No. 20-3557

In the United States Court of Appeals for the Sixth Circuit

SUSAN BEIERSDORFER, DARIO HUNTER, GREG HOWARD, SALLY JO WILEY, SARAQUOIA BRYANT, KATHARINE S. JONES, GERALD DOLCINI, GWEN FISCHER, DAMEN RAE, WILLIAM LYONS, GREGORY PACE, MARKIE MILLER, AND BRYAN TWITCHELL,

Plaintiffs-Appellants,

- v. -

FRANK LAROSE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF OHIO; PAMELA B. MILLER, LARRY G. CRAY, JOHN V. WELKER, JR., SHARON A. RAY, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE MEDINA COUNTY BOARD OF ELECTIONS; HELEN WALKER, KATE MCGUCKIN, KEN RYAN, AUNDREA CARPENTER-COLVIN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE ATHENS COUNTY BOARD OF ELECTIONS; DAVID BETRAS, MARK E. MUNROE, ROBERT WASKO, TRACEY S. WINBUSH, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE MAHONING COUNTY BOARD OF ELECTIONS; ELAYNE J. CROSS, DORIA DANIELS, PATRICIA NELSON, DENISE L. SMITH, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE PORTAGE COUNTY BOARD OF ELECTIONS; DAVID W. FOX, JAMES V. STEWART, CHARLES E. WILLIAMS, PAULA J. WOOD, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE MEIGS COUNTY BOARD OF ELECTIONS; DOUGLAS J. PRIESSE, BRAD K. SINNOTT, KIMBERLY E. MARINELLO, MICHAEL E. SEXTON, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE FRANKLIN COUNTY BOARD OF ELECTIONS; AND RICHARD F. SCHOEN, BRENDA HILL JOSHUA HUGHES, DAVID KARMOL, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE LUCAS COUNTY BOARD OF ELECTIONS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, NO. 4:19-CV-00260 (HON. BENITA Y. PEARSON)

BRIEF *AMICUS CURIAE* OF THE EARTH LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Earth Law Center (ELC) is a non-profit, public-interest organization, dedicated to transforming the law to recognize, honor, and protect nature's inherent rights to exist, thrive, and evolve. ELC engages in advocacy work across the globe, and works with grassroots organizations, local communities, and indigenous groups, to change anthropocentric worldviews and legal frameworks to recognize the rights of nature.

ELC has a strong interest in this case because it raises important questions about direct democracy, a tool often used to advocate for environmental protection, eco-centric laws, and rights of nature. Its outcome implicates the ability of people and communities to advocate for progressive laws that ensure clean and sustainable environments.

SUMMARY OF ARGUMENT

This *amicus* brief argues against substantive pre-enactment review of ballot initiatives. The Introduction addresses the history of direct democracy to add context to the instant case. Part I explains the role that the initiative process plays in allowing our laws to evolve. Part II addresses the issue of "Who" is conducting

[1] *Amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution for the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

the review. It argues that the actions by Boards of Elections and the Secretary of State violate Ohio's separation of powers doctrine. Further, no adequate normative reason exists for the distinction between municipal charters, where the court has determined substantive pre-enactment review is a violation of separation of powers, and county charters, where it has not. It then explains why this claim should not be blocked by the Eleventh Amendment. Part III addresses the issue of "When" and "How" the review is conducted. It argues that the timing (pre-enactment) and the manner (substantive), together violate the First Amendment protections guaranteed by the United States Constitution. It explains why the court should consider Plaintiffs' burden a severe one and apply strict scrutiny. It then explains that the district court's reliance on certain cases when analyzing Plaintiffs' burden was misplaced. Finally, it articulates why, even if the court decides not to apply strict scrutiny, Plaintiffs' burdens dramatically outweigh Defendants' stated interests.

INTRODUCTION

Direct democracy is the "most direct expression of the people's power to govern themselves." Henry Noyes, *Direct Democracy as a Legislative Act*, 19 Chap. L. Rev. 199, 201 (2016). The idea became prevalent in the late 1800's, when "Populists and Progressives, disenfranchised by representative government," advocated for the use of ballot measures. Robin E. Perkins, *A State Guide to*

Regulating Ballot Initiatives, 2007 Mich. St. L. Rev. 723, 727 (2007). "Populists wanted to take back control of government for ordinary citizens from the hands of the moneyed elite. Progressives wanted to improve government by making it more responsive to the will of the people, and less corrupt." Noyes, *supra*, at 200.

