No. 20-3717

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOWARD "HOWIE" HAWKINS, et al.,

Plaintiffs-Appellants,

v.

RICHARD "MIKE" DeWINE, et al.,

Defendants-Appellees.

Expedited Appeal from the United States District Court
for the Southern District of Ohio
Case No. 2:20-cv-2781

BRIEF OF PLAINTIFFS-APPELLANTS

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ORAL ARGUMENT NOT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, and 6 Cir. R. 26.1, Plaintiffs-Appellants hereby certify that they are not subsidiaries or affiliates of a publicly-owned corporation, and that no publicly-owned corporation is a party to this appeal or has a financial interest in the outcome of this appeal.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), and 6 Cir. R. 34(a), the plaintiffs-appellants state that oral argument is unnecessary because an expedited decision is needed, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. §1291, the Sixth Circuit Court of Appeals has jurisdiction over the present case because the district court below issued a final order granting Defendants-Appellees' motion and dismissing all of the Plaintiffs-Appellants' claims on June 24, 2020, and the Plaintiffs-Appellants filed a timely notice of appeal from the district court's order on July 6, 2020.

CITATION FORMS

Amend. Verified Compl.	Amended Verified Complaint
Amend. Mot. for TRO & Prelim. Inj.	Amended Motion for Temporary Restraining Order and Preliminary Injunction
Memo. Opp. Mot. to Dismiss	Memorandum Opposing Motion to Dismiss
Mot. to Dismiss	Motion to Dismiss
Notice of App.	Notice of Appeal
Op. & Order	Opinion and Order
RE	Record Entry
Verified Compl.	Verified Complaint

STATEMENT OF ISSUES FOR REVIEW

1. The district court erred by adjudicating issues of fact in order to grant defendants-appellees' motion to dismiss the plaintiffs-appellants' amended verified complaint under Fed. R. Civ. P. 12(b)(6).

2. The district court erred by ruling that Ohio statutes which required in-person signing and witnessing of nominating petitions or minor party formation petitions did not violate the First and Fourteenth Amendment to the United States Constitution, as applied under Appellees' "COVID-19" social distancing orders.

3. The district court erred by overruling plaintiffs-appellants' motions for temporary restraining order and preliminary injunction against the defendants-appellees' enforcement of Ohio statutes that required candidate nominating petitions and minor party formation petitions to be signed and witnessed in person.

STATEMENT OF THE CASE

The plaintiffs-appellants consist of: (a) Howard "Howie" Hawkins and Dario Hunter, who are independent candidates for President of the United States in the 2020 general election; and (b) Joseph R. DeMare, Nathaniel Lane, Brett Joseph, Becca Calhoun, and Anita Rios, who are registered voters in the State of Ohio, experienced circulators of candidates' nominating petitions, have successfully gathered signatures to nominate candidates, seek to do so for the November 3, 2020

general election in the State of Ohio, seek to circulate and gather signatures for a petition to re-form the Ohio Green Party as a minor political party under Ohio law, and are in one or more high-risk categories subject to life-threatening complications from "COVID-19". (Amend. Verified Compl., RE #8, PageID 56-57.) They are hereinafter referred to as the "Appellants".

The defendants-appellees consist of: (a) Richard "Mike" DeWine, who is the Governor of the State of Ohio, and is empowered by the laws of the State of Ohio to declare emergencies and authorize State departments and agencies to take measures affecting the lives, safety, and health of Ohio residents; (b) Frank LaRose, who is the Secretary of State for the State of Ohio, and is empowered by the laws of the State of Ohio to enforce statutes and rules governing elections, candidate nominating petitions, and minor political party formation; and (c) Amy Acton, who was the Director of the Ohio Department of Health, and was empowered by Ohio Rev. Code §3701.13 to make special orders for preventing the spread of contagious or infectious diseases, limiting public gatherings, restricting business activity, and imposing social distancing requirements that prevent the collection of signatures on nominating petitions and on minor party formation petitions. (Amend. Verified Compl., RE #8, PageID 57-58.) They are hereinafter referred to as the "Appellees".

