UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

OHIOANS AGAINST CORPORATE BAILOUTS, *et al.*,	:	**Case No. 2:19-CV-4466**
	:	
	:	**Judge Sargus**
Plaintiffs,	:	
	:	
v.	:	
	:	
FRANK LAROSE, *in his official capacity* as Ohio Secretary of State, *et al.*,	:	
	:	
	:	
Defendants.		

PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION WITH RESPECT TO THE *SUMMARY STATUTE* SO AS TO EXTEND THE CIRCULATION PERIOD OF THE REFERENDUM PETITION IN ORDER TO ALLOW FOR THE FULL EXERCISE OF FIRST AMENDMENT RIGHTS FOR THE FULL 90-DAY PERIOD EXPRESSLY ALLOWED BY THE OHIO CONSTITUTION

Plaintiffs OHIOANS AGAINST CORPORATE BAILOUTS, DAVID J. ECKERT, BRANDON S. LYNAUGH, and TREVOR J. VESSELS (collectively, the "COMMITTEE"), hereby move, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, for the immediate issuance of a preliminary injunction so as to afford the COMMITTEE the full 90 days provided for in the Ohio Constitution in which to circulate a referendum petition, free of any inhibition or prohibition on the exercise of their rights to freedom of speech and freedom to petition for redress. Through imposition of extra-constitutional mandates in Ohio Rev. Code § 3519.01(B)(the "*Summary Statute*") which require, prior to obtaining a single signature on any referendum petition, those seeking to subject legislation to referendum to obtain pre-approval from the government of the proposed petition and that, while awaiting such pre-approval, the 90-day period to obtain signatures on the petition is not tolled or stayed, the State of Ohio has unconstitutionally

burdened and infringed upon the full and robust exercise of the First Amendment rights of the COMMITTEE and those supportive of subjecting H.B. 6 to a vote of the people.

Because of the ban on core political speech resulting from the *Summary Statute*, the COMMITTEE seeks to be afforded an additional 38 days in which to continue engaging in core political speech with the voters of Ohio in order to obtain signatures on the petition to subject H.B. 6 to referendum. Additionally, should the COMMITTEE not have a sufficient number of signatures to tender to the Ohio Secretary of State on October 21, 2019, they request the Court retroactively stay the effective date of H.B. 6 or otherwise provide that the COMMITTEE is afforded the full 90-day period provided for in the Ohio Constitution for the circulation of referendum petitions.

In addition to the following Memorandum in Support, this *Motion* is supported by (i) the *Declaration of Brandon Lynaugh, including the Exhibits thereto* (Doc. No. 4, PageID#76-104); (ii) the *Second Declaration of Brandon Lynaugh* (Doc. No. 30, PageID#525-30); (iii) and the *Declaration of William Rogers* (Doc. No. 31, PageID#531-35).

MEMORANDUM IN SUPPORT

I. Background

The history of the passage of H.B. 6 and the on-going effort to subject that legislation to referendum was fully summarized in the *Motion for Temporary Restraining Order and Preliminary and Permanent Injunction*, at 6-9 (Doc. No. 2, PageID#40-43). For purposes of the present *Motion*, consideration must also be given to the referendum-petition process and how that process burdened and infringed upon the First and Fourteenth Amendment rights of the COMMITTEE and those supportive of subjecting H.B. 6 to a vote of the people.

A. The referendum-petition process under the Ohio Constitution and state law.

Following the 1912 Constitutional Convention, the people of the State of Ohio reserved unto themselves the power to subject legislation passed by the Ohio General Assembly to referendum:

> The legislative power of the state shall be vested in a general assembly … [but the people reserve to themselves] the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided.

Ohio Const., art. II, sec. 1.[1]

The Ohio Constitution then proceeds to set forth the petition requirements in order to subject a law or a portion of a law to referendum, *viz.*, the submission of valid signatures of at least 6 percent of the number of votes cast in the last gubernatorial election. *Ohio Const., art. II, sec. 1c & 1g*. In terms of timing, the Ohio Constitution also provides for what the Ohio Supreme Court has described as a "relatively short 90-day period" in which to circulate the petition, obtain a sufficient number of valid signatures, and then file it with the Ohio Secretary of State.[2] *State ex rel. Barren v. Brown*, 51 Ohio St.2d 169, 171, 365 N.E.2d 887 (1977); *see Ohio Const., art. II, sec. 1c* ("[w]hen a petition…shall have been filed with the secretary of state within ninety days…the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item…").