During Ohio's Progressive-Era Constitutional Convention of 1912, the voters approved changes to the constitution which embraced direct democracy. Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 Ohio St. L.J. 281, 285 (2016). "[D]elegates were also aware of the possible need to supplement the constitutional provisions, and they gave the General Assembly the power to enact legislation to facilitate, *but not limit or restrict, the initiative*." *Id.* at 311–12 (emphasis added). "[T]he [Ohio Supreme] [C]ourt has held that Ohio courts may not provide substantive judicial review of the constitutionality of proposed amendments before elections, and state courts around the country generally also take this position." *Id.* at 330; *see also id.* at 330 n.334 ("*State ex rel. Cramer v. Brown*, 454 N.E.2d 1321, 1322 (Ohio 1983) (per curiam) ("It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature."). This limitation dates back to the early years after the adoption of the initiative. *See Weinland v. Fulton*, 121 N.E. 816, 816 (Ohio 1918) (per curiam) ("In an action to enjoin the Secretary of State from submitting for the

approval or rejection of the electors a constitutional amendment proposed by petition . . . a court cannot consider or determine whether such proposed amendment is in conflict with the Constitution of the United States."); *Pfeifer v. Graves*, 104 N.E. 529, syllabus para. 5 (Ohio 1913)").

Nevertheless, the Ohio state government is choosing to interfere with the citizen lawmaking process "by deferring to election officials' substantive, content-based review; by interjecting itself into the citizen lawmaking process pre-enactment; and by issuing advisory opinions on the validity of proposed measures pre-enactment." Complaint, RE 1, Page ID # 3, ¶ 6. In 2017, the Ohio legislature passed HB 463 which created significant reforms to the election laws, including parts that codified judicial decisions which allowed unconstitutional pre-enactment, content-based review of proposed initiatives. Complaint, RE 1, Page ID # 3, ¶ 7.

Direct democracy is an essential tool for communities suffering from environmental problems. Representation through elected officials often does not adequately represent their interests. This is because the effects of environmental issues may be diffuse, other interests may be more profitable or influential, and the temporary nature of public offices can incentivize the postponement of costly, difficult, and less notorious environmental projects in favor of projects with more instant gratification. The outcome of this case has implications on the ability of

communities to advocate for a system that adequately recognizes environmental and ecosystem rights, and the health and sustainability of their communities.

ARGUMENT

I. The Initiative Process Plays a Key Role in the Evolution of Law

Laws change. Our democratic society is meant to represent the peoples' values and it necessarily evolves as society does. New laws are regularly passed, and outdated ones are repealed. Sometimes, however, government will resist change and favor the status quo. There are many reasons why this can happen, some innocent and others less so, but the result is that our democratic government, will not actually be representative of the wishes and the desires of the people. Theodore Roosevelt, as well as many legal scholars, believed that the "initiative and referendum" should be used to "correct [representative government] whenever it becomes misrepresentative." K.K. DuVivier, *Fast-Food Government and Physician Assisted Death: The Role of Direct Democracy in Federalism*, 86 Or. L. Rev. 895, 913 (2007).

In fact, direct democracy plays an important role in ensuring our nation's government remains representative of our desires. "[A] decentralized government [] will be more sensitive to the diverse needs of a heterogeneous society" because it "increases [the] opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "Initiatives force local

representatives to be in touch directly with their constituents' desires" which can result in "a more responsive and robust form of democracy." DuVivier, *supra*, at 903-04.

Critics of the initiative consider the process "controversial" and they "see it as 'fast-food government'—unhealthy fare because it creates laws quickly, bypassing the slower, more deliberative legislative process." *Id.* at 898. The legislative process is not without its flaws though,[2] and the initiative process serves an important role in addressing them. The same concerns that motivated the adoption of the initiative process continue to exist today. Additionally, there are heightened concerns of industry capture, corruption, bribery, and inertia in government. *See e.g.*, Julie Carr Smyth & John Seewer, *Ohio House speaker, 4 others arrested in $60M bribery case*, ABC News (July 21, 2020), https://abcnews.go.com/Politics/wireStory/feds-detail-charges-60m-ohio-public-corruption-case-71895450 (discussing recent corruption in Ohio's government). In certain instances, initiatives are better suited to reflect the people's will than representative democracy.

