IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIOANS FOR RAISING THE WAGE, et al., Plaintiffs,	:	Case No. 20CV002381
OHIOANS FOR SECURE AND FAIR ELECTIONS, et al., Intervenors,	:	Judge David C. Young
v.	:	
OHIO SECRETARY OF STATE FRANK LAROSE, Defendant.	:	

MOTION TO DISMISS INTERVENORS' AND PLAINTIFFS' COMPLAINTS OF DEFENDANT OHIO SECRETARY OF STATE FRANK LAROSE

Pursuant to Ohio Rule of Civil Procedure 12(b)(6), Defendant Ohio Secretary of State Frank LaRose moves to dismiss Plaintiffs' and Intervenors' Complaints for failure to state a claim upon which relief may be granted. This Motion is more fully supported by the attached Memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND BACKGROUND

Plaintiffs Ohioans for Raising the Wage ("Plaintiffs") and Intervenors Ohioans for Secure and Fair Elections ("Intervenors") are before this Court asking it to ignore and enjoin the Ohio Constitution. Their request for such unprecedented relief is legally unsupportable. As a threshold matter, neither Plaintiffs, nor Intervenors (collectively "Petitioners"), have stated a claim upon which this Court can grant such relief. First, Plaintiffs' entire case is based upon alleged violations of the free speech and assembly clauses of Ohio's Constitution. But, neither of those clauses is a self-executing source of protection upon which a claim for relief *can* be based. Thus, their Complaint must be dismissed. Second, although Intervenors take a different route and assert claims under the First Amendment to the United States Constitution, their case fares no better. The provisions of the Ohio Constitution and its effectuating statutes that Intervenors challenge here are election mechanic regulations that do not regulate, much less infringe upon, core political speech. Without any infringement on First Amendment speech, there can be no First Amendment claim and Intervenors' claims must similarly be dismissed.

Petitioners' failure to state a claim is not their only hurdle. The Ohio Supreme Court already denied Intervenors the same relief that they seek from this Court, specifically, more time to circulate petitions. Intervenors are not entitled to a second bite at the apple. Plaintiffs are equally unentitled to the extension that the Ohio Supreme Court refused to grant. Petitioners' respective claims, and their requests for relief must be rejected and this case dismissed.

A. Amending the Ohio Constitution by initiative.

The process by which the Ohio Constitution can be amended via the ballot (that Petitioners seek to bypass here) is enshrined within it. *See* Ohio Const., Art. II, Secs. 1a, 1g. For an amendment to be put to the voters, a petitioner must file a petition and signatures equal to at

least 10 percent of the total vote cast for the office of governor in the last gubernatorial election not later than 125 days before the general election with the Ohio Secretary of State. Ohio Const., Art. II, Secs. 1a, 1g. The signatures must be from at least 44 of Ohio's 88 counties, and from each of the 44 counties, there must be signatures equal to at least five percent of the total vote cast for governor in the last gubernatorial election. *Id.* To be valid, each signature must be in ink. R.C. 3501.38(B); Ohio Const., Art. II, § 1g. And it must be the original signature of the elector, signed in the elector's "own hand", *see* R.C. 3501.011; Ohio Const., Art. II, § 1g, and the elector's signature on the petition must match the signature that is on file with the board of elections. *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St.3d 205, 209, 602 N.E.2d 644 (1992). Each part-petition must contain a circulator's statement, signed by the circulator "under penalty of election falsification", R.C. 3501.38(E), to affirm that the circulator "witnessed the affixing of every signature." Ohio Const., Art. II, § 1g.

The Secretary of State may not accept a petition that does not have the required minimum number of signatures. R.C. 3519.14. If the Secretary accepts a petition and later determines that it has an insufficient number of valid signatures, the petitioner is given ten additional days to "cure" the deficiency by submitting additional supplementary petitions. Ohio Const., Art. II, Sec. 1g; R.C. 3519.16(F). A petitioner may not collect the supplemental signatures until he or she is notified of the deficiency from the Secretary. *Id.* R.C. 3519.16(F) expounds upon the ten-day cure period prescribed by Article II, Section 1g of the Ohio Constitution and specifies that supplemental signatures may not be collected until after the Secretary of State notifies the petitioner that the initial signatures are insufficient. Additionally, the statute requires that the petitioner submit an electronic copy of the petition, a summary containing "the number of part-

petitions filed per county, and the number of signatures on each part-petition" at the time the initial petition and signatures is filed with the Secretary of State. R.C. 3519.16(B).

Before a petitioner can begin the process to circulate petitions and gather signatures, he or she must first submit to the Ohio Attorney General a petition that contains the proposed amendment, a summary of it, and signatures of at least 1,000 Ohio electors. R.C. 3519.01(A). Within ten days, the Attorney General must review the petition and determine whether the summary contained thereon is a fair and truthful statement of the proposed amendment. *Id.* If it is, the Attorney General must certify that fact and forward the petition to the Ohio Ballot Board, which has ten days to determine whether the proposed amendment "contains only one proposed law or constitutional amendment." R.C. 3505.062(A). The Attorney General's certification does not expire.

