IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 20-3557

SUSAN S. BEIERSDORFER; SARAQUOIA BRYANT; SALLY JO WILEY; KATHARINE S. JONES; GERALD T. DOLCINI; GWEN B. FISCHER; DAMON RAE; GREGORY D. HOWARD; WILLIAM LYONS; GREGORY THOMAS PACE; MARKIE MILLER; BRYAN TWITCHELL,

Plaintiffs - Appellants

and

DARIO HUNTER,

Plaintiff,

v.

FRANK LAROSE, in his offical capacity as Secretary of State of the State of Ohio; PAMELA B. MILLER, in her official capacity as a member of the Medina County Board of Elections; LARRY G. CRAY, in his official capacity as a member of the Medina County Board of Elections; JOHN V. WELKER, JR., in his official capacity as a member of the Medina County Board of Elections; SHARON A. RAY, in her official capacity as a member of the Medina County Board of Elections; HELEN WALKER, in her official capacity as a member of the Athens County Board of Elections; KATE MCGUCKIN, in her official capacity as a member of the Athens County Board of Elections; KEN RYAN, in his official capacity as a member of the Athens County Board of Elections; AUNDREA CARPENTER-COLVIN, in her official capacity as a member of the Athens County Board of Elections; DAVID BETRAS, in his official capacity as a member of the Mahoning County Board of Elections; MARK E. MUNROE, in his official capacity as a member of the Mahoning County Board of Elections; TRACEY S. WINBUSH, in her official capacity as a member of the Mahoning County Board of Elections; ROBERT WASKO, in his official capacity as a member of the Mahoning County Board of Elections; ELAYNE J. CROSS, in her

official capacity as a member of the Portage County Board of Elections; DORIA DANIELS, in her official capacity as a member of the Portage County Board of Elections; PATRICIA NELSON, in her official capacity as a member of the Portage County Board of Elections; DENISE L. SMITH, in her official capacity as a member of the Portage County Board of Elections; DAVID W. FOX, in his official capacity as a member of the Meigs County Board of Elections; JAMES V. STEWART, in his official capacity as a member of the Meigs County Board of Elections; CHARLES E. WILLIAMS, in his official capacity as a member of the Meigs County Board of Elections; PAULA J. WOOD, in her official capacity as a member of the Meigs County Board of Elections; DOUGLAS J. PRIESSE, in his official capacity as a member of the Franklin County Board of Elections; BRAD K. SINNOTT, in his official capacity as a member of the Franklin County Board of Elections; KIMBERLY E. MARINELLO, in her official capacity as a member of the Franklin County Board of Elections; MICHAEL E. SEXTON, in his official capacity as a member of the Franklin County Board of Elections; BRENDA HILL, in her official capacity as a member of the Lucas County Board of Elections; JOSHUA HUGHES, in his official capacity as a member of the Lucas County Board of Elections; RICHARD F. SCHOEN, in his official capacity as a member of the Lucas County Board of Elections; DAVID KARMOL, in his official capacity as a member of the Lucas County Board of Elections,

Defendants - Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION (YOUNGSTOWN)

OPENING BRIEF OF PLAINTIFFS-APPELLANTS SUSAN S. BEIERSDORFER, SARAQUOIA BRYANT, SALLY JO WILEY, KATHARINE S. JONES, GERALD T. DOLCINI, GWEN B. FISCHER, DAMON RAE, GREGORY D. HOWARD, WILLIAM LYONS, GREGORY THOMAS PACE, MARKIE MILLER AND BRYAN TWITCHELL

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September 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-3557 Case Name: S. Beiersdorfer, et al. v. Frank LaRose

Name of counsel: Terry J. Lodge

Pursuant to 6th Cir. R. 26.1, All Appellants
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

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

No

CERTIFICATE OF SERVICE

I certify that on June 12, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Terry J. Lodge
Counsel for All Appellants

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants Saraquoia Bryant, Sally Jo Wiley, Katharine S. Jones, Gerald T. Dolcini, Gwen B. Fischer, Damen Rae, Gregory D. Howard, Susan L. Beiersdorfer, William Lyons, Gregory Thomas Pace, Markie Miller, and Bryan Twitchell ("Plaintiffs") request that oral argument of this appeal be had.

Applying the standards of F.R.A.P. Rule 34(a)(2), (a) this appeal is not frivolous; (b) the dispositive issues raised in this appeal, particularly those concerning the degree of First Amendment protection which must be accorded the citizens' right under state law to initiate legislation, have not been recently and authoritatively decided by the Sixth Circuit; and (c) the facts and legal arguments are complex and the decisional process would be significantly aided by oral argument.

This case advances the arguments for a significant extension of the First Amendment protections conferred by *Meyer v. Grant*, 486 U.S. 414 (1988) on state-law initiatives. In addition, a recent controversial determination involving Ohio initiative law by the Sixth Circuit, *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), will be construed and possibly reinterpreted by the Court en route to rendering a decision in this appeal.

STATEMENT OF JURISDICTION

Pursuant to the requirements of FRAP 28(a)(4), Appellants provide the following jurisdictional information.

A. Court's subject matter jurisdiction

Plaintiffs-Appellants sought declaratory and injunctive relief pursuant to the Uniform Declaratory Judgment Act, 28 U.S.C. § 2201, and relief for alleged civil rights deprivations pursuant to 42 U.S.C. § 1983. As Ohio electors, they alleged past and continuing harm by Ohio election laws and the manner in which the ballot access scheme violates their constitutional rights.

The U.S. District Court of Northern Ohio, Eastern Division at Youngstown had federal question jurisdiction pursuant to 28 U.S.C. § 1331 over at least two of the Plaintiffs' causes of action brought pursuant to the First, Ninth, and Fourteenth Amendments of the U.S. Constitution. The trial court had supplemental jurisdiction over the pendent state law claims under 28 U.S.C. § 1367.Venue was properly laid in the District court pursuant to 28 U.S.C. § 1391(b) and (c) because at least one Defendant resides in the District.

B. Sixth Circuit's Jurisdiction

By 28 U.S.C. § 1291, the Sixth Circuit Court of Appeals has jurisdiction over appeals from the final decisions of the U.S. District Court for the Northern District of Ohio, Eastern Division at Youngstown, where this matter was litigated.

C. Timeliness of Appeal

Pursuant to 28 U.S.C. § 1291, Plaintiffs-Appellants timely filed their Notice of Appeal on May 28, 2020, which is within thirty days of the April 30, 2020 final ruling by the District Court dismissing the Complaint (Order, RE 88).

D. Assertion re Finality of Decision

Certain interlocutory rulings became final with the April 30, 3030 Order (RE 88), including the August 30, 2019 Memorandum and Order granting the motions to dismiss of the Secretary of State of Ohio and the Boards of Elections of Lucas County and Mahoning County, Ohio (RE 69); the Order dated December 31, 2019 (RE 77) granting the Motion to Dismiss of the Board of Elections of Portage County, Ohio; and the Memorandum and Order dated April 30, 2020 (RE 87), granting the motions to dismiss of the Boards of Elections of Franklin County, Athens County and Meigs County, Ohio, as well as the Motion for Judgment on the Pleadings of the Board of Elections of Medina County, Ohio.

STATEMENT OF ISSUES

1. Has Ohio's House Bill 463, which legislated new content review requirements for election officials in their review of citizen-initiated legislative proposals, severely burdened core free speech rights of the electors who petition for local government initiatives in violation of the First Amendment?
2. Is the sweeping mandate for Boards of Elections and the Ohio Secretary of State to conduct pre-election reviews of initiative petitions to determine the following: whether a proposal is within the scope of a municipal political subdivision's authority to enact via initiative, including the limitations placed by Article XVIII, §§ 3 and 7 of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot -- an unconstitutional infringement on electoral free speech and association rights?
3. Does the State of Ohio have a compelling interest in ordering Executive Branch elections officials by statute to exercise veto power over the substantive content of an initiated ballot proposal when more than 25 Ohio Supreme Court decisions dating from 1918 have consistently forbidden

pre-election content review of initiative proposals?