[2] Not all laws the legislature passes are subject to careful, public debate. H.B. 463 was stuck into a bill revising foreclosure laws and Ohio's recent effort to ban rights of nature laws was a budget bill rider. *See* H.B. 463, 131st Leg. (Ohio 2017); H.B. 166, 133rd Leg. (Ohio 2019) (adding § 2305.011 on p. 482 of 2600).

The initiative process provides benefits at the national level too. For example, "[a]ddressing controversial issues" through the initiative process "can promote the evolution of innovation" by allowing the states to function as "Brandeis laboratories." DuVivier, *supra*, at 898-99. "[D]ispersing power to the states encourages the evolution of ideas that can help advance an issue nationally" because "[t]he evolutionary process of innovation works best when experimentation is diffused." *Id.* Further, initiatives are often the "first, or sometimes the only, successful mechanisms for addressing some progressive issues." *Id.* at 899.

Community movements contribute to the evolution of more representative laws, so long as the laws are presented to the voters. The Lake Erie Bill of Rights (LEBOR) provides an excellent example. In 2016, Toledoans, appalled at the lack of meaningful response to the 2014 Toledo Water Crisis, founded a grassroots organization. *See* Complaint, RE 1, Page ID # 34. Members circulated a petition, introducing the LEBOR, a city charter with a "rights of nature" component to protect Lake Erie. *See* Complaint, RE 1, Page ID # 35. The petition garnered massive support, and despite facing the same unconstitutional pre-enactment review that is seen here, a successful legal challenge allowed it to be placed on the ballot. *See* Complaint, RE 1, Page ID # 35-37. The ballot initiative was passed by the voters, and it gained both national, and international attention, the likes of

which would have been impossible, absent this method of speech. *See* The Daily Show, *The Fight to Turn Lake Erie Into a Person*, YouTube (Jul. 19, 2019), *https://www.youtube.com/watch?v=3fyUD28UtlU#action=share;* Vox, *This lake now has legal rights, just like you*, YouTube *(Apr. 29, 2019), https://www.youtube.com/watch?v=WwhcrpJTzGQ#action=share; see also Programme for Ninth Interactive Dialogue of the General Assembly on Harmony with Nature*, United Nations, *http://files.harmonywithnatureun.org/uploads/upload792.pdf* (listing Markie Miller, speaking about the LEBOR).

Post-enactment litigation ensued. Unfortunately for LEBOR's thousands of supporters, a federal court invalidated the law, *see Drewes Farms P'ship v. State*, 441 F.Supp.3d 551 (N.D. Ohio 2020), although state court litigation is ongoing. *See Ferner, et al. v. State of Ohio*, No. L-20-1041, 2020 WL 5834855 (Ohio Ct. App. Sept. 30, 2020). LEBOR is forcing the government to grapple with the public's wishes to save a dying Lake Erie. Its presence at the national and international level, introduced and advanced the idea of ecosystems possessing rights to countless others.

The initiative process has brought important changes to our laws in the past. *See* DuVivier, *supra*, at 919-920 (explaining its importance to women's suffrage, fisheries management, safe working conditions, government aid programs, and

much more). Limiting the initiative power prevents our government and our laws from evolving to represent society's changing circumstances and values.

II. Separation of Powers, a Protection for the People

a. Substantive review by the executive branch is a violation of the separation of powers doctrine

Allowing Boards of Elections to conduct what is essentially constitutional review violates the doctrine of separation of powers under the Ohio Constitution. The Ohio Constitution vests "the judicial power of the state" in the courts, Ohio Const. art. IV, §1, and the "supreme executive power of the state" in the governor, Ohio Const. art. III, §5. Separation of powers is "implicitly embedded in the . . . the Ohio Constitution . . . " *S. Euclid v. Jemison*, 503 N.E.2d 136, 138 (Ohio 1986). Its importance has been articulated by the Ohio Supreme Court before:

> The distribution of the powers of government, legislative, executive, and judicial, among three co-ordinate branches, separate and independent of each other, is a fundamental feature of our system of constitutional government. In the preservation of these distinctions is seen, by many able jurists, the preservation of all the rights, civil and political, of the individual, secured by our free form of government; and it is held that any encroachment by one upon the other is a step in the direction of arbitrary power.