On May 29, 2020, Appellants brought this action in the district court on to enjoin the enforcement of Ohio's ballot access requirements for the November 3,

2020 general election, specifically the in-person nominating petition signing and filing requirements to qualify independent candidates for the November 3, 2020 general election ballot. (Verified Compl., RE #1, PageID 1-26.) In an amended complaint filed on June 9, 2020, Appellants asserted that enforcement of such requirements are unconstitutional as applied here due to the social distancing orders adopted by the State of Ohio to address the novel coronavirus "COVID-19" public health emergency. (Amend. Verified Compl., RE #8, PageID 52.)

Appellants also brought this action to enjoin the enforcement of Ohio's requirements to form a minor political party, specifically the in-person petition signing and filing requirements to organize a minor political party. They asserted that enforcement of such requirements are unconstitutional as applied here due to the social distancing orders adopted by the State of Ohio to address the novel coronavirus "COVID-19" for the public health emergency. (Amend. Verified Compl., RE #8, PageID 53.)

Supported by their amended verified complaint, Appellants moved on June 9, 2020 for a temporary restraining order and/or preliminary injunction against Appellees' enforcement of Ohio Rev. Code §§3501.38(E) and 3513.257, with respect to Howard "Howie" Hawkins and Dario Hunter as independent candidates for President of the United States. These statutes required in-person signing of their nominating petitions, in-person collection and witnessing of their petitions'

signatures, and in-person filing of their petitions with the Ohio Secretary of State ***no later than 4:00 p.m. on August 5, 2020.*** (Amend. Mot. for TRO & Prelim. Inj., RE #9, PageID 79.)

Appellants also moved for a temporary restraining order and/or preliminary injunction against Appellees' enforcement of Ohio Rev. Code §§3517.011 and 3517.012(A) to re-form the Ohio Green Party as a minor political party[1]. These statutes required in-person signing of party formation petitions, in-person collection and witnessing of the petitions' signatures, and in-person filing of the petitions with the Ohio Secretary of State no later than 4:00 p.m. on June 30, 2020. (Amend. Mot. for TRO & Prelim. Inj., RE #9, PageID 85.)

In response to Appellants' motions for temporary restraining order and/or preliminary injunction, the Appellees moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (6). (Mot. to Dismiss, RE #11, PageID 98.) Appellees argued to the district court that the Appellants lacked standing to sue, and that Appellants' arguments failed on the merits. (Mot. to Dismiss, RE #11, PageID 115-154.) Appellees argued to the contrary. (Memo. Opp. Mot. to Dismiss, RE #12, PageID 155-173). The district court granted Appellees' motion to dismiss on June 24, 2020, finding that Appellants had standing but ruling that the Appellants' constitutional

[1] In the 2018 Ohio general election, the Ohio Green Party's candidate for Governor failed to receive three percent (3%) of the total vote cast for this office, so the Ohio Green Party lost its minor party status under Ohio Rev. Code §3501.01(F).

rights were not violated. The district court entered final orders under Fed. R. Civ. P. 12(b)(6) denying the Appellants' motions for temporary restraining order and/or preliminary injunction, and then dismissing Appellants' action. (Op. & Order, RE #14, PageID 191-202.)

On July 6, 2020, the Appellants timely appealed to this Court. (Notice of App., RE #16, PageID204.) Appellants moved this Court on July 10, 2020 to expedite the appeal and its briefing schedule. This Court granted Appellants' motion and ordered them to file their brief by July 21, 2020.

