

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

<b>CHAD THOMPSON, et al.,</b>	:	
	:	<b>Case No. 20-3526</b>
<b>Plaintiffs-Appellees,</b>	:	
	:	<b>On Appeal from the</b>
<b>v.</b>	:	<b>United States District Court</b>
	:	<b>for the Southern District of Ohio</b>
<b>GOVERNOR OF OHIO,</b>	:	<b>Case No. 20-cv-2129</b>
<b>MICHAEL DEWINE, et al.,</b>	:	
	:	
<b>Defendants-Appellants.</b>	:	

**MOTION FOR LEAVE TO FILE**  
**AMICI CURIAE’S MEMORANDUM IN SUPPORT OF APPELLANTS’**  
**MOTION TO STAY**

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Federation; Ohio Council of Retail  
Merchants; and Ohio Business Roundtable*

Amici curiae, Ohio Manufacturers' Association, Ohio Chamber of Commerce, National Federation of Independent Businesses/Ohio, Ohio Farm Bureau Federation, Ohio Council of Retail Merchants, and Ohio Business Roundtable, move for leave to file the attached memorandum in support of Appellants' motion to stay the district court's order.

The attached memorandum in support sets forth the reasons amici curiae have an interest in this matter, including that they have an interest in ensuring the integrity of Ohio's ballot-initiative process.

Amici curiae sought consent of all counsel prior to filing this motion, and obtained the Appellants' consent, but has only heard definitively from one of the Appellees and that response was to provide consent.

Respectfully submitted,

/s/ Anne Marie Sferra

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Motion* complies with the type-volume requirements and contains 112 words. *See* Fed. R. App. P. 27(d)(2)(A).

*/s/ Anne Marie Sferra*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **MOTION FOR LEAVE TO FILE AMICI CURIAE'S MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION TO STAY** was filed with the Clerk of Courts using the ECF system, which will send notification of such filing to all attorneys of record on May 22, 2020.

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MICHAEL DEWINE, et al.,	:	
	:	
Defendants-Appellants.	:	

**MEMORANDUM OF AMICI CURIAE, OHIO MANUFACTURERS  
ASSOCIATION, OHIO CHAMBER OF COMMERCE; NATIONAL  
FEDERATION OF INDEPENDENT BUSINESSES/OHIO; OHIO FARM  
BUREAU FEDERATION; OHIO COUNCIL OF RETAIL MERCHANTS;  
AND OHIO BUSINESS ROUNDTABLE  
IN SUPPORT OF APPELLANTS' MOTION TO STAY**

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Businesses/Ohio; Ohio Farm Bureau  
Federation; Ohio Council of Retail  
Merchants; and Ohio Business Roundtable*

## **MEMORANDUM IN SUPPORT**

### **A. Statement of Amicus Interest**

The Ohio Manufacturers' Association ("OMA") is a statewide nonprofit trade association whose membership consists of over 1,400 manufacturing companies. The OMA aims to enhance the competitiveness of manufacturers and improve living standards of Ohioans by shaping a legislative and regulatory environment conducive to economic growth in Ohio.

The Ohio Chamber of Commerce ("Chamber") is Ohio's largest and most diverse business advocacy organization. The Chamber represents members of virtually every industry throughout Ohio, including retail, transportation, manufacturing, healthcare, and others. The Chamber works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate.

The Ohio Chapter of the National Federation of Independent Businesses ("NFIB") is an association with more than 25,000 members, making it the State's largest association dedicated exclusively to serving the interests of small and independent business owners. NFIB members typically employ fewer than twenty-five people and record annual revenue of \$250,000 or less.

The Ohio Farm Bureau Federation, Inc. ("Ohio Farm Bureau") is Ohio's largest general farm organization, representing nearly 200,000 member families.



The Ohio Farm Bureau is a federation of 86 member-county Farm Bureaus, representing Ohio's 88 counties. Farm Bureau members in Ohio serve on boards and committees working on legislation, regulations, and issues that affect agriculture, rural areas, and Ohio's citizens in general.

The Ohio Council of Retail Merchants ("Council"), founded in 1922, is a statewide trade association that includes 5,400 member companies, ranging from large department stores, supermarkets, and drug store chains, to independently owned retail businesses. The Council promotes and supports legislation and initiatives that pave a positive path for Ohio's retail community.

The Ohio Business Roundtable ("OBRT") was founded for one sole purpose: to improve Ohio's business climate. Since its inception, the OBRT has worked with Ohio's governors and legislative leaders to make Ohio more business-friendly and more competitive both nationally and internationally. OBRT members — the Chief Executive Officers of many of our state's largest, most successful businesses — have helped bring about momentous change in Ohio's economic landscape. It is the belief of OBRT members that any changes to laws regulating the mechanics of the petition and initiative process belong to the Ohio General Assembly and the citizens of Ohio.