4. Is post-election court review of the constitutionality or legality of an initiative proposal that has been voted into law, a practice dating back more than 100 years in Ohio, a satisfactory safeguard over the public's initiative right under the Ohio Constitution?
5. Does state-authorized censorship of initiative ballot speech protect the integrity and reliability of the initiative process, ensure voter confidence in the electoral process, and avoid the overcrowding of ballots, and so to justify the burdening of electors' First Amendment rights?
6. Is the right of local, community self-government a fundamental right under the U.S. Constitution, and is it protected by the Substantive Due Process Clause of the Fourteenth Amendment?
7. Is the inherent and fundamental right of local, community self-government, including the exercise of that right as expressed through the exercise of direct democracy, among the implicit liberties preserved for the people and protected from government intrusion by the Ninth Amendment?
8. Should the District Court have exercised 28 U.S.C. § 1367 supplemental jurisdiction over Plaintiffs' allegations pertaining to the separation-of-powers doctrine as articulated in Ohio law?
9. Is Plaintiffs' state-law separation-of-powers claim so related to and

intertwined with their First, Ninth, and Fourteenth Amendment that the District Court should have taken jurisdiction over it?

STATEMENT OF THE CASE

The people's right to propose and enact laws by popular vote lies at the heart of our democracy. Saraquoia Bryant, Sally Jo Wiley, Katharine S. Jones, Gerald T. Dolcini, Gwen B. Fischer, Damen Rae, Gregory D. Howard, Susan L. Beiersdorfer, William Lyons, Gregory Thomas Pace, Markie Miller, and Bryan Twitchell the Plaintiffs-Appellants ("Plaintiffs") in this case are residents and electors of various Ohio counties and municipalities. (Complaint, RE 1, Page ID #4-8). Plaintiffs brought suit against multiple entities: the Secretary of the State of Ohio, who has official responsibility for the administration of Ohio's election laws; the Boards of Election of Lucas, Mahoning, Franklin, Portage, Meigs, Athens, Franklin and Medina Counties of Ohio; and the 28 members of those Boards of Election, in their official capacities.

Plaintiffs have, collectively, spent thousands of hours navigating Ohio election laws and the arbitrary practices of Defendants election officials, only to be denied placement of their proposed measures on electoral ballots, or alternatively, to be confronted with costly and time consuming litigation to force placement of proposed measures onto the ballot. The Complaint sets forth, in detail, the Ohio election laws at issue (Complaint, RE 1,Page ID #12-18), and explains the state judiciary's role in Ohio's unconstitutional ballot access scheme. (Compl. RE 1, Page ID #18).

Defendants have violated Plaintiffs' constitutional rights, in most cases repeatedly, by preventing, or otherwise severely burdening, their ballot access. Plaintiffs alleged before the District Court that they were being subjected to unconstitutional pre-enactment review of proposed ballot measures by election officials and the judiciary in violation of the people's core political rights and separation of powers.

Plaintiffs challenge the constitutionality of portions of Ohio Revised Code ("O.R.C.") §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1) and 3501.39(A)(3) (collectively, "House Bill 463" or "H.B. 463"), which authorize local boards of elections and Ohio's Secretary of State to scrutinize the subject matter and content of ballot initiatives and to prohibit those initiatives from ballot placement should they believe the cited statutes have been violated. They also challenge the Ohio state judiciary's interference in the citizen lawmaking process by deferring to election officials' substantive, content-based review; by interjecting the courts into the citizen lawmaking process, pre-enactment; and by issuing advisory opinions on the validity of proposed measures, pre-enactment. Plaintiffs seek a court order enjoining application of unconstitutional provisions of the aforementioned statutes that also enjoins Defendants' unconstitutional acts of content-based pre-enactment review and ballot vetoes.

The Complaint was filed on February 1, 2019. (Complaint, RE 1). In it,

Plaintiffs assert facial and as-applied claims under the First Amendment against Defendants for enforcing Ohio's ballot access scheme. Counts One and Two allege that Ohio's pre-screening ballot procedure is a content-based restriction on core political speech and the right to vote, for which "Defendants do not have any interests that could justify such burdens as to survive strict scrutiny or any other standard of review . . . ." (Complaint, RE 1, Page ID #52-53). Counts Three and Four allege that Ohio's pre-screening ballot procedure "impose[s] severe burdens and unreasonable restrictions on ballot access" and is therefore a prior restraint on core political speech. *Id.*, Page ID #53-55. Plaintiffs also brought as Count Five, a First Amendment claim alleging a violation of their right to assembly and to petition the government for redress of grievances. *Id.*, Page ID #55-56. Count Six is a substantive due process claim based on Plaintiffs' claim to an "inherent and fundamental right of local, community self-government[.]" (RE 1, Page ID #56-58). Count Seven alleges Ninth Amendment a reservation of local government rights as being constitutionally enforceable. (RE 1, Page ID #58-59). Count Eight alleges violation of Ohio's separation of powers principles by the delegation of quasi-judicial responsibility to the Secretary of State and the county boards of election ("BOEs"). (RE 1, Page ID #60-61).

All Defendants timely answered (Answers, RE 4, 21, 25, 26, 27, 36, 39, 42).

In February 2019, the Lucas County Board of Elections ("BOE") Defendants

moved for judgment on the pleadings. RE 5. The Mahoning County BOE Defendants moved to dismiss, RE 22. Ohio's Secretary of State, Defendant Frank LaRose, also filed a Motion to Dismiss. RE 38. Plaintiffs opposed each motion, RE 40, 45, 48, and all Defendants replied, RE 44, 51, 52. The Lucas County Defendants and Defendant LaRose filed supplemental briefs in support of their motions, RE 65, 66, to which Plaintiffs responded further, RE 67. The Court heard oral argument as to the pending motions on August 26, 2019. (Transcript, RE 92).

On August 30, 2019, the trial judge granted these Defendants' motions. The Complaint was dismissed against Mahoning County BOE for lack of standing. (Order, RE 69, Page ID # 629). As to the Lucas County BOE and Secretary of State, the court ruled that there was no First Amendment prior restraint because the ballot initiative regulations challenged by Plaintiffs ostensibly were applied without regard to the subject matter or viewpoint of the initiative. (*Id.*, Page ID #630). Regarding the First, Second and Fifth (First Amendment "*Anderson-Burdick*") counts, the judge held that Plaintiffs "have not been burdened with exclusion or virtual exclusion from participating in the election process" and "remain free to exercise the initiative power in compliance with Ohio's initiative ballot statutes." (*Id.*, Page ID #634). The substantive due process claim of Count Six failed because no court has recognized local, community self-government as a fundamental right under the Constitution. (*Id.*, Page ID #637).

Count Seven respecting Ninth Amendment reserved rights failed for the same reason. (*Id.,* Page ID #639). Count Eight was dismissed on grounds of Eleventh Amendment immunity, where the Plaintiffs did not have the State of Ohio's consent to be sued. (*Id.,* Page ID #639).

The trial court applied the same legal principles when the remaining Defendants later moved for dismissal of the Complaint. On September 23, 2019, the Portage County BOE Defendants filed a Motion to Dismiss Plaintiffs' claims pursuant to Fed R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). (Motion, RE 71). Plaintiffs opposed the motion. (Opposition, RE 76). In its subsequent December 31, 2019 ruling, the District Court applied the reasoning from its August 30, 2019 decision, finding that Ohio's "significant interests" in regulating elections and safeguarding the "integrity and reliability of the initiative process" did not burden Plaintiffs' First Amendment rights, and dismissal of Complaint Counts 1 through 5 was justified. (Order, RE 77, Page ID #923-924). Then, the court consistently applied its August 30, 2019 rulings as to Counts 6 through 8. (*Id.*, Page ID # 924-926).