STATEMENT OF FACTS

To qualify Hawkins and Hunter for the November 3, 2020 general election ballot as independent candidates, Ohio Rev. Code §3513.257 requires that their nominating petitions for election as President of the United States be filed with the Ohio Secretary of State ***no later than 4:00 p.m. on August 5, 2020*** (and that each nominating petition contain no fewer than 5,000 signatures from qualified Ohio electors). Ohio Rev. Code §3501.38(E) requires the circulator of a candidate's nominating petition to sign a statement under penalty of perjury that: (a) the circulator witnessed the affixing of each signature on the petition; (b) all signers, to the best of the circulator's knowledge and belief, were qualified to sign; and (c) each signature is, to the best of the circulator's knowledge and belief, the signature of the

person whose signature it purports to be. Circulators of nominating petitions for Hawkins and Hunter must therefore collect and witness the signature of each elector in person. (Amend. Mot. for TRO & Prelim. Inj., RE #9, PageID 85.)

To re-form the Ohio Green Party as a minor political party, Ohio Rev. Code §3517.012(A) requires that the party formation petition be filed with the Ohio Secretary of State no later than 4:00 p.m. on June 30, 2020. Ohio Rev. Code §3517.011 requires that the circulator of a minor party formation petition follow the mandates of Ohio Rev. Code §3513.257 to collect and witness the signature of each elector in person. (Amend. Mot. for TRO & Prelim. Injunction, RE #9, PageID 85.)

On March 12, 2020, Appellees imposed a social distancing order banning all gatherings of one hundred (100) or more persons. On March 17, 2020, Appellees modified the social distancing order extending the ban to mass gatherings to groups of fifty (50) or more persons and ordered the closures of most recreational sites in Ohio. On March 22, 2020, Appellees imposed an order that everyone in the State of Ohio "stay at home or at their place of residence" unless subject to a specific exception for providing or receiving "essential" services, maintain at least a six foot social distance between themselves and others outside "a single household or living unit", and completely banning gatherings of ten or more people. On April 30, 2020, Appellees imposed a "Stay Safe Ohio" order that still required the general public to abide by "Social Distancing Requirements as defined in this Order . . . [for]

maintaining six-foot social distancing . . . [between] members of the public". (Amend. Mot. for TRO & Prelim. Inj., RE #9, PageID 82-83.)

Persons who violated these orders were exposed to criminal liability under Ohio Rev. Code §3701.352, which provides that "[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event." A violation of this statute is a second-degree misdemeanor punishable by a fine of up to $750.00, up to 90 days in jail, or both. (Amend. Mot. for TRO & Prelim. Inj., RE #9, PageID 85-86.)

Although the social distancing orders of March 12, 2020 and March 17, 2020 permitted "gatherings for the . . . expression of First Amendment protected speech", Appellants said that this language is vague and failed to give them, as persons of ordinary intelligence, fair notice as to whether circulating petitions was allowed or prohibited. Nothing specifically said that circulating petitions was permitted, or guided petition circulators how to do so lawfully. The social distancing order of March 22, 2020 said that "First [A]mendment protected speech" was essential, but Appellants said that this language is also vague and failed to give them, as persons of ordinary intelligence, fair notice as to whether circulating petitions was allowed or prohibited. Nothing specifically said that circulating petitions was permitted, or guided petition circulators how to do so lawfully. In the April 30, 2020 "Stay Safe

Ohio" order, Appellees allege that it did not apply to "petition or referendum circulators". Appellants said that this was self-contradictory, vague, and failed to give them, as persons of ordinary intelligence, fair notice as to whether circulating petitions was allowed or prohibited. It was overshadowed by requiring the public to continue six-foot social distancing. Nothing specifically said that circulating petitions was permitted, or guided petition circulators how to do so lawfully. (Amend. Mot. for TRO & Prelim. Inj., RE #9, PageID 84.)

Petition circulators cannot gather petition signatures while social distancing orders continue because fewer people congregate in public places and fewer people will open their doors to strangers. Appellees' actions deprived the Appellants of adequate time to collect and file signatures on nominating petitions for Hawkins and Hunter, or on the minor party re-formation petition for the Ohio Green Party. (Amend. Mot. for TRO & Prelim. Inj., RE #9, PageID 84.)

Nonetheless, the district court ruled that:

> the First Amendment exemption found in the Health Director's March 12, 17, 22 and April 2, 2020 orders is not unconstitutionally vague. The exemption broadly permits and protects First Amendment speech.