City of Zanesville v. Zanesville Tel. & Tel. Co., 59 N.E. 109, 110 (Ohio 1900). *See also State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361–62 (Ohio 2000) ("Though the judgment in Zanesville was reversed . . . we adhere to the principles espoused therein."). Importantly, "[t]he reason the legislative, executive, and judicial powers

are separate and balanced is to protect the *people*, not to protect the various branches of government." *Bray*, 729 N.E.2d at 362 (emphasis added). Any transgression by the executive branch, on the powers of the judicial branch, is therefore an infringement on the rights of the people of Ohio.

The Secretary of State, an executive branch official, oversees the state's Boards of Elections, arms of the executive branch. While it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), the Secretary of State and the Boards of Elections have been exercising judicial powers in their substantive pre-enactment review.

Even recently, courts have determined that this substantive pre-enactment review by Boards of Elections is a violation of separation of powers, at least in the context of municipal charter amendments. The Ohio Supreme Court has held that "[t]he boards of elections [] do not have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms" and that even "an unconstitutional amendment may be a proper item for referendum or initiative." *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 41 N.E.3d 1229, 1232 (Ohio 2015). The district court in the instant case even recognized that "a board of elections may not review the substance of a proposed municipal charter amendment." Mem. of Op. and Order, RE 69, Page ID # 627. These court

decisions, however, have been limited to the review of municipal charter amendments. *See State ex rel. Espen v. Wood Cty. Bd. of Elections*, 110 N.E.3d 1222, 1226, n.2. (Ohio 2017) ("Other provisions enacted as part of 2016 Sub.H.B. No. 463, such as R.C. 3501.11(K)(2), are not implicated in this case, because they relate exclusively to the adoption of *county* charter amendments.").

While the courts have held that their decisions preventing Boards of Elections from making substantive determinations apply to municipal charters, not county charters, there is no sufficient normative reason for this distinction. They implicate the same concerns about separation of powers, First Amendment rights, and the integrity of the democratic process. This arbitrary distinction has not gone unnoticed. *See State ex rel. Maxcy v. Saferin*, 122 N.E.3d 1165, 1178 (2018) (Fisher, J., dissenting), *reconsideration denied sub nom.*, *State ex rel. Maxcy v. Lucas Cty. Bd. of Elections*, 111 N.E.3d 1 (Ohio 2018) ("As detailed in my separate opinion in *Flak*, I would hold that pursuant to State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections, the board of elections' role in processing initiative petitions does not extend to evaluating the substantive ballot-worthiness of a proposal. Pursuant to that opinion, I would also hold that R.C. 3501.11(K)(2) is unconstitutional . . . to the limited extent that it incorporates R.C. 3501.38(M)(1)(a)") (internal citations omitted). Unfortunately, this arbitrary

distinction has not been corrected, and the court continues to erroneously treat the two subjects differently.

b. The Eleventh Amendment does not block Plaintiffs' separation of powers claim

Contrary to the district court's holding, this Court should find that the Eleventh Amendment does not bar the separation of powers claim. The general rule is that the Eleventh Amendment will prevent states, or arms of the state, from being sued in federal court on the basis of state law, unless there is an explicit waiver of their sovereign immunity. *See* U.S. Const. amend. XI. The district court erroneously held that Plaintiffs' cause of action did not implicate federal law and that it was blocked by sovereign immunity. Mem. of Op. and Order, RE 69, Page ID # 639-40.

It is well recognized that Eleventh Amendment immunity does not attach to suits "filed against a state official for purely injunctive relief enjoining the official from violating federal law." *Ernst v. Rising*, 427 F.3d 351, 358-59 (6th Cir. 2005) (citing *ex parte Young*, 209 U.S. 123, 155-56 (1908). Here, Plaintiffs are requesting equitable relief that would enjoin the executive branch from violating the doctrine of separation of powers. Additionally, even more specific to the case at hand, the U.S. Supreme Court has articulated that "although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal

Constitution." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). The district court correctly notes that application of these rules still requires a violation of the federal constitution or federal law.