On February 19, 2020, the Franklin County BOE Defendants filed their Motion to Dismiss, (Motion, RE 78), soon followed by the dismissal motion of the Athens County and Meigs County BOE Defendants, (Motion, RE 79), and a Motion for Judgment on the Pleadings by the Medina County BOE Defendants,

(Motion, RE 80). The Plaintiffs responded. (Oppositions, RE 84, 85, 86). On April 30, 2020, the District Court granted all motions and dismissed the Complaint, following it by a final order. (Memorandum Opinion, RE 87; Order of Dismissal, RE 88). In so doing, the trial court again applied its earlier reasoning to dismiss the five First Amendment Counts (Memorandum Opinion, RE 87, Page ID #1070 ("State of Ohio maintains 'significant interests' in regulating elections and safeguarding the 'integrity and reliability' of the initiative process. . . . after balancing the State of Ohio's interests against Plaintiffs' First Amendment Rights, the Court found that any such burden on Plaintiffs' First Amendment rights is justified.")). *See id.* at Page ID #1073, 1074. The trial judge restated and applied her previous reasoning as to Counts 6-8. (*Id.*, Page ID #1074-1075).

After issuing the April 30, 2020 Memorandum Opinion, the trial court ordered the entire case to be dismissed. (Order, RE 80). Timely appeal was taken by Plaintiffs to bring the case before the Sixth Circuit.

SUMMARY OF ARGUMENT

The Plaintiff's First Amendment challenge to the Ohio initiative ballot scheme (H.B. 463) should succeed under the *Anderson-Burdick* framework. Proposing legislation by means of initiative involves core political speech. In the area of citizen initiative lawmaking "the importance of First Amendment protections is at its zenith" and the state's burden to justify restrictions on that

process is "well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988). Thus, while the right to pass legislation through initiative or referendum is a state-created right not guaranteed or required by the U.S. Constitution, if a state chooses to confer the right of initiative and referendum to its citizens, it is "obligated to do so in a manner consistent with the Constitution." *Meyer*, 486 U.S. at 420; *see also Taxpayers United for Assessment Cuts v. Austin,* 994 F.2d 291, 295 (6th Cir. 1993) ("[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution ….").

The Ohio statutory scheme severely burdens ballot access and freedom of association, and so violates the First Amendment. *Anderson v. Celebrezze*, 460 U.S. 780 (1983), as later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Anderson-Burdick*"). Sixth Circuit judges "generally evaluate First Amendment challenges to state election regulations under the three-step *Anderson-Burdick* framework." *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019); *see also Committee to Impose Term Limits v. Ohio Ballot Board*, 885 F.3d 443 (6th Cir. 2018) (First Amendment applies where state statutes complained of "regulate the mechanics of the initiative process[.]"); *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (Readler, J., concurring) ("*Anderson-Burdick* is tailored to the regulation of election mechanics.").

Anderson-Burdick provides a 'flexible standard'" to evaluate "'[c]onstitutional challenges to specific provisions of a State's election laws'" under the First Amendment. *Daunt v. Benson*, 956 F.3d at 406 (citing *Anderson*, 460 U.S. 780 and *Burdick*, 504 U.S. 428 (1992)). A court considering a challenge to a state election law must "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and 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,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). "When a state promulgates a regulation which imposes a 'severe' burden on individuals' rights, that regulation will only be upheld if it is 'narrowly drawn to advance a state interest of compelling importance.'" *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (quoting *Burdick*, 504 U.S. at 434).

Applying *Anderson-Burdick,* the Ohio initiative ballot scheme negatively affects core protected speech, and even runs afoul of intermediate scrutiny because of the breadth of the governmental intrusion, ease of veto power, and the lack of satisfactory alternative forms of speech.

The legislative scheme also comprises a prior restraint under the First Amendment. "Prior restraints are presumptively invalid because of the risk of

censorship associated with the vesting of unbridled discretion in government officials and the risk of indefinitely suppressing permissible speech when a licensing law fails to provide for the prompt issuance of a license." *Bronco's Entm't, Ltd. v. Charter Twp. of Van Buren*, 421 F.3d 440, 444 (6th Cir. 2005).

The right of local community self-government is fundamental, and therefore, protected by the Substantive Due Process Clause of the Fourteenth Amendment. *See Marcum ex rel. C.V. v. Bd. of Educ. of Bloom-Carroll Local Sch. Dist.*, 727 F.Supp. 2d 657, 672-73 (S.D. Ohio 2010) ("The substantive component of the Due Process Clause protects 'fundamental rights otherwise not explicitly protected by the Bill of Rights' and serves 'as a limitation on official misconduct which, although not infringing on a fundamental right,' is so oppressive that it shocks the conscience." (quoting *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996))).

"Substantive due process . . . serves the goal of preventing governmental power from being 'used for purposes of oppression,' regardless of the fairness of the procedures used." *Howard v. Grinage*, 82 F.3d at 1349.

The right of local, community self-government predates the American Revolution and falls within the protection of the Ninth Amendment, which provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." "Among the implicit liberties preserved for the people and protected from government intrusion by the

Ninth Amendment is the inherent and fundamental right of local, community self-government, including the exercise of that right as expressed through the exercise of direct democracy." *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 935 (2008) ("Strict scrutiny is generally reserved for government actions that impinge upon protected rights. The text of the Ninth Amendment reminds us that maintaining an area of retained local autonomy is itself a right of the people.").

The trial court should have exercised supplemental jurisdiction over Plaintiffs' separation-of-powers claim. According to 28 U.S.C. § 1367: "…in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy…"

Given the trial court's original jurisdiction over Plaintiffs' First, Ninth, and Fourteenth Amendment challenges, and that the state-law separation-of-powers claim is related to and intertwined with those challenges, the trial court should have taken exercised supplemental jurisdiction over the Ohio separation-of-powers claim. The Eleventh Amendment's rationale for barring a federal court from considering state law claims does not apply here.

ARGUMENT

A. Introduction

The nature and scope of Plaintiffs' challenge to Ohio's ballot access scheme is an issue of first impression in this Circuit. No Sixth Circuit decision has considered the constitutionality of O.R.C. §§ 307.95, 307.95(C), 3501.11(K)(1) and (2), 3501.38(M)(1), 3501.39(A)(3) ("H.B. 463") in particular, or of content-based pre-enactment review by election officials and the judiciary, in general, on the grounds alleged in the Complaint. (RE 1).

The Court must decide whether, having created a ballot initiative process for its citizens, Ohio has severely burdened citizens, in violation of the First Amendment, by legislating discretion for election officials and the judiciary to engage in sweeping content-based review as a prior restraint to keep measures off the ballot. Also, the Court must determine whether Ohio's ballot initiative process, facially and/or as applied, deprives citizens of their right to politically associate and campaign by according Executive Branch elections officials pre-election powers to block subjectively politically disagreeable initiatives in circumstances that deny a merits appeal.

STANDARD OF REVIEW

Rule 12(c) of the Federal Rules of Civil Procedure provides that "a party may move for judgment on the pleadings." Such motions are addressed under the

same standard applicable to a motion to dismiss under Rule 12(b)(6). *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). "To survive a [Rule 12(b)(6)] motion to dismiss, [the complaint] must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622, 627 (6th Cir. 2010). "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 (2009). A court may dismiss a claim if it finds, on the face of the pleading, that "there is an insurmountable bar to relief indicating that the plaintiff does not have a claim." *Ashiegbu v. Purviance*, 76 F. Supp.2d 824, 828 (S.D. Ohio 1998), aff'd 194 F.3d 1311 (6th Cir. 1999), cert. denied, 529 U.S. 1001 (2000).

"For purposes of a motion for judgment on the pleadings [or a motion to dismiss], all well-pleaded material allegations of the pleadings of the opposing party must be taken as true." *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012). The Court "must construe the complaint in the light most favorable to [the] plaintiff[.]" *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010) (quoting *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523, 527 (6th Cir. 2007)). In addition to reviewing the claims set forth in the complaint, a court may also consider exhibits, public records, and items appearing in the record of the case

as long as the items are referenced in the complaint and are central to the claims contained therein. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

"[W]here a defendant argues that the plaintiff has not alleged sufficient facts in her complaint to create subject matter jurisdiction, the trial court takes the allegations in the complaint as true." *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003).