B. Petitioners' attempts to amend the Ohio Constitution by initiative.

Plaintiffs filed their petition, "Raise the Wage Ohio," with the Attorney General on January 17, 2020, and the Attorney General certified it on January 27, 2020. Pls. Compl., ¶¶10, 11. On February 5, 2020, the Ohio Ballot Board met and certified the petition as containing only one proposed constitutional amendment and as of that date the Plaintiffs were free to circulate the petitions and obtain signatures. *Id.* at ¶12.

On February 10, 2020, Intervenors submitted "The Secure and Fair Elections Amendment" to the Attorney General and the Attorney General certified it on February 21, 2020. Intervenors' Compl., ¶¶20, 21. The Ballot Board subsequently met and determined that it contained more than one proposed constitutional amendment and voted to divide it into four separate amendments. *Id.* at ¶21. Intervenors challenged the Ballot Board's division in the Ohio Supreme Court. Intervenors' Compl., ¶22. In that challenge, Intervenors also asked the Supreme Court for additional time to collect signatures. Although the Supreme Court issued a writ of

mandamus requiring the Ballot Board to meet and certify the Secure and Fair Elections Amendment as containing only one amendment, it refused to grant the Intervenors more time to circulate petitions. *State ex rel. Ohioans for Secure & Fair Elections v. LaRose*, Slip Opinion No. 2020-Ohio-1459. The Court held that Intervenors "[had] not demonstrated any urgency for placing them on this November's ballot as opposed to a ballot in November 2021." *Id.* at ¶ 21.

C. Plaintiffs' and Intervenors' claims.

Although they are both suing Secretary of State LaRose, Petitioners' are not before this Court claiming that Secretary LaRose has done anything that impacts their ability to circulate petitions and gather signatures. Instead, Petitioners go to great length to describe the current COVID-19 pandemic and the Orders issued by Ohio Department of Health Director Amy Acton. Pls. Compl., ¶¶17-26, Intervenors' Compl., ¶¶30-45, and allege that *those* events and Orders will impact their ability to circulate petitions. Critically, neither Petitioner challenges Dr. Acton's Orders.

Plaintiffs' Claims and Prayer for Relief: Plaintiffs claim that "the COVID-19 health crisis and the necessary restrictions imposed by [Dr. Acton's] Orders" create an undue burden on their right to circulate petitions. Pls. Compl., ¶46 (emphasis added). They claim that the current circumstances render Ohio's constitutional and statutory requirements for ballot initiatives burdensome on rights conferred by other portions of the Ohio Constitution, namely Article I, Section 3's assembly clause and Article I, Section 11's free speech clause. Id. at ¶¶ 46-48. Thus, they ask this Court to enjoin the Ohio Constitution, and the statutes that give it effect, as follows: (1) Enjoin Ohio Constitution Article II, Section 1g's July 1, 2020 deadline to file petitions with the Secretary of State and move it to August 21, 2020; (2) enjoin the Ohio Constitution's Article II, Section 1a's requirement that petitions have signatures in an amount equal to ten percent of the number of electors who voted in the last gubernatorial election and lower it to only 6 percent;

(3) eliminate Article II, Section 1g's requirement that petitions contain signatures from at least five percent of electors in at least half of Ohio's counties; (4) enjoin R.C. 3519.14's requirement that the Secretary may not accept a petition that does not have the required minimum number of signatures; and (5) enjoin Article II, Section 1g of the Constitution and R.C. 3519.16 such that they be permitted to collect signatures on supplementary petitions before Ohio's constitutionally and statutorily prescribed ten-day cure period begins. Id. at Prayer for Relief, (b)(i)-(v). In the alternative, Plaintiffs seek this Court to order relief that violates the Ohio law. That is, they ask this Court to enjoin Article II, Section 1g's requirement that signatures be in ink and witnessed by circulators and R.C. 3519.05 and R.C. 3519.16's requirement that petitioners submit an electronic copy of their petition with the Secretary of State. Id. at Prayer for Relief, (c), (d). Instead, they seek to gather signatures electronically, without citing any statutory or constitutional authority for such a procedure, or a logistical plan for executing it.

Intervenors' Claims and Prayer for Relief: Intervenors similarly claim that their own fear of exposure to COVID-19 prevents them from signing petitions, recruiting circulators, or circulating petitions themselves. Intervenors' Compl., ¶¶53-57. Intervenors bring a similar claim premised on Article I, Sections 3 and 11 of the Ohio Constitution and also allege that applying current constitutional and statutory petition requirements violates their rights protected by the First Amendment of the United States Constitution. Intervenors' Compl., ¶¶82-87; 72-76.

Intervenors seek the same relief as Plaintiffs but also request an additional alternative form of relief—that the number of signatures required by the Ohio Constitution (i.e., 442,958) be all but eliminated and reduced to the 1,000 they already gathered and submitted. Intervenors' Compl., ¶25, Prayer for Relief at (C)(2). In other words, they want this Court to order them on the November ballot.

Plaintiffs' and Intervenors' claims fail as a matter of law and their respective Complaints merit dismissal.

II. LEGAL ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.,* 125 Ohio St.3d. 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. A court "must presume that all factual allegations in the complaint are true and must make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "Unsupported conclusions of a complaint are not considered admitted, and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots*, 45 Ohio St. 3d 324, 544 N.E.2d 639 (1989) (citation omitted).