(Op. & Order, RE #14, PageID 200.) The district court thereby adjudicated the Appellants' sworn statements to the contrary.

SUMMARY OF ARGUMENT

1. In deciding a motion to dismiss, all well-pleaded factual allegations are accepted as true. A district court cannot resolve issues of fact on a motion to dismiss. Appellants made sworn statements in their amended verified complaint that the exclusion of First Amendment activities in Appellees' social distancing orders was vague. The question of whether an order is vague raises an issue of fact. The district court's decision erroneously adjudicated issues of fact to decide that Appellees' orders were not vague.

2. Language in Appellees' social distancing orders that purportedly excluded First Amendment activities from their scope is unconstitutionally vague. Orders regulating persons or entities must give fair notice of conduct that is forbidden or required. A failure to give fair notice violates Fourteenth Amendment due process, and renders such regulations void for vagueness. Appellees' vague orders deny Appellants lawful procedures by which they may collect petition signatures to qualify Hawkins and Hunter for the November 3, 2020 general election ballot, or re-form the Ohio Green Party of Ohio as a minor political party. This severely burdens Appellants' ballot access and violates their First Amendment rights. Strict scrutiny is applied to a State's law that severely burdens ballot access, meaning that it must be narrowly drawn to advance a state interest of compelling importance. Petition signature collection mechanisms that place a severe burden on their First

Amendment rights cannot be justified.

3. Appellants are entitled to injunctive relief because they do not have an adequate remedy at law and will suffer irreparable harm in its absence. In First Amendment cases, quantification of injury is difficult and damages are therefore not an adequate remedy". The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. Each day that Appellees' orders impede the Appellants from circulating their nominating or party formation petitions, they suffer irreparable harm to their core First Amendment rights. Without injunctive relief, Hawkins and Hunter will be excluded from the November 3, 2020 general election ballot, and the Ohio Green Party will not be allowed to re-form as a minor political party. The injunctive relief sought by Appellants will not cause the Appellees any identifiable injury. Even if it did this hardship is outweighed by the significant difficulties that would be experienced by campaigns trying to implement a new signature-gathering process in such a short amount of time.

STANDARD OF REVIEW

The district court's dismissal of a case under Fed. R. Civ. P. 12(b)(6) is reviewed by the Sixth Circuit *de novo*. Kottmyer v. Maas, 436 F.3d 684, 688 (6th Cir. 2006). Fed. R. Civ. P. 12(b)(6) does not require a complaint to provide "[the]

heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009). The dismissal standard articulated in *Iqbal* and *Twombly* "governs dismissals for failure to state a claim under [28 U.S.C. §§ 1915A and 1915(e)(2)(B)] because the relevant statutory language tracks the language in Rule 12(b)(6)." Hill v. Lappin, 630 F.3d 468, 471 (6th Cir. 2010).

The district court "must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true." Tackett v. M & G Polymers USA, LLC, 561 F.3d 478, 488 (6th Cir. 2009). It need not accept a "bare assertion of legal conclusions". Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995). However, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'." Erickson v. Pardus, 551 U.S. 89, 93, 127 S.Ct. 2197, 2200 (2007) (quoting Twombly, 550 U.S. at 555, 127 S.Ct. at 1964). Factual allegations in the complaint need only "be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible." Hayward v. Cleveland Clinic Found., 759 F.3d

601, 608 (6th Cir. 2015) (quoting Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949). Legal conclusions can provide the framework of a complaint where they are supported by factual allegations. Iqbal, 556 U.S. at 679, 129 S.Ct. at 1950.

ARGUMENT

1. THE DISTRICT COURT ERRED BY ADJUDICATING ISSUES OF FACT IN ORDER TO GRANT DEFENDANTS-APPELLEES' MOTION TO DISMISS THE PLAINTIFFS-APPELLANTS' AMENDED VERIFIED COMPLAINT UNDER FED. R. CIV. P. 12(B)(6).