Assignment of Error No. 1: The District Court improperly analyzed Ohio's statutory scheme under the First Amendment to conclude Plaintiffs' constitutional rights have not been abridged.

Counts 1 through 5 of the Complaint assert violations of Plaintiffs' First Amendment rights. Counts 1 and 2 assert facial and as-applied challenges against the Defendants for enforcing content-based restrictions on the initiative right. Counts 3 and 4 allege facial and as-applied challenges against the Defendants for imposing prior restraints on their First Amendment rights. Count 5 alleges violations of Plaintiffs' First Amendment Assembly and Petition rights under the Fourteenth Amendment.

Plaintiffs argue for remand of Counts 1, 2 and 6 as a separate group from Counts 3 and 4.

A. Ohio's statutory scheme fails under *Anderson-Burdick* analysis

1. Strict scrutiny reveals Ohio initiatives are severely burdened by H.B. 463

As alleged in Counts 1, 2 and 6, the Ohio statutory scheme severely burdens ballot access and freedom of association, and so violates the First Amendment. *Anderson v. Celebrezze*, 460 U.S. 780 (1983), as later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Anderson-Burdick*"). This three-step framework weighs the character and magnitude of the burden the State's rule imposes on Plaintiffs' First Amendment rights against the interests the State contends justify that burden, and considers the extent to which the State's concerns make the burden necessary.

The Sixth Circuit applies the three *Anderson-Burdick* steps as follows:

> The first, most critical step is to consider the severity of the restriction. Laws imposing severe burdens on plaintiffs' rights are subject to strict scrutiny, but lesser burdens trigger… less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. Regulations that fall in the middle warrant a flexible analysis that weighs the state's interests and chosen means of pursuing them against the burden of the restriction. At the second step we identify and evaluate the state's interests in and justifications for the regulation. The third step requires that we assess the legitimacy and strength of those interests and determine whether the restrictions are constitutional.

Schmitt at 639 (citations and internal quotation marks omitted).

The Sixth Circuit has further stated that "[t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). The Complaint is rife with acts of exclusion by

the various Defendants election officials to reject initiated measures from the ballot. Complaint, RE 1. These include allegations that Defendants have engaged in unconstitutional reviews of the substance of proposed charter amendments to exclude proposed initiatives from the ballot, Complaint, RE 1, PageID #27-51. Plaintiffs also described how pre-enactment substantive review consumes time and resources as it effectively curtails public debate over the measures because of uncertainty over the outcome of mandamus litigation. *Id.*, Page ID #21. And, they have shown that content-based, substantive pre-enactment review of proposed ballot measures interferes with core political speech and petition for redress of grievances, violates voters' fundamental right to vote, and inhibits citizens from reforming or altering their current form of government. *Id.*, PageID #52-53.

Oddly, while the trial court cited the Grimes test (the "hallmark of a severe burden is exclusion or virtual exclusion from the ballot"), it found that Plaintiffs' were not "excluded," but were "restricted:"

> Plaintiffs . . . have not been burdened with exclusion or virtual exclusion from participating in the election process. Rather, they have been restricted from placing initiatives on the ballot that were determined by state officials to exceed the scope of legislative authority. They remain free to exercise the initiative power in compliance with Ohio's initiative ballot statutes. Such a restriction does not severely burden Plaintiffs' rights, under the First Amendment, to engage in political expression.

Memorandum Opinion, RE 69, Page ID #634.[1]

1 The trial court reiterated its determination that H.B. 463 merely regulates the process by which initiative legislation is put before the electorate and not core

Plaintiffs beg to differ: the burden of the restrictions imposed by H.B. 463 and the exclusions that follow their application is enormous. The resulting "freedom to comply" with the statutes is devoid of meaning.

Ohio's courts have vociferously protected the citizens' right to initiative for more than a century. The Ohio Supreme Court, the highest authority on interpretation of the Ohio Constitution, has adhered for 100 years to the precept that, even if the thrust of an initiative would be unlawful if passed, Ohio does not allow pre-election judicial review over substance and the vote must be allowed to take place. Since the 1912 Constitutional Convention, which created the initiative and referendum rights, the Court has forcefully ruled out any inquiries into the content of measures proposed by the people, over and over again.

"The proper time for an aggrieved party to challenge the constitutionality of a proposed charter amendment is after the voters approve the measure, assuming they do so." *State ex rel. Ebersole v. City of Powell*, 2014-Ohio-4283, 21 N.E.3d 274, ¶¶ 2, 6, 7. The boards of election are limited to considering the "propriety of its submission to the voters," not the legality or efficacy of the initiated proposal.

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expressive speech when it dismissed the claims against Portage County BOE (Memorandum Opinion, RE 77, Page ID #923). Similarly, when the court dismissed the claims against Franklin County, Meigs County, Athens County and Medina County BOEs, it ruled that Ohio's ballot initiative process does not function as a prior restraint and that it does not severely burden initiative proponents' rights to engage in political expression. (Memorandum Opinion, RE 87, Page ID #1069-1070).

State ex rel. N. Main St. Coalition v. Webb, 106 Ohio St.3d 437, 2005-Ohio-5009, ¶ 38; *see also State ex rel. Brecksville v. Husted*, 133 Ohio St.3d 301, 2012-Ohio-4530, ¶ 14 (claim that public policy requires removal of initiative from the ballot because electorate cannot force mayor to speak in support of an issue contrary to the U.S. Constitution attacks substance of proposed ordinances; challenge is premature before adoption of the proposed ordinance by the people); *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 6 (1999) ("Any claims alleging the unconstitutionality or illegality of the substance of the proposed ordinance, or action to be taken pursuant to the ordinance when enacted, are premature before its approval by the electorate."); *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5, 6, 7 OBR 317, 318 (1983) ("It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature."); *State ex rel. Espen v. Wood Cty. Bd. of Elections*, 2017-Ohio-8223, ¶¶ 13-15 (2017); *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶ 11; *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 2015-Ohio-3749, ¶ 15 (2015); *State ex rel. Lange v. King*, 2015-Ohio-3440, No. 2015-1281, ¶ 11 (2015); *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 2012-Ohio-4310, ¶ 12 (2012); *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶ 24; *State*

ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections, 115 Ohio St.3d 437, 2007-Ohio-5379, ¶ 43 (2007); *State ex rel. Lewis v. Rolston*, 115 Ohio St.3d 293, 2007-Ohio-5139, ¶ 28 (2007); *Mason City School Dist. v. Warren Cty. Bd of Elections*, 107 Ohio St.3d 373, 2005-Ohio-5363, ¶ 21; *State ex rel. Commt. for the Charter Amendment v. Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, ¶ 43 n. 3; *State ex rel. Hazel v. Cuyahoga Cty. Bd of Elections*, 80 Ohio St.3d 165, 169 (1997); *State ex rel. Thurn v. Cuyahoga Cty. Bd of Elections*, 72 Ohio St.3d 289, 293 (1995); *State ex rel. Williams v. Iannucci*, 39 Ohio St.3d 292, 294 (1988); *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 146 (1988); *State ex rel. Walter v. Edgar*, 13 Ohio St.3d 1, 2 (1984); *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 17-18 (1977); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, syll. (1941); *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 138 N.E. 881, syll. (1922); *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, syll. ¶ 2 (1921); *Weinland v. Fulton*, 99 Ohio St. 10, syll. (1918).

As recently as 2019, the Ohio Supreme Court reiterated that "a board of elections has no legal authority to review the substance of a proposed charter amendment and has no discretion to block the measure from the ballot based on an assessment of its suitability." *State ex. rel. Abernathy v. Lucas County Board of Elections*, 2019-Ohio 201, No. 2018-1824, ¶ 7. And it noted, "A board of elections has no discretion to keep a proposed charter amendment off the ballot because in

placing a proposed amendment to a municipal charter on the ballot, the board of elections has nothing but a ministerial role under the Constitution." *Id.* At ¶ 9 (internal quotations and citation removed). In 2018, that Court held "…boards of election have no authority to review the substance of a proposed municipal charter amendment." *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, No. 2018-1242, ¶ 13.