In order to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim in a challenge to the initiative petition process, "[t]he plaintiffs still must make allegations that, if true, would state a violation of the First or Fourteenth Amendment." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295–96 (6th Cir. 1993) (upholding a Rule 12(b)(6) dismissal of a challenge to the initiative petition certification process); *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1105 (10th Cir. 2006) (affirming a dismissal, for failure to state a claim, of a challenge to initiative process requirements). As in *Austin* and *Walker*, the complaint here states no claim on which relief can be granted. But, it is a "fundamental principle that a court must 'presume the constitutionality of lawfully enacted legislation.'" *City of Cleveland v. State,* 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, ¶ 6, quoting *Arnold v. Cleveland,* 67 OhioSt.3d 35, 38, 616 N.E.2d 163 (1993). A party raising an as-applied constitutional challenge must prove by *clear and convincing evidence* that a statute

is unconstitutional when applied to an existing set of facts. *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 181.

As discussed below, Petitioners have failed to state any cognizable constitutional violation that could survive a 12(b)(6) motion.

B. Petitioners' complaints fail to state a claim for which this Court may grant relief and must be dismissed.

1. This Court has no authority to enjoin and alter the deadlines established by the Ohio Constitution.

Petitioners ask this Court for extraordinary and unprecedented relief that this Court lacks authority to grant. They want this Court to enjoin and declare unconstitutional provisions of the Ohio Constitution and the statutes enacted to effectuate them. Said differently, they want this Court to change the Ohio Constitution. But, the Ohio Constitution explicitly prohibits this Court from doing so. By its own terms, only *the people* retain the power to amend the Ohio Constitution. *See* Ohio Const., Art. II, Sec. 1 ("the people reserve to themselves the power…independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls.") As the Ohio Supreme Court held, "controls as written unless changed by the people themselves through the amendment procedures[.]" *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, ¶16. Thus, only the people, not courts, have the authority to enjoin or alter provisions of Ohio's Constitution.

Rather, courts are mandated to preserve and protect the Ohio Constitution. *Walker v. Cincinnati*, 21 Ohio St. 14, 53 (1871) (courts "have no power to amend the constitution, under the color of construction. . . [and] cannot supply all omissions, which we may believe have arisen from inadvertence on the part of the constitutional convention."); *see also State ex rel. Ganoom v. Franklin Cty. Bd. of Elections*, 148 Ohio St.3d 339, 2016-Ohio-5864, 70 N.E.3d 592, ¶24 (O'Connor, J., concurring); *State v. Mitchell*, 32 Ohio App.2d 16, 35, 288 N.E.2d 216 (10th

Dist.1972) (Whiteside, J., concurring) ("No court has the power or right to amend the constitution. Any decision of any court so attempting is itself unconstitutional.") Moreover, courts are obligated to "give a construction to the Constitution as will…harmonize and give effect to all its various provisions." *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶59 (quotation and citation omitted.). Petitioners ignore these fundamental concepts.

This Court's inability to amend the Constitution is further underscored by the limits to its jurisdiction, as also set out in the Ohio Constitution. The Ohio Constitution establishes the jurisdiction of common pleas courts. Ohio Const., Art. IV, Sec. 4(B). A common pleas court is a "court of general jurisdiction, with subject-matter jurisdiction that extends to 'all matters at law and in equity that *are not denied to it*.'" *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040 (Citation omitted and emphasis added.) The Constitution denies courts the ability to [redacted] it, and this court therefore lacks jurisdiction to grant Petitioners the relief that they seek.

In short, this Court has no authority to enjoin or alter provisions of the Ohio Constitution. While Plaintiffs identify absolutely no authority for the notion that it does, Intervenors rest only on anecdotes regarding candidate (not ballot initiative) signature-gathering in Utah and Virginia. It is altogether irrelevant that the Governor of Utah by executive order "suspend[ed] a provision in state election law" governing *candidates*' (not ballot initiative) signature-gathering requirements. Intervenors' Compl., ¶69, citing to *Utah Candidates can now collect signatures without risking spread of Coronavirus* at fn 22. Similarly unhelpful is a court order from Richmond, Virginia suspending statutes that likewise established candidate signature requirements. Intervenors' Compl., ¶70, citing Order at fn 23. And any argument that this Court has authority akin to that of the U.S. Supreme Court's to invalidate state constitutional provisions

misapprehends the authority bestowed on that court by the United States Constitution. *See* Art. III, Sec. 1 ("The judicial Power of the United States, shall be vested in one supreme Court…").

Likewise, Ohio's Declaratory Judgment Act in R.C. 2721.03 in no way authorizes this Court to enjoin or declare unconstitutional provisions of the Ohio Constitution. That Act entitles a party to "obtain a declaration of rights, status, or other legal relations under…[an] instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise." R.C. 2721.03. Of course, here, Petitioners are not seeking a simple declaration of their rights but a declaration that provisions of the Ohio Constitution are themselves invalid under the present circumstances.

As Petitioners must acknowledge, there is no authority for *this Court* to eliminate, alter, or amend any provision of the Ohio Constitution. As a matter of law, such authority lies only with the people of the State. Because this Court has no authority to provide the relief that Plaintiffs and Intervenors seeks, their Complaints should be dismissed.