In deciding a motion to dismiss, all well-pleaded factual allegations are accepted as true. Tackett, 561 F.3d at 488. A district court "cannot resolve issues of fact on a motion to dismiss." Finley v. Ocwen Loan Servicing, LLC, No. 1:17-cv-2561, 2018 WL 1705802, at *4 (N.D. Ohio, Apr. 9, 2018).

In their amended verified complaint, the Appellants made sworn statements that: (1) the Appellees' social distancing orders of March 12, 2020 and March 17, 2020, which purportedly allowed "gatherings for the . . . expression of First Amendment protected speech", were vague and failed to give them, as persons of ordinary intelligence, fair notice as to whether circulating petitions was allowed or prohibited; (2) the Appellees' social distancing order of March 22, 2020, which purportedly allowed "First [A]mendment protected speech", was also vague and failed to give them, as persons of ordinary intelligence, fair notice as to whether circulating petitions was allowed or prohibited; (3) the Appellees' "Stay Safe Ohio"

order of April 30, 2020, which purportedly excuded "petition or referendum circulators", was self-contradictory, vague, and failed to give them, as persons of ordinary intelligence, fair notice as to whether circulating petitions was allowed or prohibited; and (4) the Appellees' purported exclusion of petition circulators from the April 30, 2020 order was overshadowed by requiring the public to continue six-foot social distancing. The district court accepted these as well-pleaded factual allegations. (Opinion and Order, RE #14, PageID 194, 199-200.)

The question of whether an order is vague raises an issue of fact. See Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973). The district court's decision clearly adjudicated the Appellant's well-pleaded facts that Appellees' "COVID-19" orders were vague. However, the district court cannot resolve issues of fact on a motion to dismiss. The district court erred to Appellants' prejudice by adjudicating their well-pleaded facts to decide Appellees' motion to dismiss.

2. THE DISTRICT COURT ERRED BY RULING THAT OHIO STATUTES WHICH REQUIRED IN-PERSON SIGNING AND WITNESSING OF NOMINATING PETITIONS OR MINOR PARTY FORMATION PETITIONS DID NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS APPLIED UNDER APPELLEES' "COVID-19" SOCIAL DISTANCING ORDERS.

The Supreme Court has held that "[p]etition circulation . . . is 'core political speech', because it involves 'interactive communication concerning political change'." Buckley v. American Constitutional Law Found., Inc., 525 U.S. 182, 186,

119 S.Ct. 636, 638 (1999) (quoting Meyer v. Grant, 486 U.S. 414, 422, 108 S.Ct. 1886, 1892 (1988)). Accordingly, "First Amendment protections" are "at [their] zenith" and "exacting scrutiny" is required. Meyer, 486 U.S. at 425, 108 S.Ct. at 1894.

Petitions are "basic instruments of democratic government." City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 196, 123 S.Ct. 1389, 1393 (2003). States are not required to recognize popular democracy but, once they do, the processes they employ are protected by the First and Fourteenth Amendments. Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 295 (6th Cir. 1993).

As the Supreme Court explained in Anderson v. Celebrezze, 460 U.S. 780, 786, 103 S.Ct. 1564, 1568 (1983), "the impact of candidate eligibility requirements on voters implicates basic constitutional rights." The exclusion of candidates "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." Id., 460 U.S. at 787-788, 103 S.Ct. at 1570. Also, because "voters can assert their preferences only through candidates or parties or both . . . [t]he right to vote is heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or

other candidates are clamoring for a place on the ballot." Id., 460 U.S. at 787, 103 S.Ct. at 1569.

In Esshaki v. Whitmer, No. 20-1336, 2020 WL 2185553 (6th Cir., May 5, 2020), Michigan candidates for public office were stymied by state requirements for in-person petitions to place their names on the August 2020 primary ballot. Michigan's emergency social distancing orders, responding to the "COVID-19" pandemic, barred them from collecting the petition signatures they needed between imposition of the first emergency order on March 23, 2020 and the April 21, 2020 deadline for filing petition signatures. The Sixth Circuit found that:

> the combination of the State's strict enforcement of the ballot access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored to the present circumstances. Thus, the State's strict application of the ballot-access provisions is unconstitutional as applied here.