The invocation of the unlawful discretion accorded election officials since passage of H.B. 463 in 2017 striking. Despite the aforementioned bright line ban on election officials' discretionarily vetoing initiatives based on content, many environmental and voting rights protections have repeatedly been ruled off the ballot. In 2017, citizens in Mahoning County sought to amend the Youngstown city charter to ban hydraulic fracturing for oil and gas – "fracking" – in the city. Mahoning's BOE refused to place a proposed Youngstown charter amendment on the election ballot, concluding that it exceeded the city's legislative power by creating new causes of action. (Memorandum Opinion, RE 69, PageID #620). In August 2018, citizens in Toledo produced petitions with 10,500 signatures to put the Lake Erie Bill of Rights ("LEBOR") on the ballot, a municipal charter amendment with a "rights of nature" component providing a legal basis, including standing, for citizens to sue for the purpose of protecting the Lake Erie watershed. The Lucas County BOE declined to put it on the ballot because in the members' opinion, LEBOR contained provisions beyond the scope of the City of Toledo's

power to enact. (*Id.*, PageID # 621-622).

The people have a right under the Ohio Constitution to, not only initiative, but also to create a county government and propose that form of government to the people by initiative. The courts may not become involved in the formation of a county charter form of government until the people have voted on it as their form of government. Yet, the Secretary of State has repeatedly refused to put county charter proposals on the ballot. In Meigs County, the Secretary and BOE members refused to put a county charter proposal on the ballot after making a determination of its invalidity because of noncompliance with the Ohio Constitution. (Complaint, RE 1, PageID #40). The Secretary has repeatedly blocked county charters from the ballot because of arbitrarily shifting views of whether Ohio "general law" could be incorporated by reference into charter proposals to define county governmental officers' duties under the charter form of government. At different times, the Secretary has barred charters from the ballot because they contained lengthy but supposedly incomplete recitations of descriptions of elected officials' legal duties. (Complaint, RE 1, Page ID #40-41). The BOEs in Athens and Medina counties have repudiated proposed charters for opposite ways of representing the duties of public officials.

The Secretary also has barred county charter proposals by incorrectly requiring chartered county governments to have a unitary executive. Athens

County BOE refused to put an initiated county charter on the ballot that banned fracking waste injection wells in the county. The Secretary of State affirmed the refusal and added that Ohio law supposedly requires appointment of a county executive as well as pre-empting the authority to regulate oil and gas operations in Ohio. (Id., PageID #42). The Medina county charter proposal sought to block construction of natural gas megapipelines and oil and gas waste injection wells in the county and attempted to legislate a "rights of nature" provision. (Complaint, RE 1, PageID #44-45).

In Portage County, the county charter story is similar. Following an intense petition drive for a proposal to alter the structure of county government and legislate prohibitions on fracking and injection well usage to dispose of fracking-related wastes, the Portage County BOE and Secretary of State combined to block the proposal as being beyond the scope of authority and the legally incorrect claim that a county executive position was required in the new government. (Complaint, RE 1, PageID #49-50).

In Franklin County, citizens initiated a Columbus ordinance which contained a comprehensive community bill of rights declaring that Columbus citizens possess rights to local, community self-government, potable water, clean air, safe soil, peaceful enjoyment of home, freedom from toxic trespass, and a sustainable energy future, and endows natural communities, including wetlands, streams, and rivers,

with the rights to exist and flourish within the City. The petition sought a ban on fracking within the City and created legal means of enforcing it. The Franklin County BOE voted 4-0 to reject it from the ballot despite the circulators' gathering more than 13,000 signatures, because provisions of the petition, in the BOE members' opinion, fell outside the scope of a municipal political subdivision's authority to enact by initiative. (*Id.*, PageID #32-33)

The exclusions of Plaintiffs' initiatives from the ballot are case-by-case censorship events which require either BOE members to concur (as to city charter amendments or ordinances), or two BOE members and the Secretary of State to agree (in county charter initiatives). The result is "exclusion. . . from the ballot."

H.B. 463 confided considerable quasi-judicial power to Boards of Election and the Secretary of State. The new, discretionary power grants elections officials the power to decide what the people are allowed to decide, a uniquely anti-democratic concept. The district court's allusion to Plaintiffs' remaining freedom "to exercise the initiative power in compliance with Ohio's initiative ballot statutes" (Memorandum Opinion, RE 69, PageID #634) is meaningless, since the H.B. 463 scheme consigns the people to an endless and egregious guessing game of what proposal, if any, could possibly please enough BOE members and the Secretary of State to get onto the ballot.

A court considering a challenge to a state election law must "weigh 'the

character and magnitude of the asserted injury to the rights protected by the First and 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,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). "When a state promulgates a regulation which imposes a 'severe' burden on individuals' rights, that regulation will only be upheld if it is 'narrowly drawn to advance a state interest of compelling importance.'" *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (quoting *Burdick*, 504 U.S. at 434).

The district judge asserted that "Plaintiffs fail to adequately explain how being prevented from voting on ballot measures exceeding the scope of state law is, itself, a substantial burden on First Amendment rights." (Memorandum Opinion, RE 69, PageID #636). She decided that state-authorized censorship of ballot campaign speech "protect[s] the integrity and reliability of the initiative process, ensur[es] voter confidence in the electoral process, and avoid[s] the overcrowding of ballots," and so "justifies any such burden on Plaintiffs' First Amendment rights." *Id.* To reach that conclusion (and to reach it without evidence that a trial on the merits would have required), the trial court was required to deny that initiatives are about ideas, about community problem-solving, speech, debate, association,

voting, and protecting the right of communities to evolve and change. Prior to 2015, the Ohio Supreme Court has made it clear that even an initiative with an unlawful objective must be decided by the voters:

> *An unconstitutional amendment may be a proper item for referendum or initiative. Such an amendment becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction.* Any other conclusion would authorize a board of elections to adjudicate a constitutional question and require this court to affirm its decision even if the court disagreed with the board's conclusion on the underlying constitutional question, so long as the board had not abused its discretion.

State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶ 11 (2015) (Emphasis added). The Ohio Supreme Court recognizes a mechanism where the people first vote, then the measure is assessed for its constitutionality and legality in a court, post-election. This approach has worked satisfactorily for decades. Conversely, a statutory scheme that confides sweeping pre-election discretion to the Executive Branch to decide what the people are allowed to debate and consider and that allows a veto for even slight perceived flaws shuts down the First Amendment's freedoms of ideas and association, and guts the power of people to bring up their own legislative proposals as a counterpoint to governmental legislating.

2. Ohio's statutory restrictions cannot withstand *Anderson-Burdick* 'intermediate scrutiny'

Even assuming for argument's sake that the Ohio ballot scheme maintains

content neutrality, the statutes still fail under *Anderson-Burdick* intermediate scrutiny. Under this test, the government may impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided the restrictions: (1) "serve a significant governmental interest;" (2) are "narrowly tailored;" and (3) "leave open ample alternative channels for communication of the information." *Grider v. Abramson*, 180 F.3d 739, 748-49 (6th Cir. 1999), applying *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

Under H.B. 463, the governmental interest to be served is illegitimate BOE power to arbitrarily veto duly-circulated initiatives from the ballot, making broad constitutional determinations outside of the courts, and terminating the bedrock constitutional right in Ohio that the people shall have unimpeded access to the ballot, regardless of a proposal's content. The statutes are certainly not "narrowly tailored." Notably missing from the lengthy checklist of legal parameters which elections officials are now required to apply by O.R.C. § 3501.38 is obedience to the century of Ohio Supreme Court jurisprudence against initiative content vetoes – ominous evidence that the Ohio General Assembly has forsaken the guidance of the Ohio Constitution and the courts.