2. Plaintiffs and Intervenors fail to state a claim under Article 1, Sections 3 and 11 of the Ohio Constitution.

Petitioners' claim that Ohio's constitutional and statutory provisions that govern initiative process, as applied to them, violate Ohio Constitution Article I, Sections 3 and 11 must fail, as neither is a self-executing source of protection. Here, Petitioners seek relief pursuant to Ohio's Declaratory Judgment Act, which allows Ohio courts to declare the rights of parties in various contexts. *See, e.g.*, R.C. 2721.02(A) ("[C]ourts of record may declare rights, status, and other legal relations…"); R.C. 2721.03. But, the Act itself does not actually create any substantive rights and Petitioners must identify a source of substantive rights that is allegedly being violated. *See Scott v. Houk*, 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E. 835, ¶20 (O'Connor, J., concurring) ("In the absence of demonstrating an established right, a declaratory judgment does

not lie under R.C. 2721.02(A)."); *cf also Sessions v. Skelton*, 163 Ohio St. 409, 415, 127 N.E.2d 378 (1955) ("A declaratory judgment action creates no new or substantive rights, it is purely a procedural remedy…"). They failed to do so here.

As a matter of law, Petitioners' have failed to state a claim under either Ohio Const. Article I, Sections 3 or 11, because neither is a source of substantive rights. "'A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation.'" *PDU, Inc. v. City of Cleveland,* 8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671, ¶ 20, quoting *State v. Williams*, 88 Ohio St.3d 513, 521, 728 N.E.2d 342 (2000). If the language of a constitutional provision "cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment," then it is not self-executing. *Id.* Constitutional provisions that are not self-executing cannot serve as the basis for a claim. *Id.* at ¶27.

The Ohio Supreme Court has already held that Article I, Section 11 is not self-executing. *Provens v. Stark Cnty. Bd. of Mental Retardation & Developmental Disabilities*, 594 N.E.2d 959, 961, 64 Ohio St.3d 252 (1992). Although the *Provens* Court did not use the phrase "self-executing," it held that Article I, Section 11 "does not set forth an accompanying cause of action for a violation of the right of free speech." *Id.* at 961. Without an accompanying cause of action, Article I, Section 11 is not self-executing. This interpretation makes sense. The very purpose of a self-executing provision is that "it is complete in itself and becomes operative without the aid of supplemental or enabling legislation." *State v. Williams*, 728 N.E.2d 342, 352 (2000). A constitutional provision must be "sufficiently precise in order to provide clear guidance to courts with respect to their application" in order to be self-executing. *Id.* Following this logic, in *PDU,*

the Eighth District Court of Appeals also held that Article I, Section 11 was not self-executing. *PDU* at ¶ 24.

Following this precedent, the Fifth District Court of Appeals similarly held that a motion to dismiss for failure to state a claim upon which relief was proper because Ohio's equal protection and due process clauses, like Article I, Section 11, were not self-executing. *Autumn Care Center, Inc. v. Todd*, 22 N.E.3d 1105, 1107–11 (5th Dist. 2014). The plaintiffs in that case, like the Plaintiffs here, unsuccessfully sought declaratory judgment against the State. *Id.* at ¶ 11 (seeking declaratory judgment that employees of the Ohio Department of Health denied appellant "due course of law and equal protection of the law.") The court held that dismissal was proper, because these constitutional provisions were not self-executing. Petitioners have similarly failed to state a claim here.

Indeed, neither Article I, Section 11 nor Article I, Section 3 provides for "meaningful enforcement" absent "other legislative enactment." *PDU* at ¶20. Neither "is [] an independent source of self-executing protections;" rather, the language in Article I, Section 11 is a "statement[] of fundamental ideals upon which our government is based." *Id.* at ¶24. Sections 2 (equal protection) and 16 (due process) of Article 1 likewise fail to provide self-executing protections. *Id.* at ¶27. The same holds true for Article 1, Section 3, which guarantees the right to assemble, but confers only a "fundamental ideal" and offers no "self-executing protections." *See id.* Both Section 3 and Section 11 lack the completeness necessary to provide meaningful guidance for judicial review. Because Article I, Sections 3 and 11 are not self-executing Petitioners fail to state any claim premised upon them. Accordingly, Plaintiffs' complaint should be dismissed in its entirety and Intervenors' claim for relief under the Ohio Constitution should be dismissed.

C. Petitioners fail to state any First Amendment claims.

1. Intervenors have failed to state a claim that their federal First Amendment right to engage in political speech has been or will be infringed.

Intervenors' federal First Amendment claims fare no better than their Ohio constitutional claims. Federal circuit courts have repeatedly found that the First Amendment "does not protect the right to make law, by initiative or otherwise." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 [redacted]Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. C[redacted]) ("[T]he First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject."). "It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring).

Here, the Ohio constitutional and statutory provisions Petitioners challenge regulate the mechanics of the initiative process, not protected speech or expressive conduct. Thus, the First Amendment does not apply to them *at all*. States may, without violating the First Amendment, regulate the placement of initiatives and referenda on the ballot. In fact, the Sixth Circuit recently upheld a law mandating pre-submission review of initiatives and referenda. *Schmitt v. LaRose*, 933 F.3d 628, 634 (6th Cir. 2019) (citation and quotation marks omitted). Because Ohio law limits local initiatives and referenda to legislative, as opposed to administrative, subjects, election officials must keep administrative issues off the ballots. *Id.* at 635. While the majority applied the *Anderson-Burdick* balancing test, the concurring opinion would have subjected the pre-petition review laws to rational-basis review only. *Id.* at 643 (Bush, J., concurring). Because the law regulated election processes, not speech or expressive conduct, the concurring opinion did not find the First Amendment involved at all.