Amici have an interest in this matter because they are often engaged in the initiative process, especially when their members are impacted by out-of-state

interests seeking to change Ohio law. They urge this Court to stay the district court's injunction thus ensuring the integrity of the ballot-initiative process and avoiding a court-legislated petition-initiative process where there is no meaningful oversight or accountability.

## **B. Law and Argument**

### **1. Introduction**

While the initiative power is reserved to the people of this state, the Ohio Constitution contemplates the existence of statutes that facilitate the people's exercise of that power by "ensuring the integrity of and confidence in the process." *In re Protest Filed with the Franklin Cty. Bd. of Elec. by Citizens for the Merit Selection of Judges, Inc.*, 49 Ohio St.3d 102; *see also* Ohio. Const. Article II, §1g (allowing laws to "facilitate" the statewide initiative process).

Adherence to reasonable requirements enacted by the General Assembly is vital to maintaining the integrity of Ohio's initiative process. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 191, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) ("states allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally"); *In Re Protest of Keith Brooks*, 155 Ohio App.3d 370, 2003-Ohio-6348, 801 N.E.2d 503 (same) (citing *Buckley*). To safeguard the integrity of the process, Ohio courts have required strict compliance with applicable

laws unless a statute expressly states otherwise. *See State v. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, 777 N.E.2d 830, ¶ 32. These laws should not be disregarded or rewritten for expediency.

In recent years, out-of-state interests have pushed a variety of constitutional amendments and other ballot initiatives in Ohio to serve their own purposes. With its relatively low signature threshold for obtaining ballot access and tight timelines for review and challenges that favor petitioners, Ohio has become a magnet for petition efforts, making it less about Ohio citizens petitioning their government and more about the agendas of well-funded out-of-state interests. Unfortunately, the onslaught of ballot initiatives often results in questionable practices and irregularities in the petition process.<sup>1</sup>

Amici ask this Court to stay the District's Court's order issued on May 19, 2020, because it completely rewrites Ohio election laws pertaining to initiative petitions by: (1) substituting still-evolving court-made rules for tried-and-true Ohio constitutional and statutory provisions; (2) eliminating security and oversight measures; and (3) depriving Ohioans of their right to challenge the petitions at issue.

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<sup>1</sup> For instance, less than two years ago, the Supreme Court of Ohio invalidated a statewide initiative petition for failure to comply with Ohio law. *See Ohio Renal Association v. Kidney Dialysis Patient Protection Amendment Committee*, 154 Ohio St.3d 86, 2018-Ohio-3220 111 N.E.3d 1139.

A stay will allow these important issues to be addressed in a thorough and orderly fashion without prejudice to Appellees.

## **2. Established Ohio law governs the initiative process**

The Tenth Amendment reserves to the states all powers not specifically granted to the federal government, including “the power to regulate elections.” *Gregory v. Ashcroft*, 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The states’ powers to regulate their initiative processes require more than lip service. After all, ““as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”” *Burdick v. Takushi* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974).

The Ohio General Assembly has not enacted laws to allow signatures in support of an initiative petition to be obtained electronically. The injunction, however, legislates a yet-to-be-determined online-signature provision—eliminating many of the safeguards that help protect the secure enactment of initiative-based laws.

The injunction tramples the Tenth Amendment because it replaces Ohio’s Constitution- and statute-based initiative system with court-legislated procedure. For security purposes, Ohio’s constitution requires petition signatures to be in *ink and*

*witnessed* by the circulator. Ohio Const. Art. II, § 1g. The injunction rewrites those requirements to allow for *unwitnessed electronic signatures*. No such procedure exists in Ohio election law—it is wholly court-legislated.

The injunction trades Ohio’s tried-and-true in-person ink-signature requirements for an untested electronic procedure suggested and monitored by, in the Ohioans for Raising the Wage instance, a for-profit signature-collection firm under a multimillion-dollar contract with the initiative backers. [Doc 30-1, PAGEID 433.] Worse, instead of applying the neutral laws enacted by Ohio’s elected legislators, the preliminary injunction installs the for-profit signature collector as the vote counter for this untested process. That process contains no security beyond a circulator “monitoring for duplicate names and multiple uses of an IP address” and a “voter” who must provide the last four digits of their Social Security number. [Doc 30-1, PAGEID 434.] In short, this system leaves the proverbial fox guarding the henhouse.