As for the third consideration of intermediate scrutiny, it is not an "ample alternative channel for communication of information" for citizens' only recourse

to be to circulate a revised, watered-down or toothless initiative to the same arbitrary Board of Elections, or else to give up the whole idea as hopeless. The trial judge's finding that "Plaintiffs offer nothing more than conclusory allegations that the ballot initiative statutes were applied based on content," RE 69, PageID #630, ignores the enormous discretion accorded non-judicial and non-elected public officers to control and censor ballot messages.

The First Amendment applies where challenged state statutes "regulate the mechanics of the initiative process[.]" *See Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (Readler, J., concurring) ("*Anderson-Burdick* is tailored to the regulation of election mechanics."). *Anderson-Burdick* provides a 'flexible standard'" to evaluate "'[c]onstitutional challenges to specific provisions of a State's election laws'" under the First Amendment. *Daunt v. Benson*, 956 F.3d at 406 (citing *Anderson*, 460 U.S. 780 and *Burdick*, 504 U.S. 428 (1992)).

The Sixth Circuit in *Schmitt v. LaRose* ruled on a ballot-regulatory statute that "enable[d] boards of election to make structural decisions that inevitably affect — at least to some degree — the individual's right to speak about political issues and to associate with others for political ends." 963 F.3d at 638 (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) and *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) of the *Anderson-Burdick* test). However, O.R.C. § 3501.38(M)(1)(a) isn't "structural" – it doesn't prescribe what the

components of an initiative must be; rather, it commands evaluation of content. And because it direct scrutiny and censoring of content, the H.B. 463 scheme is therefore not "a step removed from the communicative aspect of core political speech," but stands as a barrier to core political speech.

Ohio's statutory regulation of initiatives thus collapses under each framework, *Anderson-Burdick* strict scrutiny, and intermediate scrutiny.

B. The trial court erred in failing to find that Ohio's statutory scheme comprises a prior restraint forbidden by the First Amendment

Plaintiffs maintain that the initiative is protected by the First Amendment through every stage, including the election and any post-election challenges. But H.B. 463 has enabled 88 county "election courts," where non-lawyers and non-judges can pass on the legal viability of any measure they choose to question, and they may impose their subjective beliefs by their vetoes of an otherwise qualified measure. Thus Ohio's statutory restrictions are not "reasonable" because they invite unbridled arbitrariness. They are severely burdensome: a single perceived defect – not a considered adversarial court proceeding – is enough according to the statute to condemn an entire complex proposal from the ballot.[2]

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2 Strict compliance is express in H.B. 463's text. O.R.C. § 3501.11(K)(2) states:

> Each board of elections shall . . . :
>
> (K)(2) Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact

The district court found that the Ohio initiative ballot scheme did not comprise a prior restraint as alleged in Plaintiffs' Counts 3 and 4, and in doing so, read far more into *Schmitt v. LaRose*, 963 F.3d 628 (6th Cir. 2019) than the Sixth Circuit may have intended. The facts advanced by the *Schmitt* plaintiffs differ from Plaintiff's allegations n this appeal. The Plaintiffs here argue that Defendants' implementation of H.B. 463 and the resulting content-based, substantive pre-enactment review of proposed ballot measures by election officials and the judiciary violates the First and Fourteenth Amendments, facially and as applied.

> via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. *The petition shall be invalid if any portion of the petition is not within the initiative power*." (Emphasis added).

O.R.C. § 3501.38(M)(1) similarly states:

> (M)(1) Upon receiving an initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, concerning a ballot issue that is to be submitted to the electors of a county or municipal political subdivision, the board of elections shall examine the petition to determine:
>
> (a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. *The petition shall be invalid if any portion of the petition is not within the initiative power*. . . ."

(Emphasis added).

The *Schmitt* plaintiffs asserted "that because the ballot-initiative statutes delegate authority to boards of elections to review proposed initiatives prior to the election, the statutes amount to a prior restraint, and consistent with *Freedman* [*v. Maryland*], Ohio must provide de novo judicial review of a board's decisions." *Id*. at 638. But the *Schmitt* plaintiffs sought only *de novo* judicial review of a BOE's application of the initiative ballot application statutes. The *Schmitt* plaintiffs "never challenged the legitimacy of the legislative-administrative distinction or the state's right to vest in county boards of elections the authority to apply that distinction." *Id.* at 639. The interpretation of the challenged ballot laws to deny pre-enactment judicial review was not regarded as a restriction on "core expressive conduct." *Id*.

The *Schmitt* court held that the procedural portions of the statutory scheme "regulate the process by which initiative legislation is put before the electorate, which has, at most, a second-order effect on protected speech." *Id.* at 638 (cited at Memorandum Opinion, RE 69, Page ID #630).[3] The trial judge here did not grasp the incongruity of this conclusion with the instant facts. The Ohio initiative

3 The trial court reiterated its determination that H.B. 463 merely regulates the process by which initiative legislation is put before the electorate, and not core expressive speech when it dismissed the claims against Portage County BOE (Memorandum Opinion, RE 77, Page ID #923). Similarly, when the court dismissed the claims against Franklin County, Meigs County, Athens County and Medina County BOEs, it ruled that Ohio's ballot initiative process does not function as a prior restraint and that it does not severely burden initiative proponents' rights to engage in political expression. (Memorandum Opinion, RE 87, Page ID #1069-1070).

scheme, as applied here, is the essence of a First Amendment prior restraint on core protected speech. *The H.B. 463 statutes mandate review and approval by the BOE, or Secretary of State, of contents of the initiative proposal* as a prerequisite to ballot placement. Consequently, Plaintiffs are not challenging the process by which an initiative proposal is put on the ballot, but instead, the discretion accorded election officials to veto a proposal based on its substance.

As previously explained, the substantial intrusions into permissible initiative content authorized by H.B. 463 statutorily overrule a century of Ohio constitutional jurisprudence forbidding substantive review and pre-election veto of initiatives. "Prior restraints are presumptively invalid because of the risk of censorship associated with the vesting of unbridled discretion in government officials and the risk of indefinitely suppressing permissible speech when a licensing law fails to provide for the prompt issuance of a license." *Bronco's Entm't, Ltd. v. Charter Twp. of Van Buren*, 421 F.3d 440, 444 (6th Cir. 2005) (citation and internal quotation marks omitted).

The *Schmitt* plaintiffs merely sought a right to *de novo* court review of a BOE's decision. The Plaintiffs here, however, seek a bright-line rule against content-based, substantive pre-enactment review of proposed ballot measures because this practice violates the First and Fourteenth Amendments. In other words, they challenge the legislative-administrative distinction and the whether the

State of Ohio may vest authority in county boards of elections to apply that distinction.

The trial court in the instant case went awry when it failed to understand how H.B, 463 permeates core expressive conduct:

> But *Schmitt* concluded Ohio's ballot-initiative process is not a prior restraint because the statutes regulated the process by which initiative legislation is put before the electorate, rather than directly restricting core expressive conduct. *Whether Ohio law permitted pre-election review has no bearing on whether the statutory scheme directly burdened core expressive conduct. Because it does not, Plaintiffs' prior restraint claims fail.*

(Memorandum Opinion, RE 69, PageID #632) (Emphasis added). The district court conflated, or confused, the process of ballot placement with the examination of the substance of the proposal. Proposing legislation by means of initiative involves core political speech, such that in the area of citizen initiative lawmaking "the importance of First Amendment protections is at its zenith" and the state's burden to justify restrictions on that process is "well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988) (overturning state's prohibition on using paid petition circulators). Thus, while the right to pass legislation through initiative or referendum is a state-created right not guaranteed or required by the U.S. Constitution, if a state chooses to confer the right of initiative and referendum to its citizens, it is "obligated to do so in a manner consistent with the Constitution." *Meyer*, 486 U.S. at 420; *see also Taxpayers United for Assessment Cuts v. Austin*,

994 F.2d 291, 295 (6th Cir. 1993) ("[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution …."); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (applying First Amendment to invalidate restrictions on circulation of initiatives); *Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F. 3d 443, 446 (6th Cir. 2018) (applying First Amendment to Ohio's single-subject requirement for initiatives).