Further, there is no First Amendment right to speak through the state's ballot. "Ballots serve primarily to elect candidates, not as fora for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363. While political parties, their members, and their candidates have the right to "campaign . . . , endorse, and vote" in an election, they do not have "a right to use the ballot itself to send a particularized message." *Id.* After all, "[a] ballot is a ballot, not a bumper sticker." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir.2002).

Thus, courts have routinely upheld initiative-related laws, such as those at issue here, holding that they do not even implicate First Amendment advocacy. For example, limiting the subjects available for initiative, requiring a supermajority to pass certain types of initiated laws, restricting the number of initiative ballot slots available, or requiring pre-screening do not implicate protected speech. *Marijuana Policy Project*, 304 F.3d at 87 (limit on initiative subject); *Port of Tacoma v. Save Tacoma Water*, 4 Wash.App.2d 562, 577, 422 P.3d 917 (2018) (limit on initiative subject); *Walker*, 450 F.3d at 1101 (supermajority requirement); *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir.2018) (limit on number of initiative spots); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir.1996) (overruled on other grounds) (removal of initiative during pre-screening review of its content for constitutionality); *Schmitt v. LaRose*, 933 F.3d 628, 634 (6th Cir. 2019) (upholding Ohio law mandating pre-submission review of initiatives and referenda noting that the challenged laws "regulate the process by which initiative legislation is put before the electorate, which has, *at most,* a second-order effect on protected speech") (emphasis added). There is a difference between "establishing [] limits on legislative authority" and "limits on legislative advocacy." *Marijuana Policy Project*, 304 F.3d at 85. The former does not implicate the First Amendment, the latter does. *Id.* The provisions challenged

here fall within the former. Without any intrusion on protected speech, the First Amendment does not apply at all.

To be sure, laws that actually regulate expressive speech—unlike those at issue here—come under closer scrutiny. State laws that restrict advocacy have been found to regulate core political speech. *See Meyer v. Grant*, 486 U.S. 414, 416 (1988) (criminalizing the payment of paid petition circulators); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995) (banning distribution of anonymous leaflets). Further, laws that "[require] that petition circulators be registered voters, [require] that petition circulators wear a name badge, and certain reporting requirements applicable to proponents of an initiative" have been held unconstitutional. *Walker*, 450 F.3d at 1099 [redacted] *Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1100-05 (10th Cir.1997), [redacted]b nom. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999)). These laws implicate the First Amendment because they "specifically regulated the process of advocacy itself: the laws dictated *who* could speak (only volunteer circulators and registered voters) or *how* to go about speaking (with name badges and subsequent reports)." *Id.*

But such laws that govern *how* a petitioner may advocate are readily distinguishable from those at issue here. None of the laws Intervenors challenge regulate, or even implicate, advocacy. Intervenors are free to advocate for their proposed amendment, as much as or as little as they choose. Nothing in the challenged statutes or constitutional provisions infringes, or even speaks to, that advocacy. To the extent that Intervenors claim that the COVID-19 pandemic is impacting their ability to advocate, they claim that it is a global pandemic, not state action, that is causing the impact. Indeed, Intervenors fail to identify *a single* state constitutional provision or statute that *bans* their advocacy or signature-gathering efforts. None of the laws that Intervenors challenge here restrict Intervenors' ability to advocate in favor or against their initiative proposal.

Intervenors have failed to state a claim that is cognizable under the First Amendment and their claim must be dismissed.

2. Intervenors failed to state a claim that the Ohio Constitution and its enabling statutes violate their First Amendment right to freely associate.

Intervenors' First Amendment freedom of association claim similarly fails and must be dismissed. The First Amendment guarantees two different types of associational freedoms. *State v. Barnett,* 93 Ohio St.3d 419, 424, 755 N.E.2d 857 (2001). The first includes the choice to enter into and maintain certain intimate human relationships. *Id.,* citing *Dallas v. Stanglin,* 490 U.S. 19, 23-23 (1989). The second type is the right to associate for the purpose of engaging expressive activity protected by the First Amendment, including the rights of free speech, assembly, petition for the redress of grievances, and the exercise of religion. *Id.,* citing *Stanglin*, 490 U.S. at 24. It is this second associational right that Intervenors seem to claim is violated here. With regard to elections, the First Amendment right to association ensures that state laws cannot "unconstitutionally limit access to the ballot by party or independent candidates," *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) , or "exclude[] a particular group of citizens, or a political party, from participation in the election process." *Timmons*, 520 U.S. at 361.