Here, there is a violation of rights that are implied in the federal constitution. The court has found certain basic rights implied in the Constitution before. *See e.g. Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing the right to privacy in the penumbras of the constitution, mainly the First, Third, Fourth, and Fifth Amendments). Here, such a similarly basic principle, the prohibition of encroachment of power by one branch on another, can find its basis in the penumbras of the Constitution, perhaps in the First, Fourth, Ninth, and Tenth Amendments.

Additionally, U.S. Supreme Court jurisprudence has articulated the basic rule against encroachment of powers at the state level. "[A]ll the powers intrusted to government, *whether State or national*, are divided into the three grand departments, the executive, the legislative, and the judicial . . . [i]t is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1880). While states retain the freedom, as is

their right as sovereigns, to distribute the governmental powers between their branches as they see fit, that is not the same as the right to allow encroachment of powers that are already delineated.

The Supreme Court has noted that "in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, J., concurring). This however is not a question of the *distribution* of powers among the branches of a State's government. That was done in the state constitution long ago, and is not questioned here. This is a question about the *exercising* of powers among branches of a State's government. More specifically, the departure from the original manner that power was distributed among the branches.

A closer look at the effects of allowing the Eleventh Amendment to block this claim highlights its impossibility. Ohioans carefully prescribed their government's structure, duties, and limitations of power in their state constitution. It was a narrow grant of authority and power, and those intentionally created boundaries between the branches of government, are meant to constrain each branch, and protect the people from their state government encroaching on their reserved rights. This is therefore an exceptional case, because allowing the state government to alter its structure, duties, and limitations of power behind the

curtain of the Eleventh Amendment erodes at the democratic nature of the Ohio government and even democracy itself. This surely cannot be the case.

The underlying purposes of the Eleventh Amendment also indicate that sovereign immunity should not apply in the instant case. The first and the "most concrete interest motivating the Amendment" was the "financial aspect." Kelsey Joyce Dayton, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86 Univ. of Chicago L. Rev. 1603, 1610 (2019). Unnecessary and constant litigation would be an enormous expense on the state, and the Amendment was passed to spare the state from crippling amounts of litigation. The second purpose behind the Eleventh Amendment, was to preserve "an ideal of federalism" and the "dignity of the states within the republican system." *Id.* at 1610-11. This was in recognition that the "States, although a union, maintain certain attributes of sovereignty." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). *See also* Dayton, *supra*, at 1610-11.

These motivations are inapposite or minimized in the instant case. The financial interest is lessened here because the petitioners are requesting injunctive relief rather than monetary damages. The second concern, regarding federalism and state dignity is also minimized here. The Eleventh Amendment was adopted out of concerns of federalism and as a protection of our republican form of government. The instant case, however, involves a situation where the executive

branch is usurping power from the people acting as the legislative branch, in a move that diminishes the democratic power of the people. Power of the legislative branch is similarly usurped by pre-enactment judicial review. Allowing the Eleventh Amendment to block that claim, in fact threatens those very interests that it was meant to protect, and it becomes counterproductive to its very purpose.

This court should find that the separation of powers claim should not be blocked by the Eleventh Amendment, because the instant case violates rights implicit in the federal constitution, it creates an absurd result, and because the purposes underlying the Eleventh Amendment do not apply, and in fact application is counterproductive to the purpose of the Amendment.

III. Substantive Pre-Enactment Review Violates the First Amendment

The court determined that this is a content-neutral restriction, Mem. of Op. and Order, RE 69, Page ID # 632, and content neutral restrictions in the context of election laws are subject to the *Anderson-Burdick* framework, derived from the Supreme Court's holdings in *Anderson v. Celebrezze,* 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). The *Anderson-Burdick* framework has three steps, and it is applied in the following manner:

> The first, most critical step is to consider the severity of the restriction. Laws imposing severe burdens on plaintiffs' rights are subject to strict scrutiny, but lesser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. Regulations that fall in the middle warrant a flexible analysis that weighs the state's interests and chosen means of

> pursuing them against the burden of the restriction. At the second step, we identify and evaluate the state's interests in and justifications for the regulation. The third step requires that we assess the legitimacy and strength of those interests and determine whether the restrictions are constitutional.