There is nothing wrong with election officials reading the contents of an initiative proposal, but there is a lot wrong with the invocation of unbridled veto power by three BOE votes (or a combination of BOE and Secretary of State votes) to repudiate a complex proposal because of feigned error or flaw. The danger is superficially viewing the ballot statutes as broadly regulating how initiative legislation is put before the electorate, instead of investigating whether they directly infringe upon core expressive conduct. A statutory scheme, after all, encompasses the actual statutes, the interpretations of those statutes by the courts, and the manner in which those statutes are applied by the Executive Branch. House Bill 463 is a prior restraint on First Amendment-protected ballot speech.

Assignment of Error No. 2: The District Court incorrectly held the right of local self-government to be a matter governed only by state law, and not to be a fundamental right under the Constitution

Count 6 of Plaintiffs' Complaint alleges violation of the right of local community self-government pursuant to the substantive due process clause of the Fourteenth Amendment. (Complaint, RE 1, PageID # 56-57). The district court dismissed the claim, finding that "the right to local, community self-government is governed by state law. It is not a fundamental right under the United States Constitution." (Memorandum Opinion, RE 69, PageID #638).

Plaintiffs assert that the right of local community self-government is fundamental, and therefore, protected by the substantive due process clause. *See Marcum ex rel. C.V. v. Bd. of Educ. of Bloom-Carroll Local Sch. Dist.*, 727 F.Supp. 2d 657, 672–73 (S.D. Ohio 2010) ("The substantive component of the Due Process Clause protects 'fundamental rights otherwise not explicitly protected by the Bill of Rights' and serves 'as a limitation on official misconduct which, although not infringing on a fundamental right,' is so oppressive that it shocks the conscience." (quoting *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996))).

"Substantive due process . . . serves the goal of preventing governmental power from being 'used for purposes of oppression,' regardless of the fairness of the procedures used." *Howard v. Grinage*, 82 F.3d at 1349 (citations omitted); *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted). *League of*

Women Voters of Ohio v. Brunner, 548 F.3d 463, 478 (6th Cir. 2008), based on the fundamental right to vote, provides guidance to the Court on how to entertain a claim based on the fundamental unfairness of Ohio's ballot access scheme.

In *Brunner*, the Sixth Circuit recognized that fundamental unfairness may occur if a state uses non-uniform procedures that result in significant disenfranchisement and vote dilution. *Id.* at 478 (holding plaintiff's "allegations, if true, could support a troubling picture of a system so devoid of standards and procedures as to violate substantive due process"); *see also Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635–37 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265, 198 L.Ed.2d 699 (2017) ("The Due Process Clause is implicated in 'exceptional' cases where a state's voting system is 'fundamentally unfair.' *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010)" (quoting *League of Women Voters of Ohio*, 548 F.3d at 478)).

The Ohio Supreme Court has noted that the right of local, community self-government predates constitutional government in Ohio. In *Federal Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 118 N.E. 103 (1917), the court explained:

> The historical fact is that we had a hundred and more municipalities in Ohio already in existence at the time of the adoption of our first constitution, in 1802 .... All were then exercising local self-government. The constitutional fathers did not even mention municipalities or cities in the first constitution, and in the second constitution [of 1851] granted to

> the general assembly certain power to restrict, from all of which it would seem a mere legal and constitutional axiom that they never granted, nor intended to grant, to the general assembly of Ohio the general guardianship of all municipalities. If all political power is inherent in the people, as written in our constitution, for the government of the state, it would seem at least of equal importance that all political power should be inherent in the people for the government of our cities and villages and so it seemed to men like Thurman, Ranney, Cooley and Campbell, than whom there have been few greater in American jurisprudence. I prefer to follow their course of reasoning, based upon historical fact and political principles, rather than the mere dictums and dogmas of decisions holding that municipal government is government by the general assembly.

Id. at 534-35. *Federal Gas* recognized local, community self-government in Ohio as a fundamental political right of people to govern their local communities. This unwritten body of rights was secured by the Declaration of Independence, which delineated the right to local, community self-government by recognizing four principles essential to American governments: first, that people possess certain fundamental civil and political rights; second, that governments are created to secure those rights; third, that governments owe their existence to, and derive their power exclusively from the community of people which creates and empowers them; and fourth, that if government becomes destructive of those ends, the people have both a right and a duty to alter or abolish that system of government, and replace it with a system of government that recognizes self-governing authority and that protects the people's civil and political rights. The Ohio Constitution, in turn, reflects the spirit of the Declaration of Independence at Article I, Section 2,

which provides that political power is inherent in the people and that the people have the right to alter, reform, or abolish the same, whenever they may deem it necessary.

In sum, the genesis of the right to local self-government is federal. The right achieved stature in Ohio's Constitution; and is so fundamental that it may be enforced through Fourteenth Amendment Due Process.

Assignment of Error No. 3: The District Court erred in finding that Plaintiffs have not stated a claim under the Ninth Amendment

Count 7 of Plaintiffs' Complaint is based on the Ninth Amendment of the U.S. Constitution, which provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Plaintiffs allege that "[a]mong the implicit liberties preserved for the people and protected from government intrusion by the Ninth Amendment is the inherent and fundamental right of local, community self-government, including the exercise of that right as expressed through the exercise of direct democracy." See Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 935 (2008) ("Strict scrutiny is generally reserved for government actions that impinge upon protected rights. The text of the Ninth Amendment reminds us that maintaining an area of retained local autonomy is itself a right of the people.").

The trial court dismissed Count 7, finding that Plaintiffs' reliance on the

Ninth Amendment could not stand because "[t]he right to local, community self-government, however, is not a right guaranteed under the United States Constitution." (Memorandum Opinion, RE 69, PageID #639).

Plaintiffs urge that the right of local community self-government, as discussed above, is explicitly based on the retained rights by the people and that as a common-law right that pre-exists even the Declaration of Independence and the U.S. Constitution, the right should be deemed protected and enforceable under the Ninth Amendment. Accordingly, this Court should reverse the District Court as to the dismissal of Count 7.

CONCLUSION

Underlying Plaintiffs' entire case is the importance of direct democracy as it relates to our system of governance and Plaintiffs' fundamental, constitutional rights. In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003), the Supreme Court emphasized the importance of popular measures like initiatives and referenda:

> In assessing the referendum as a "basic instrument of democratic government," we have observed that "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." And our well-established First Amendment admonition that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" dovetails with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government.

It is not "content-neutral" to grant a small governmental board unbridled discretion to censor or veto citizens' ideas, particularly when those ideas bear the signatures of thousands of electors who've clearly manifested their desire to hold a vote to possibly legislate them.

Even "an unconstitutional amendment may be a proper item for referendum or initiative. Such an amendment becomes void and unenforceable only when declared unconstitutional by a court of competent jurisdiction. Any other conclusion would authorize a board of elections to adjudicate a constitutional question and require this court to affirm its decision even if the court disagreed with the board's conclusion on the underlying constitutional question, so long as the board had not abused its discretion." *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St.3d 239, 2015-Ohio-3761, 41 N.E.3d 1229, ¶ 11 (2015).

The Plaintiffs have alleged "enough facts to state a claim to relief that is plausible on its face" in their Complaint, against all Defendants. *Traverse Bay Area Immediate Sch. Dist.v. Mich. Dep't of Educ.,* 615 F.3d 622, 627 (6th Cir. 2010).

Ohio cannot "mandamus" its way to uniform applicability of the First Amendment to all citizen ballot initiatives. There must be federal court involvement and oversight.

WHEREFORE, Plaintiffs pray the Court of Appeals to reverse the District

Court's dispositive rulings and orders, RE 69, 77, 87 and 88, and to remand this lawsuit for further proceedings.

Respectfully submitted on September 29, 2020,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A) AS TO TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,050 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Libre word processing program and Times New Roman, 14 pt. type.

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I deposited a copy of the original Brief of Appellants into the Electronic Case Filing system maintained by the Court, and that on October 7, 2020, I deposited a copy of the Brief of Appellants, corrected, into the ECF system, and that according to protocols of the system, it was electronically served upon all counsel registered to receive electronic filings.