Esshaki, at *1-*2.

In Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020), several Ohio plaintiffs sought to place proposed local initiatives and constitutional amendments on the November 3, 2020 general election ballot. The Ohio Constitution and state statutes impose a number of formal requirements for qualifying on the ballot, including a

total number of signatures required, a geographic distribution of signers, requirements that petitions must be signed in ink, must be witnessed by the petition circulator, and may not be made by proxy, together with deadlines for submission to the Secretary of State or local officials. While the plaintiffs were advancing their petitions for the November 3, 2020 general election, the "COVID-19" pandemic struck Ohio.

The district court found that State enforcement of petition signature requirements prevented qualifying the plaintiffs' constitutional amendments and initiatives because signature collection was impeded by Ohio's emergency "COVID-19" social distancing orders. It held that Ohio's strict enforcement of its ballot regulations imposed a severe burden on plaintiffs' First Amendment rights due to the pandemic. Accordingly, the district court enjoined enforcement of the petition signature requirements. Thompson, 959 F.3d at 807.

In granting a stay pending appeal, the Sixth Circuit tried to distinguish *Esshaki* and reject the notion that Ohio imposed restrictions that excluded or virtually excluded initiatives from the ballot. This Court said that:

> Ohio specifically exempted conduct protected by the First Amendment from its stay-at-home orders. From the first Department of Health Order issued on March 12, Ohio made clear that its stay-at-home restrictions did not apply to 'gatherings for the purpose of the expression of First Amendment protected speech[.]' Ohio Dep't of Health, Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio ¶ 7 (March 12, 2020). And in its April 30

> order, the State declared that its stay-at-home restrictionsdid not apply to 'petition or referendum circulators[.]' Ohio Dep't of Health, Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order ¶ 4 (April 30, 2020).

Thompson, 959 F.3d at 809. So, this Court said that the burden was not severe since "Ohio requires the same from Plaintiffs now as it does during non-pandemic times." Id., at 811.

The Sixth Circuit did not consider that Appellees' March 12, 2020, March 17, 2020, and March 22, 2020 orders are unconstitutionally vague. The Supreme Court has said that:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly . . . When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253-54, 132 S. Ct. 2307, 2317 (2012). Fair notice means that a person of ordinary intelligence has a reasonable opportunity to understand what conduct is allowed or prohibited. United States v. Williams, 553 U.S. 285, 304, 128 S.Ct. 1830, 1845 (2008). A failure to give fair notice violates Fourteenth Amendment due process. Hill v. Colorado, 530 U.S. 703,

732, 120 S.Ct. 2480, 2498 (2000). It renders such regulations void for vagueness. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983).

Although the Appellees' social distancing orders of March 12, 2020 and March 17, 2020 permitted "gatherings for the . . . expression of First Amendment protected speech", this language was unconstitutionally vague. They failed to give the plaintiffs fair notice by denying persons of ordinary intelligence a reasonable opportunity to understand whether they were allowed or prohibited to circulate petitions. Nothing specifically said that circulating petitions was permitted, or guided petition circulators how to do so lawfully. These orders exposed the plaintiffs to criminal liability under Ohio Rev. Code §3701.352, thereby denying them due process, and is consequently void.

Although the Appellees' social distancing order of March 22, 2020 said that "First [A]mendment protected speech" was essential, this language was also unconstitutionally vague. It failed to give the plaintiffs fair notice by denying persons of ordinary intelligence a reasonable opportunity to understand whether they were allowed or prohibited to circulate petitions. Nothing specifically said that circulating petitions was permitted, or guided petition circulators how to do so lawfully. This order exposed the plaintiffs to criminal liability under Ohio Rev. Code §3701.352, thereby denying them due process, and is consequently void.