Intervenors do not claim that the challenged Ohio constitutional provisions, or the challenged statutes infringe upon their right, or ability, to associate with others. Instead, they claim that their fear of exposure to COVID-19 prevents them from signing petitions, recruiting circulators, or circulating petitions themselves. Intervenors' Compl., ¶¶ 53-57. To be sure, "[t]o state a claim under §1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Salehpour v. University of Tennessee*, 159 F.3d 199, 206 (6th Cir. 1998) (internal quotations and citations omitted). But, the injury on

which Intervenors premise their First Amendment claim arises only by reference to the public health orders implementing COVID-19 social distancing requirements. *See* Intervenors' Compl., ¶46 ("The coronavirus pandemic makes signature gathering impossible."). But, Ohio's public health orders, as issued and subsequently amended by the Director of Ohio's Department of Health specifically *exempt* "First amendment protected speech" as an "essential business and operation" that is permitted to function. *Id.* at ¶43, citing to COVID-19 Orders from the Ohio Department of Health at fn 17. Thus, even assuming the First Amendment applies here, no state action interferes with any First Amendment speech. Here, there is a complete break in causation to Intervenors' argument. It is COVID-19, not Ohio's Constitution and the statutes that give it effect, that is impacting their First Amendment associational rights. And where there is no causal connection between the constitutional violations alleged and any action by the state defendant, courts have found that plaintiffs' claims fail. *See Thomas v. Nationwide Children's Hosp.*, 882 F.3d 608, 614 (6th Cir.2018) (holding that "no evidence of causation exists here with respect to the constitutional injuries…with respect to any of the defendants."). Intervenors are not entitled to enjoin statues and constitutional provisions that they have not alleged are harming them.

D. Even if Intervenors stated a First Amendment claim, as a matter of law, Ohio's Constitution and the statutes that give it effect are constitutional.

But, even if even if the First Amendment applied in this context (and it does not) the constitutional and statutory provisions that Intervenors challenge are constitutional as a matter of law. The Supreme Court has recognized that election regulations "will invariably impose some burden upon individual voters." *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick*, 504 U.S. at 433. Subjecting every such regulation to strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* Rather, "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." *Id.*, quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, a "more flexible standard" applies to state election laws. *Burdick* at 434. This standard requires that the court "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and the Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put *forward by the State as justifications for the burden imposed by its rule*[.]'" *Id.*, quoting *Anderson* at 789.

In short, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* As the Sixth Circuit explained in *Taxpayers United for Assessment Cuts v. Austin*, "it is constitutionally permissible for [a State] to condition the use of its initiative procedure on compliance with content-neutral, nondiscriminatory regulations that are, as here, reasonably related to the purpose of administering an honest and fair initiative procedure." 994 F.2d 291, 297 (6th Cir.1993). Because Petitioners' claims fail under *Anderson-Burdick* as a matter of law, they are properly disposed of on a motion to dismiss. *See Commt. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, 885 F.3d 443, 448 (6th Cir.2018).

1. Ohio's requirements are reasonable, non-discriminatory regulations supported by substantial regulatory interests.

Even if this Court were to engage in *Anderson-Burdick* balancing, the State's reasonable, nondiscriminatory initiative process withstands scrutiny. The State's procedures apply equally to all subject matters and viewpoints, with no content-based restriction. And the challenged constitutional and statutory provisions protect the State's important regulatory interests of facilitating an orderly ballot that bears only initiatives that fall within a municipality's legislative authority. Initially, even if Intervenors had stated a cognizable claim under the First Amendment

(and they have not), strict scrutiny would not apply to it. "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," *Buckley*, 525 U.S. at 191-92, citing *Biddulph*, 89 F.3d 1491. In *Biddulph*, the Eleventh Circuit affirmed the dismissal for failing to state a claim, a challenge to Florida's single-subject law for initiative measures. 89 F.3d at 1501. It held that "strict scrutiny" did not apply to the single-subject rule because the rule was not "content-based," it had no "disparate impact on certain political viewpoints," and it did not "impermissibly burden the free exchange of ideas about the objective of an initiative proposal." *Id.* at 1500. Indeed, in Ohio, every initiative proposal is subject to the same prerequisites regardless of the message conveyed in the initiative petition. *See State ex rel. Ethics First-You Decide Ohio PAC v. Dewine*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689, ¶23, citing to *Reed v. Town of Gilbert*, ___U.S.___, 135 S.Ct. 2218, 2227 (2015) (holding that a petition requirement is "not content based" when it "applies to all petitions, irrespective of the substantive message the petition seeks to communicate.") In other words, the challenged constitutional provisions and statutes do not discriminate on the basis of content or viewpoint, they are not content-based restrictions on speech, and strict scrutiny does not apply to their review.

Any claim that *Biddulph* is inapposite because Ohio's ballot access laws amount to an unconstitutional ban on signature collection and advocacy is flat wrong—and inconsistent with Intervenors' theory of their case. Intervenors' entire case is premised upon the idea that the COVID-19 outbreak and Dr. Acton's orders—not Ohio law—are making it more difficult for them to obtain signatures. And, again, Dr. Acton's orders *exempt* "First amendment protected speech" from restrictions during the COVID-19 pandemic. Intervenors' Compl., ¶43, at fn 17.

Ohio's ballot access laws—as applied to them or anyone else—are not to blame. As they allege, the COVID-19 pandemic is.

