninth Amendment does not provide a right to “local, community self-government” (Count VII).*

As with their substantive due-process argument, Plaintiffs claim that the Ninth Amendment confers a right to “local, community self-government.” But the Ninth Amendment “does not confer substantive rights;” it simply protects “additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.” *Butt ex rel. Q.T.R. v. Barr*, 954 F.3d 901, 908 (6th Cir. 2020) (citing *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991)); *United States v. Warin*, 530 F.2d 103, 108 (6th Cir. 1976), *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008). Aside from a law-review article, Plaintiffs cite no case law supporting the notion that the Ninth Amendment protects a right to “local, community self-government,” which exists alongside the first eight constitutional amendments. Appellants Br. 36; *Warin*, 530 F.2d at 108. This Court should not recognize a right now for the same reasons stated above—federal courts should not be mired in matters of state and local government. *See* Section IV.D.1.

E. Plaintiffs’ separation-of-powers claim under Ohio law is barred by the Eleventh Amendment (Count VIII).

Plaintiffs improperly argue that the trial court should have exercised supplemental or pendent jurisdiction over their Ohio-based separation-of-powers claim. Appellants Br. 10. Specifically, Plaintiffs claim that H.B. 463 violates Ohio’s separation-of-powers doctrine because BoEs may usurp the authority of the (state) courts in reviewing ballot initiatives for any constitutional or statutory defects. *See* Compl. R.1, ¶¶ 281-86. But, under the sovereign-immunity doctrine, federal courts are barred by the Eleventh Amendment from exercising pendent jurisdiction over state-law claims against the state. *See Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520-521 (6th Cir. 2007) (“The Supreme Court has squarely held that pendent state law claims against state officials in their official capacity are barred by the Eleventh Amendment.”). Again, this Court should not put its thumb on the scale of Ohio’s constitutional structure and allocate powers among the three branches of state government, especially where the Supreme Court of Ohio itself has declined to address the question. *Preisse*, 119 N.E.3d at 362 (declining to address separation-of-powers issue related to H.B. 463); *see also Walker*, 87 N.E.3d at 204 (declining to address the “constitutionality of the statutory amendments”); *State ex rel. Maxcy v. Saferin*, 155 Ohio St. 3d 496, 2018-Ohio-4035, 122 N.E.3d 1165, 1169 (2018)

(declining to address constitutionality of Ohio Rev. Code § 3501.11(K)(2)). For these reasons, this Court should not consider Plaintiffs' separation-of-powers claim.

V. CONCLUSION

For the reasons explained above, amici curiae respectfully request that this Court affirm the trial court's decisions in their entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 32(a)(7)(B), 29(a)(5) and Sixth Circuit Rule 32(b)(1), I hereby certify that the foregoing brief contains 5991 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the court, but excluding certificates and other items properly excludable under Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1), and there is within the word limit set by the Court.

The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2010 word processing program in 14-point Times New Roman font.

STATEMENT OF AUTHORSHIP AND NONCONTRIBUTION

In accordance with Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby states that (i) counsel for the parties in this appeal did not author the foregoing brief in whole or in part; (ii) a party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and (iii) no person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Brief was served on December 1, 2020 via CM/ECF upon counsel of record.

/s/ Syed Ahmadul Huda

Syed Ahmadul Huda