Appellees' social distancing order of April 30, 2020 order was unconstitutionally vague because its exclusion of petition circulators was overshadowed by its continuing six-foot social distancing. This is a contradiction because circulators cannot gather petition signatures while electors are following social distancing orders. It is a form of vagueness that failed to give the Appellants fair notice by denying them a reasonable opportunity to understand whether they were allowed or prohibited to circulate petitions. Nothing guided petition circulators how to do so lawfully. This order exposed the plaintiffs to criminal liability under Ohio Rev. Code §3701.352, thereby denying them due process, and is consequently void.

After the Sixth Circuit's decision in *Thompson*, the Supreme Court denied an application for injunctive relief in South Bay United Pentecostal Church v. Newsome, No. 19A1044, 2020 WL 2813056 (Sup. Ct., May 29, 2020). The Court found it "quite improbable" that a First Amendment exception could be carved out of a content-neutral limit on public gatherings (like Ohio's) during the "COVID-19" crisis. Newsome, 2020 WL 2813056, at *1-*2.

Appellants have no lawful procedure by which they may qualify the Hawkins and Hunter for the November 3, 2020 general election ballot. Also, the Appellants have no lawful procedure to re-form the Green Party of Ohio as a minor party.

Strict scrutiny is applied to a State's law that severely burdens ballot access and intermediate scrutiny to a law that imposes lesser burdens. Anderson, 460 U.S. at 793-794, 103 S.Ct. at 1572-1573; Burdick v. Takushi, 504 U.S. 428, 434, 112 S.Ct. 2059, 2063 (1992). If a state imposes "severe restrictions" on constitutional rights, then the state "must pass strict scrutiny to survive, meaning that it must be 'narrowly drawn to advance a state interest of compelling importance'." Ohio Council 8 AFSCME v. Husted, 814 F.3d 329, 335 (6th Cir. 2016) (quoting Norman v. Reed, 502 U.S. 279, 289, 112 S.Ct. 698, 705 (1992)). Strict scrutiny is reserved for cases in which the State has "totally denied the electoral franchise to a particular class of [electors]." Mays v. LaRose, 951 F.3d 775, 786 (6th Cir. 2020).

The Sixth Circuit applied the *Anderson-Burdick* test in Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 593 (6th Cir. 2006), and found that Ohio's signature collection mechanism for political parties placed a severe burden on their First Amendment rights that could not be justified. In Libertarian Party of Ohio v. Husted, No. 2:13-cv-953, 2014 WL 11515569, at *7 (S.D. Ohio, Jan. 7, 2014), Ohio enacted a law in November 2013 that altered ballot access for minor political parties in the 2014 general election. The district court ruled that Ohio's election law changes in the middle of the 2013-2014 election cycle failed strict scrutiny and thereby violated Fourteenth Amendment due process. The court found that it interfered with "Plaintiffs' legitimate expectation that, having complied with the

process that was (and remains) in place, they would have the opportunity to reap the political benefits of participating in the primary." Id., 2014 WL 11515569, at *7. It further remarked that:

> [t]he Ohio Legislature moved the proverbial goalpost in the midst of the game. Stripping Plaintiffs of the opportunity to participate in the 2014 primary in these circumstances would be patently unfair.

Id., 2014 WL 11515569, at *7.

Appellees' "COVID-19" social distancing orders do the same. It is patently unfair to expect the Appellants to comply with Ohio's in-person petition signature and filing requirements, while abiding by Ohio's new social distancing rules, because it is impossible to do so. Accordingly, the district court erred to Appellants' prejudice by ruling that Appellees' "COVID-19" social distancing orders did not violate the Appellants' First Amendment and Fourteenth Amendment due process rights.

3. THE DISTRICT COURT ERRED BY OVERRULING PLAINTIFFS-APPELLANTS' MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST THE DEFENDANTS-APPELLEES' ENFORCEMENT OF OHIO STATUTES THAT REQUIRED CANDIDATE NOMINATING PETITIONS AND MINOR PARTY FORMATION PETITIONS TO BE SIGNED AND WITNESSED IN PERSON.