2. Ohio's important interests amply justify its Constitution and Statutes.

Contrary to Petitioners claims, throwing out all standards that apply to Ohio's ballot initiative process is not the answer here. Ohio and its citizens have important interests in keeping unauthorized initiative proposals off the ballot itself. It simplifies the ballot. *See Jones*, 892 F.3d at 938 ("[S]tates have a strong interest in simplifying the ballot."); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) (noting the Supreme Court has "never required a State to make a particularized showing of the existence of voter confusion [or] ballot overcrowding . . . prior to the imposition of reasonable restrictions on ballot access"). It prevents voter confusion. *See Commt. to Impose Term Limits on the Ohio Supreme Ct.*, 885 F.3d at 448 (finding Ohio's single-subject requirement helps to avoid voter confusion). And it furthers the State's interest in maintaining voter confidence in the government and electoral process. *See First Natl. Bank v. Bellotti*, 435 U.S. 765, 788-89 (1978) (recognizing that "equally" of the highest importance is the "[p]reservation of the individual citizen's confidence in government").

The signature total and geographic distribution requirements Intervenors challenge are enshrined in Ohio's Constitution and are supported by substantial regulatory interests. They "mak[e] sure that an initiative has sufficient grass roots support to be placed on the ballot." *Meyer*, 486 U.S. at 425-26. These interests are "substantial." *Buckley*, 525 U.S. at 191. In fact, in *Buckley*, the U.S. Supreme Court cited approvingly to *Biddulph,* 89 F.3d 1491, to note that "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." 525 U.S. at 191. "[N]ecessary or proper ballot access controls," include requiring "submission of valid signatures" of a certain percentage of the electorate in order "[t]o ensure grass roots

support." *Id.* at 205. The Sixth Circuit, too, has emphasized that the State "has a strong interest in ensuring that proposals are not submitted for enactment into law unless they have sufficient support." *Taxpayers United*, 994 F.2d at 297; *see also Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (upholding Nevada's geographic distribution requirement for petition signatures).

Verifying the signatures used to demonstrate such support is critical. Measures prescribing "a signature-verification method" further the state's "substantial" interests and serve "in aid of efficiency, veracity, or clarity." *Buckley*, 525 U.S. at 205. Thus, Ohio enshrined verification measures in its Constitution. It requires that "[e]ach signer of any initiative, supplementary, or referendum petition must be an elector of the state" and provide additional verification of authenticity, including that "signer shall place on such petition after his name the date of signing and his place of residence." Ohio Const., Art. II, § 1g. This information is required to facilitate "the duty of the boards of elections [ ] to establish the authenticity of the *elector*[.]" *Georgetown v. Brown Cty. Bd. of Elections*, 158 Ohio St.3d 4, 2019-Ohio-3915, 139 N.E.3d 852, ¶24. (Emphasis in original). The Constitution further requires that "[t]he names of all signers to such petitions shall be written in ink, each signer for himself." Ohio Const., Art. II, § 1g. Recognizing the importance of this requirement, the Supreme Court held that "boards of election are *required* to compare petition signatures with voter registration cards to determine if the signatures are genuine." *State ex rel. Yiamouyiannis*, 65 Ohio St.3d 205, 209, 602 N.E.2d 644. (Emphasis added.) Finally, the Ohio Constitution also requires that each part-petition shall be accompanied by "the statement of the circulator, as may be required by law, that he witnessed the affixing of every signature." Ohio Const., Art. II, § 1g. This circulator statement must be affirmed under penalty of election falsification. R.C. 3501.38.

These requirements are supported by numerous important justifications. For one, signature verification "is a protection against signatures being added later" and is therefore "a substantial, reasonable requirement." *State ex rel. Loss v. Lucas Cty. Bd. of Elections*, 29 Ohio St.2d 233, 281 N.E.2d 186 (1972). For another, verification ensures that each elector signs the petition by themselves and not by proxy. *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections*, 65 Ohio St.3d 167, 174, 600 N.E.2d 244, 602 N.E.2d 615 (1992). Finally, R.C. 3519.16's requirement that petitioners submit electronic copies and indexes of the part-petitions to the Secretary of State in order to facilitate this verification process. It allows a board of elections to carry out its statutory duty to review the part-petitions for authenticity. In part, it accomplishes this by providing a cut-off period for the collection of signatures plus a defined, ten-day window of opportunity ensuring that all proponents have a fair and equal grace period in which to make up any shortfalls. R.C. 3519.16(F). This deadline advances the state's interest in providing sufficient time for the Secretary of State to verify signatures, and for that verification to occur in an orderly and fair fashion. *See American Party of Texas v. White*, 415 U.S. 767, 787, fn 18 (1974) ("We agree with the District Court that some cut off period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges.").

Petitioners ask this Court to ignore this precedent and the logic behind it. Plaintiffs want to implement an electronic signature process, for which they cite no legal support or logistical details, that violates the Ohio Constitution. Intervenors take their requested relief one step further, and want to be automatically granted ballot access. There is no support for either request. Ohio's ballot is not a free-for-all. This is especially true here, where Petitioners have failed to state any claim that would allow it to become one.