The court-legislated electronic-signature provision rewrites Ohio law, and, in its rewriting, bypasses the Secretary of State, a Constitutional office and person. This too harms Ohio’s election security. The Secretary is a neutral government entity and person that supervises and runs Ohio’s elections. The Secretary answers to the electorate—literally, by facing election, and figuratively, because the office is constrained by checks like Ohio’s public-records laws. The initiative backers and

their signature-collection firm answer only to each other and their cause. And the new procedure leaves the Secretary with little ability to verify their work.

**3. The Secretary and the boards of elections will not be able to properly verify whether electronic signatures were executed by actual electors**

The Secretary is charged with receiving all initiative petitions and certifying the sufficiency of those petitions. Ohio Rev. Code § 3501.05(K). Although the Secretary is charged with such a duty, the Secretary's office does not examine the petitions themselves. Instead, the Secretary must send the petitions to the county boards of elections for verification. Specifically, each board of elections must review, examine, and certify the sufficiency and validity of the petitions. Ohio Rev. Code § 3501.11(K). "The county board of election must ascertain . . . whether the names on each part-petition are on the registration lists of such county, or whether the persons whose names appear on each part-petition are eligible to vote in such county, and to determine any repetition or duplication of signatures, the number of illegal signatures, and the omission of any necessary details required by law." Ohio Rev. Code § 3501.15.

The Secretary depends on boards of elections to verify the signatures on each part-petition submitted from the petitioners, and this is usually done by comparing the signature on the petition with the signature on file with the county boards of elections. Because no Ohio law permits electronic signatures on petitions, county

boards of election have not previously had to review electronic signatures. The district court's order requires the county boards to engage in an entirely new process—on the fly.

A secure way to ensure that electronic signatures are from actual electors is to have the board of elections verify the signature by matching it with the last four digits of the elector's Social Security number. But a board of elections is not required to obtain this Social Security information from voters.

More specifically, Ohio law allows voter registration by paper or online. The paper form only requires an individual to provide either the last four digits of their Social Security number *or* their Ohio license number. Ohio Rev. Code § 3503.14. Those registering online must provide *both* their Social Security number and their Ohio license number or state identification card number. Ohio Rev. Code § 3503.20. Because not all voters provide their board of elections with the last four digits of their Social Security number, the database of registered voters does not include the Social Security information for all registered voters.

So not only are the boards of elections being asked to do something they do not ordinarily do, they likely lack some of the information necessary to accurately complete their review. But even if they had the necessary information, public accountability will be minimal because it is unlikely that the boards of elections will release information containing redacted Social Security numbers.

Therefore, electronic signatures create a muddled process for Ohio's boards of elections and pose a security threat to the ballot initiative process.

**4. The district court's decision eliminates the constitutional right to challenge**

The Ohio Constitution provides that the petitions in support of a statewide initiative must be filed 125 days before the general election—which is July 1, 2020. The district court extended this period to July 31, 2020. The Ohio Constitution also provides that any challenge to the petitions or signatures must be filed no later than 95 days before the election—which is July 31, 2020. Ohio Const. Art. II §1g. Thus, the district court's order effectively eliminates the constitutional right to challenge—thereby permitting fraudulent signatures and other irregularities to get the initiative to the ballot. The constitutional right to challenge is important to ensure accountability and compliance with Ohio's election laws. *See Ohio Renal Association v. Kidney Dialysis Patient Protection Amendment Committee*, 154 Ohio St.3d 86, 2018-Ohio-3220, 111 NE.3d 1139 (invalidating initiative petition for failure to comply with Ohio Rev. Code § 3501.381(A)(1)). There is no legal basis for depriving Ohioans of this right.

Further, as a general matter, petitioners “do not have a constitutional right for the initiative to appear on any ballot, far less any particular ballot.” *Jones v. Husted*, 2016 WL 3453658,\*4 (S.D. Ohio June 20, 2016). Thus, there is no irreparable harm to petitioners. Whenever they get the required number of signatures, they can



proceed to submit them to the Secretary and, if sufficient, the initiative will be placed on the ballot at the next appropriate election.

**C. Conclusion**

Amici urge the Court to stay the District Court's order because it is unlikely that Appellees can prevail on the merits of their claims and they will suffer no irreparable harm by adhering to established Ohio law governing initiative petitions.

Respectfully submitted,

/s/ Anne Marie Sferra

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I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Motion* complies with the type-volume requirements and contains 2,122 words. *See* Fed.R.App.P. 27(d)(2)(A).

/s/ Anne Marie Sferra

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I hereby certify that a true copy of the foregoing **AMICUS MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION TO STAY** was filed with the Clerk of Courts using the ECF system, which will send notification of such filing to all attorneys of record on May 22, 2020.

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