Schmitt v. LaRose, 933 F.3d 628, 639 (6th Cir. 2019) (internal citations and quotation marks omitted).

The court, in applying this framework determined that the restrictions here did not sufficiently burden Plaintiffs, and that strict scrutiny did not apply. *See* Mem. of Op. and Order, RE 69, Page ID # 635. It held that Plaintiffs' burdens were outweighed by the state's interests in imposing these restrictions. *See id.* at 636.

a. Ohio's initiative ballot scheme imposes a severe burden

Contrary to the district court's determination, the burden imposed on Plaintiffs is a severe one, and strict scrutiny applies. "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 (6th Cir. 2016). The court here determined that Plaintiffs' First Amendment Rights were not severely burdened with exclusion or virtual exclusion from participating in the election process. Mem. of Op. and Order, RE 69, Page ID # 634.

First of all, procedural burdens much less severe than the burden in this case have required strict scrutiny. The district court correctly cited the United States Supreme Court's precedent in recognizing that that a procedural burden that imposed a cost of $701.60 for a filing fee categorically excluded indigent

candidates and left them with no reasonable alternative means of access. *See id.* at 633 (citing *Lubin v. Panish*, 415 U.S. 709, 719 (1974)). The Court considered that high cost, procedural burden severe enough to require strict scrutiny. Here, the procedural costs are much more extreme. Drafting an initiative and gathering the requisite number of signatures is already a major burden. Having to overcome often unclear, and shifting standards, and argue against potentially arbitrary decisions by the Boards of Elections imposes a financial burden well in excess of $700, as well as a personal burden that is perhaps incalculable. It is very possible that following an initiative's rejection, its supporters will never be able to bring their initiatives to this stage in the process ever again.

The burden grows exponentially when you consider that the additional requirements by the Boards of Elections are not just procedural, but also substantive. The incredibly high, all or nothing, standard regarding the substance of initiatives essentially requires Plaintiffs to possess an advanced legal education or have the resources to afford legal representation. When you consider these educational requirements that are being imposed, the citizens of Ohio are undoubtedly facing a substantial burden. It results in a categorical exclusion of those without access to legal resources similar to the categorical exclusion of indigent persons in *Lubin v. Panish*. Considering the well-documented gap in access to legal services across the country, requiring initiative proponents to mount

a full-fledged legal defense of a proposed measure pre-enactment becomes increasingly severe.

It is possible, however, that even possessing an advanced legal education would not be enough. The determinations here are being made by Boards of Elections, the members of which do not always have legal educations themselves. Even experienced lawyers might not be able to help anticipate the determinations of the Boards, because they are not necessarily going to stay within the confines of the rules of law or the constitution. Psychologists, sociologists, and political scientists might even be needed to anticipate their actions.

Importantly, many progressive ideas are masked behind the misconceived notion that they are unconstitutional. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); see e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing the right to same-sex marriage). Boards of Elections, comprised of members with varying backgrounds, are more likely to misunderstand the law and subject petitioners to arbitrary decisions, especially when they bring progressive ideas.

With this substantive requirement, which requires initiative bringers to possess advanced legal degrees, or the immense resources to ensure that they have an initiative immune to any constitutional challenges (even flawed constitutional challenges), it is clear how severe of a burden exists. The initiative process becomes increasingly exclusive, and enormous portions of the population, including Plaintiffs, are virtually excluded from participation in a fair and honest initiative process in violation of the First Amendment.

b. <u>The court erroneously determined that Ohio's initiative ballot scheme does not impose a severe burden</u>

The court, in its determination that Plaintiffs do not face a severe burden, bases its conclusion on flawed sources. It relies particularly heavily on the *Burdick* case. Using *Burdick* for the general *Anderson-Burdick* structure is appropriate, but key differences between the *Burdick* case and the case before us, illustrate that its precise holdings are inapplicable here.