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ADDENDUM

U.S. Const., Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., Amendment IX
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const., Amendment XI
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const., Amendment XIV
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rev. Code § 307.95 Determining validity of petitions.
(A) When a county charter petition has been certified to the board of elections pursuant to section 307.94 of the Revised Code, the board shall immediately proceed to determine whether the petition and the signatures on the petition meet the requirements of law, including section 3501.38 of the Revised Code, and to count the number of valid signatures. The board shall note opposite each invalid signature the reason for the invalidity. The board shall complete its examination of the petition and the signatures not later than ten days after receipt

of the petition certified by the board of county commissioners and shall submit a report to the board of county commissioners not less than one hundred days before the election certifying whether the petition is valid or invalid and, if invalid, the reasons for the invalidity, whether there are sufficient valid signatures, and the number of valid and invalid signatures. The petition and a copy of the report to the board of county commissioners shall be available for public inspection at the board of elections. If the petition is determined by the board of elections to be valid but the number of valid signatures is insufficient, the board of county commissioners shall immediately notify the committee for the petitioners, who may solicit and file additional signatures to the petition pursuant to division (E) of this section or protest the board of election's findings pursuant to division (B) of this section, or both.

(B) Protests against the findings of the board of elections concerning the validity or invalidity of a county charter petition or any signature on such petition may be filed by any elector eligible to vote at the next general election with the board of elections not later than four p.m. of the ninety-seventh day before the election. Each protest shall identify the part of, or omission from, the petition or the signature or signatures to which the protest is directed, and shall set forth specifically the reason for the protest. A protest must be in writing, signed by the elector making the protest, and shall include the protestor's address. Each protest shall be filed in duplicate.

(C) The board of elections shall deliver or mail by certified mail one copy of each protest filed with it to the secretary of state. The secretary of state, within ten days after receipt of the protests, shall determine the sufficiency or insufficiency of the signatures and the validity or invalidity of the petition, including whether the petition conforms to the requirements set forth in Section 3 of Article X and Section 3 of Article XVIII of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county offices by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power. The secretary of state may determine whether to permit matters not raised by protest to be considered in determining such validity or invalidity or sufficiency or insufficiency, and may conduct hearings, either in Columbus or in the county where the county charter petition is filed. The determination by the secretary of state is final.

(D) The secretary of state shall notify the board of elections of the determination made under division (C) of this section not later than four p.m. of

the eighty-first day before the election. If the petition is determined to be valid and to contain sufficient valid signatures, the charter shall be placed on the ballot at the next general election. If the petition is determined to be invalid, the secretary of state shall so notify the board of county commissioners and the board of county commissioners shall notify the committee. If the petition is determined by the secretary of state to be valid but the number of valid signatures is insufficient, the board of elections shall immediately notify the committee for the petitioners and the committee shall be allowed ten additional days after such notification to solicit and file additional signatures to the petition subject to division (E) of this section.

(E) All additional signatures solicited pursuant to division (A) or (D) of this section shall be filed with the board of elections not less than seventy days before the election. The board of elections shall examine and determine the validity or invalidity of the additional separate petition papers and of the signatures thereon, and its determination is final. No valid signature on an additional separate petition paper that is the same as a valid signature on an original separate petition paper shall be counted. The number of valid signatures on the original separate petition papers and the additional separate petition papers shall be added together to determine whether there are sufficient valid signatures. If the number of valid signatures is sufficient and the additional separate petition papers otherwise valid, the charter shall be placed on the ballot at the next general election. If not, the board of elections shall notify the county commissioners, and the commissioners shall notify the committee.

Ohio Rev. Code § 3501.11(K)(1)-(2) Board duties.

Each board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall do all of the following:

(K) (1) Review, examine, and certify the sufficiency and validity of petitions and nomination papers, and, after certification, return to the secretary of state all petitions and nomination papers that the secretary of state forwarded to the board;

(2) Examine each initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as

described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

Ohio Rev. Code § 3501.38(M)(1)

All declarations of candidacy, nominating petitions, or other petitions presented to or filed with the secretary of state or a board of elections or with any other public office for the purpose of becoming a candidate for any nomination or office or for the holding of an election on any issue shall, in addition to meeting the other specific requirements prescribed in the sections of the Revised Code relating to them, be governed by the following rules:

(M)(1) Upon receiving an initiative petition, or a petition filed under section 307.94 or 307.95 of the Revised Code, concerning a ballot issue that is to be submitted to the electors of a county or municipal political subdivision, the board of elections shall examine the petition to determine:

(a) Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The petition shall be invalid if any portion of the petition is not within the initiative power; or

(b) Whether the petition falls within the scope of a county's authority to enact via initiative, including whether the petition conforms to the requirements set forth in Section 3 of Article X of the Ohio Constitution, including the exercise of only those powers that have vested in, and the performance of all duties imposed upon counties and county officers by law, and whether the petition satisfies the statutory prerequisites to place the issue on the ballot. The finding of the board shall be subject to challenge by a protest filed pursuant to division (B) of section 307.95 of the Revised Code.

Ohio Rev. Code § 3501.39(A)(3) Grounds for rejection of petition or declaration of candidacy.

(A) The secretary of state or a board of elections shall accept any petition described in section 3501.38 of the Revised Code unless one of the following

occurs:

(3) In the case of an initiative petition received by the board of elections, the petition falls outside the scope of authority to enact via initiative or does not satisfy the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

DESIGNATION OF RECORD FOR APPENDIX

Date Filed	*Description, Record No., Page ID Range*
2/1/2019	Complaint, RE 1, Page ID #1-62
2/21/2019	Motion for JOP (Lucas County), RE 5, Page ID #83-100
4/8/2019	Motion to Dismiss (Mahoning County), RE 22, Page ID #177-178 and Memorandum in Support, RE 23, Page ID # 179-199
4/19/2019	Motion to Dismiss (Ohio Secretary of State), RE 38, Page ID #309-337
4/21/2019	Plaintiffs' Opposition to Lucas Co. MJOP, RE 40, Page ID #360-386
5/6/2019	Reply in Support of Lucas Co. MJOP, RE 44, Page ID #408-421
5/20/2019	Plaintiffs' Opposition to Secy of State MTD, RE 45, Page ID #422-448
5/24/2019	Plaintiffs' Opposition to Mahoning MTD, RE 48, Page ID #454-480
6/7/2019	Mahoning Reply in Support of MTD, RE 51, Page ID #488-501
6/17/2019	Secy of State Reply in Support of MTD, RE 52, Page ID #502-526
8/12/2019	Supplemental Brief Support MJOP (Lucas Co.), RE 65, Page ID #567-571
8/16/2019	Secy of State Supplemental Brief in Support of MTD, RE 66, Page ID #598-605
8/30/2019	Memorandum of Opinion and Order, RE 69, Page ID #617-640
9/23/2019	Portage County MTD, RE 71, Page ID #642-652
10/23/2019	Plaintiffs' Opposition to Portage Co MTD, RE 76, Page ID #902-915
12/31/2019	Order granting Portage Co. MTD, RE 77, Page ID #916-927
2/19/2020	Franklin Co. MTD, RE 78, Page ID #928-938
3/3/2020	Athens and Meigs Co. MTD, RE 79, Page ID #939-950
3/4/2020	Medina Co. Motion JOP, RE 80, Page ID #951-968

3/27/2020	Plaintiffs' Opposition to Franklin Co. MTD, RE 83, Page ID #973-993
4/10/2020	Plaintiffs' Opposition to Athens-Meigs MTD, RE 85, Page ID #1023-1039
4/10/2020	Plaintiffs' Opposition to Medina MTD, RE 86, Page ID #1040-1059
4/30/2020	Memorandum Opinion, RE 87, Page ID #1060-1076
4/30/2020	Order of Dismissal, RE 88, Page ID #1077
5/28/2020	Notice of Appeal, RE 89, Page ID #1078-1079
8/3/2020	Transcript, Motion Hearing,8/26/2019, RE 92, Page ID #1082-1153