3. Plaintiffs failed to state a federal First Amendment claim, at all.

Notably, Plaintiffs failed to assert a federal First Amendment claim, *at all*. The sole mechanism for seeking and obtaining this relief under the First Amendment is by alleging a claim pursuant to 42 U.S.C. § 1983. *See, e.g.*, *Aarti Hospitality, LLC v. City of Grove City, Ohio*, 350 F. App'x 1, 11 n.8 (6th Cir. 2009) (considering direct constitutional claims, including equal protection and due process claims, under § 1983 because the "statute is the exclusive remedy for the alleged constitutional violations") (internal quotations omitted); *Brown v. Contra Costa Cty.*, N.D.Cal. No. C 12-1923 PJH, 2012 U.S. Dist. LEXIS 145431, at *24 (Oct. 9, 2012) ("The Fourteenth Amendment is not self-executing, and can only be brought by plaintiff pursuant to a § 1983 claim."). Indeed, "the civil rights provisions were the very vehicle enacted by Congress to enforce the Fourteenth Amendment and give private remedial relief to those deprived of constitutional rights by state agents…." *Davis v. Jones*, 4th Dist. Hocking Case No. 93 CA 06, 1993 Ohio App. LEXIS 5055, at *9-10 (Sep. 28, 1993), citing *Monroe v. Pape*, 365 U.S. 167 (1961).

Plaintiffs did not do that here. Their Complaint completely fails to identify § 1983, or even the federal First Amendment, as the basis for their claims. They are not entitled to relief based on claims they have not asserted and any claim to the contrary must be rejected.

E. Petitioners' claims for additional time to gather signatures must fail as a matter of law.

The Ohio Supreme Court has held that "absolute election day deadlines are unambiguously imposed by Section 1a, Article II, Ohio Constitution." *State ex rel. Citizens for Responsible Taxation*, 67 Ohio St.3d 134, 138, 616 N.E.2d 869. Thus, it recently rejected Intervenors' recent request for the same relief it seeks here, more time to collect signatures. *State ex rel. Ohioans for Secure and Fair Elections v. Ohio Ballot Board*, Slip Opinion No. 2020-

Ohio-1459.[1] This Court should do the same, and for both Petitioners. Here, Petitioners ask this Court to ignore the "unambiguous" deadlines imposed by the Ohio Constitution and impose a *new* signature collection deadline of August 21, 2020. Pls. Compl., Prayer for Relief, (b)(i); Intervenors' Compl., Prayer for Relief, ¶3(ii). As Petitioners acknowledge, their requested relief would require suspending or altogether ignoring election deadlines established by the Constitution, causing a domino effect and knocking down each subsequent deadline.

Specifically, under Article II, Section 1g of the Ohio Constitution, most legal challenges must be filed not later than 95 days before the general election. The Ohio Supreme Court must resolve any legal challenges to petitions no later than 85 days before the general election. Ohio Const., Art. II, § 1g. Under Plaintiffs' and Intervenors' requested extension, it would be impossible for the Supreme Court to comply with *its* constitutional obligation and resolve any legal challenges 85 days before the election. This is the case because under Petitioners' schedule, the Secretary of State would not be able to decide the sufficiency of petition signatures until well-after that date and just days before the Secretary must certify the official form of the ballot by the fiftieth day prior to the election. Sec. 735.11 of H.B.166 (133rd G.A.). If the Supreme Court determines that the petition or signatures are insufficient, the ten-day "cure period" to file supplemental signatures with the Secretary is triggered. Ohio Const., Art. II, Sec. 1g.

Any legal challenge to the determination regarding supplemental signatures must be filed with the Supreme Court no later than 55 days before the general election. Ohio Const., Art. II, Sec. 1g. The Supreme Court must determine the validity of the signatures no later than 45 days before the general election. Ohio Const., Art. II, Sec. 1g. If the Supreme Court does not issue a

[1] "Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss." *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281, fn. 1. Here, Intervenors incorporated the Ohio Supreme Court in their Complaint. *See* Intervenors' Compl., ¶22.

ruling by that date, then the petition is presumed to be sufficient. Ohio Const., Art. II, Sec. 1g. In the event the petition satisfies constitutional requirements, the proposed constitutional amendment, with arguments in favor and in opposition to the amendment, must be published once a week for three consecutive weeks preceding the election in one newspaper of general circulation in each county of the state where the newspaper is published. *Id.* Each of these constitutional deadlines would be jettisoned if Petitioners' requested relief—an extension of the filing deadline until August 21, 2020—was granted.

Notably, in rejecting Intervenors' request to ignore constitutionally imposed deadlines, the Supreme Court found that numerous provisions of Intervenors' proposal were "not scheduled to take effect until February 1, 2022, so the amendment could appear on ballots in 2021." *Id.* at ¶21. "As for the other provisions," the Supreme Court held, Intervenors "ha[d] not demonstrated any urgency to placing them on this November's ballot as opposed to a ballot in 2021." *Id.* Although Plaintiffs' seek to pose an amendment that would go into effect in January 2021, their overall failure to state a claim negates any entitlement to relief, much less relief that would upend Ohio's constitutionally imposed election schedule. As the Ohio Supreme Court did, this Court should reject any request to ignore and amend constitutionally imposed deadlines.

III. CONCLUSION

Petitioners fail to state a claim for which this Court may grant them relief. Accordingly, their claims should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, the foregoing was filed with the Clerk of Court via the e-Filing system. I also certify that the following counsel were served via the court's electronic court filling system and via email.

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