The district court cites *Burdick* for two propositions. It first compares the rights asserted here to the right asserted in *Burdick* (to count a protest vote for Donald Duck), for the proposition that "Plaintiffs are [not] categorically entitled to add initiatives to the ballot that plainly exceed the scope of the initiative power." Mem. of Op. and Order, RE 69, Page ID # 634 (citing *Burdick*, 504 U.S. at 438). It then uses *Burdick* in its conclusion that limiting ballot options to those that have "complied with state election law requirements . . . is eminently reasonable" and

that "the assumption that an election system that imposes any restraint on voter choice is unconstitutional [is wrong]." *Id.* (citing *Burdick*, 504 U.S. at 440 n.10). The comparison to the factually impossible situation in *Burdick* contributes little more than a caricature of very legitimate constitutionally protected interests in participating in the democratic process.

Key differences between the *Burdick* case and the case at hand limit its applicability here. Those distinctions include: that it was an election for a person; the petitioners had waited until the very last minute to cast their vote, *see Burdick*, 504 U.S. at 439 (describing "petitioner's limited interest in waiting until the eleventh hour to choose his preferred candidate"); the restriction only limited the timing of the vote; and the characteristics of the vote, including its factual impossibility, were frowned upon, *see id.* at 438 (citing *Storer v. Brown,* 415 U.S. 724, 735 (1974)) (explaining that elections are not meant to "provide the means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'"); *see also id.* at 439 ("The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies."). Further, the case specifically articulates its holding around the idea of procedural restrictions, rather than substantive ones. The court explains that the "States may prescribe '[t]he Times, Places, and Manner of holding Elections for Senators and Representatives,' Art. I §4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own

elections." *Id.* at 433 (citing *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). The *Burdick* court does not attempt to say that the constitution allows states the power to regulate the *substance* of elections, simply to regulate "Times, Places, and Manner." The *Burdick* court, while recognizing that "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *id.* (internal citations removed), clearly stops short of any *substantive* inquiry of the ballot material, *see Id.* at 438 ("[W]e have repeatedly upheld reasonable, politically neutral regulations that have the effect of *channeling* expressive activity at the polls.") (emphasis added). What we are faced with here, is not a channeling of expressive activity, but rather the culling of it.

To the extent that the Donald Duck comparison applies to this case, its value is overstated. Yes, it is possible that somewhat absurd ideas can find their way onto a ballot. The signature requirement, the general cost of creating an initiative, the fact that it needs to be adopted by voters, and the availability of post-enactment challenges still remain as barriers though. The possibility of one of these ideas being presented on a ballot, however, is an inherent risk of a democratic society. Democracy is of course an imperfect system, and it bears the risk that voters may be uninformed, ambivalent, biased, or flawed in their ideologies. People can vote

for movie star candidates, often with limited qualifications, or support initiatives that simply might not work, but that is the cost of democracy. The risk of having to deal with the Donald Duck petitions that may arise is worth it, if the alternative is that genuine, hard fought, democratically developed ideas are threatened, and often arbitrarily struck down. Additionally, any unconstitutional ideas can be addressed after they are voted on, when there would be no risk to First Amendment rights or democracy in general. Those egregious situations that the court is worried about will not be difficult to challenge, and if they are, perhaps it is because the idea is not so clearly unconstitutional.

Next, the district court cites *Timmons* for the proposition that the restriction here does not severely burden Plaintiffs' rights, under the First Amendment, to engage in political expression. Mem. of Op. and Order, RE 69, Page ID # 634. It bases that proposition on the holding in *Timmons* that there is no severe burden on First Amendment rights by restricting an individual's appearance on the ballot as a party's candidate. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("That a particular individual may not appear on the ballot as a particular party candidate does not severely burden that party's associational rights."). The first problem with applying this holding to the instant case, is that the court relied entirely on *Burdick* in articulating this principle. *See id.* (citing *Burdick* for the holding that is quoted in Mem. of Op. and Order, RE 69, Page ID # 634). As

previously explained, the applicability of the *Burdick* case starts and ends with the framework. Its particular holdings do not apply here, and cases that rely on *Burdick* for their own propositions, therefore should not apply either. Additionally, *Timmons* suffers from key contextual differences, just like *Burdick*. Among those are the fact that it addressed "antifusion laws" which are procedural rather than substantive burdens, it involved the election of an individual rather than the initiative process at all, and it implicated concerns about fraudulent election practices which is not even remotely a concern here. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