Appellants are entitled to injunctive relief because they do not have an adequate remedy at law and will suffer irreparable harm in its absence. A person has no adequate remedy at law where "traditional legal remedies, i.e., money

damages, would be inadequate". Girl Scouts of Manitou v. Girl Scouts of Am., 549 F.3d 1079, 1095 (7th Cir. 2008). In First Amendment cases, "quantification of injury is difficult and damages are therefore not an adequate remedy". ACLU of Il. v. Alvarez, 679 F.3d 583, 589 (7th Cir. 2012). First Amendment issues are central to the present case, such that money damages would be inadequate. Appellants therefore have no adequate remedy outside of injunctive relief.

In addition, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976). Each day that Appellees' orders impede the Appellants from circulating their nominating or party formation petitions, they suffer irreparable harm to their core First Amendment rights. Without injunctive relief, Hawkins and Hunter will be excluded from the November 3, 2020 general election ballot, and the Ohio Green Party will not be allowed to re-form as a minor political party. These injuries are compelling reasons for the relief Appellants request.

The injunctive relief sought by Appellants will not cause the Appellees any identifiable injury. Even if it did, "this hardship [is] outweighed by the significant difficulties that would be experienced by campaigns trying to implement a new signature-gathering process . . . in such a short amount of time." Libertarian Party

of Illinois v. Pritzker, No. 1:20-cv-2112, 2020 WL 1951687, at *4 (E.D. Ill., Apr. 23, 2020). [2]

There is a compelling public interest in the relief sought by Appellants. If such relief is granted, it will enhance the public's confidence in Ohio's democratic processes. These extraordinary times must not collapse Ohio's political system. Voting for the candidate of one's choice or forming political parties are critical to Ohio's political future. Causing a forfeiture of these rights would exacerbate the pandemic's damage. Therefore, the district court erred by overruling Appellants' motions for temporary restraining order and preliminary injunction against Appellees' enforcement of Ohio statutes that required candidate nominating petitions and minor party formation petitions to be signed and witnessed in person.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants request that the Sixth Circuit Court of Appeals reverse the district court's order granting the Defendants-Appellees' motion to dismiss, and remand this case to the district court for further proceedings consistent therewith.

[2] Also, security is not mandatory under Fed. R. Civ. P. 65(c), and can be dispensed with in the discretion of the court. Moltan Co. v. Eagle-Picher Industries, Inc., 55 F.3d 1171, 1176 (6th Cir. 1995). Security is regularly dispensed with in election cases. See, e.g. Husted, 2014 WL 11515569, at *11. No security is needed in this case because the defendants are not threatened by financial harm.

Respectfully submitted,

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Dated: July 20, 2020

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this corrected brief complies with the type-volume limits in Fed. R. App. P. 32(a)(7)(B) because, as counted by Microsoft Word 365 through its word count tool, this brief contains 5,531 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements in Fed. R. App. P. 32(a)(5)(A) and the type-style requirements in Rule 32(a)(6) because this brief has been prepared in proportionally spaced 14-point Times New Roman font.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY NUMBER	DESCRIPTION	DATE FILED	PAGE ID# RANGE
1	Verified Complaint	5/29/2020	1-26
8	Amended Verified Complaint	6/9/2020	51-78
9	Amended Motion for TRO & Preliminary Injunction	6/9/2020	79-96
11	Motion to Dismiss	6/12/2020	98-154
12	Memorandum Opposing Motion to Dismiss	6/15/2020	155-174
14	Opinion and Order	6/24/2020	191-202
16	Notice of Appeal	7/6/2020	204-205

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiffs-Appellants was filed electronically on July 20, 2020 through the Court's ECF System, and service by Notice of Electronic Filing was automatically sent to Julie M. Pfeiffer, Michael Allan Walton, and Renata Y. Staff, Ohio Attorney General's Office, 30 E. Broad Street, 16th Floor, Columbus, OH 43215, Attorneys for Defendants-Appellees.

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