Finally, the district court holds that "to the extent Plaintiffs argue the onus of expending time and effort to pursue relief from an erroneous determination of state law constitutes a severe burden, that arguments fails" by citing *Schmitt*. Mem. of Op. and Order, RE 69, Page ID # 634-35; *see also Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019) (holding that the cost of obtaining legal counsel to challenge a board of elections' decision not to certify an initiative through a writ of mandamus is a burden that is neither severe nor minimal). This proposition derived from the *Schmitt* case suffers from fatal flaws as well. The court in *Schmitt* when making this holding, was presented with a question about the appropriateness of the standard of review. The court explicitly "[made] clear that Plaintiffs have never challenged the legitimacy of the legislative-administrative distinction or the

state's right to vest in county boards of elections the authority to apply that distinction. Instead, Plaintiffs assert, and the district court found, a right to de novo review of a board's decision." *Schmitt*, 933 F.3d at 639. This case on the other hand, addresses the issue that the court in *Schmitt* does not. The judgment by this court should not be constrained by language from another case that explicitly declined to analyze the core issue that is relevant here. The court in *Schmitt* decided that the standard of review, by itself, was not enough to create a severe burden. It was particularly moved by the fact that the standard of review that was argued for, was essentially the same as what was given. *Id.* at 640. The nature of the issue in question was fundamentally different too. It was a discussion about *how* a court addresses purported issues in the initiative process (specifically the precise issue regarding the standard of review), whereas this is a discussion about *what* is reviewed, *when* it is reviewed, and *who* reviews it. The discussion in the instant case is one that happens prior to any questions about standards of review, like in *Schmitt*. The difference is subtle, but important. It is illustrated by the fact that if Plaintiffs here prevail on their question, the issue in *Schmitt* becomes moot. The underlying issue in *Schmitt* is fundamentally different, and its holding and rationale do not constrain the court in the instant case.

The court's opinion regarding the severity of the burden on Plaintiffs, is without adequate support. *See* Mem. of Op. and Order, RE 69, Page ID # 634-35

(using only the flawed sources discussed in this section for its conclusion that Plaintiffs do not suffer a severe burden).

c. Defendants' interests do not outweigh the burdens on Plaintiffs

Even if the Court declines to apply strict scrutiny, which as discussed above it should, Defendants' interests do not outweigh the burden imposed on Plaintiffs. The district court points to Defendants' interest in the integrity of the ballot and "maintaining voter confidence in the electoral process", as justification for Defendants' actions. *See* Mem. of Op. and Order, RE 69, Page ID # 635-36. These concerns are also shared by Plaintiffs. Voter confidence, however, is better served by maintaining the democratic process that is explicitly outlined in the Ohio Constitution, and by ensuring that grassroots and community movements that meet the procedural requirements for an initiative can put it to a vote among the Ohioan populace. "Ensuring that only ballot-eligible initiatives go to the voters," likewise is an important value that Plaintiffs support, but the court ignores that Plaintiffs' position is more nuanced than that. Much of the impetus for this lawsuit centers on what constitutes a "ballot-eligible initiative." It has been Plaintiffs' position that substantive pre-enactment review limits initiatives that are in fact "ballot-eligible" ones. Simply stating that Defendants possess a "strong interest" in these things, without more, overstates the significance of those interests and is used to support the conclusion that initiatives that fail this unlawful, substantive pre-enactment

review are not ballot eligible. It ignores that Defendants' interests are also shared by Plaintiffs, and that Defendants' actions do more to damage those stated interests than to support them.

Finally, the court cites *Schmitt* for the proposition that "[a]lthough the chosen method for screening ballot initiatives may not be the least restrictive means available, it is not unreasonable given the significance of the interests it has in regulating elections." Mem. of Op. and Order, RE 69, Page ID # 637 (citing *Schmitt*, 933 F.3d at 642). The "interest . . . in regulating elections" is not disputed, but the extent of that regulation is. In Defendants' view, their regulatory power is so substantial that they can control not just the process, but also the very substance of elections. Equipping them with that power has created an unreasonable and unconstitutional burden on the initiative process and the people of Ohio.

CONCLUSION

For all the reasons stated above, the judgment of the district court should be reversed.

Respectfully submitted,

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Executed this 5th day of October, 2020.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on October 5, 2020.

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