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[1] The scope and nature of the referendum right in Ohio was more fully addressed in the *Motion for Temporary Restraining Order and Preliminary and Permanent Injunction*, at 12-14 (Doc. No. 2, PageID#51-53).

[2] Beyond the constitutional requirement to simply file the petition with the Secretary of State, the Ohio General Assembly has also mandated additional filings be tendered when submitting the petition: (i) an electronic copy of the petition along with a verification that the electronic copy is a true representation of the original filed paper petition; (ii) a summary of the number of part-petitions filed per county, and the number of signatures on each part-petition; and (iii) an index of the electronic copy of the petition. *Ohio Rev. Code § 3519.16*.

Notwithstanding "the minutia and detail with which the constitution-makers provided for safeguarding the initiative and referendum," *Hockett v. State Liquor Licensing Board*, 91 Ohio St. 176, 182, 110 N.E. 485 (1915), the Ohio General Assembly has imposed extra-constitutional mandates upon Ohio citizens seeking to exercise their constitutionally-guaranteed right to subject legislation to referendum. One such extra-constitutional mandate is set forth within the *Summary Statute*:

> Whoever seeks to file a referendum petition against any law, section, or item in any law shall, by a written petition signed by one thousand qualified electors, submit the measure to be referred and a summary of it to the secretary of state and, on the same day or within one business day before or after that day, submit a copy of the petition, measure, and summary to the attorney general.

Ohio Rev. Code § 3519.01(B)(1). Stated otherwise, before those desiring to subject a law to referendum may even start the constitutional referendum-petition process, an initial preliminary petition containing 1,000 signatures and a proposed summary of the law must be tendered to the Ohio Secretary of State and the Ohio Attorney General.

At this stage, the Attorney General has ten business days to determine and to certify, based solely upon his opinion and at his discretion, whether the summary of the anticipated referendum petition is a "fair and truthful statement of the measure to be referred" to the voters through the referendum petition. *Ohio Rev. Code § 3519.01(B)(3)*. During the same ten-business-day period (which can last as much as 14 days due to weekends), the Secretary of State is: (i) determining the validity of the signatures on the preliminary petition (to ensure there are at least 1,000 valid signatures) and (ii) comparing the text of the law in the proposed referendum to the enrolled act on file (to confirm the texts are the same). *Ohio Rev. Code § 3519.01(B)(2).* If, *inter alia*, the Attorney General rejects the summary contained in the preliminary petition, then the entire process must start anew, *i.e.*, a new preliminary petition with another 1,000 signatures and a new summary

must be tendered to the Secretary of State and to the Attorney General; this process can, in theory, continue indefinitely and consume the entire constitutionally-provided 90-day period. Only after the Attorney General and the Secretary of State finally issue their respective certifications, as required by the *Summary Statute*, may the proponents seeking to subject a law to referendum even begin to start the constitutional referendum process and attempt to persuade their fellow citizens that the law should be submitted to the voters for approval or rejection.

While the proponents seeking to subject a law to referendum are attempting to satisfy the extra-constitutional mandates within the *Summary Statute* – drafting the summary, developing the preliminary petition, obtaining 1,000 valid signatures thereon, submitting the preliminary petition with a summary to the Attorney General and the Secretary of State, and awaiting their approval of the signatures and the summary – they may not collect a single signature in support of the referendum petition itself. Yet, the proponents are complying with those extra-constitutional mandates, the 90-day period in which to obtain the signatures on the referendum petition continues to elapse. As a result, the extra-constitutional mandates imposed by the Ohio General Assembly through the *Summary Statute* not only steal several days from the full 90-day period provided for in the Ohio Constitution, but they actually create a *Blackout Period* during which the proponents of a referendum petition are precluded from engaging in core political speech by attempting to persuade their fellow citizens to sign the petition. And this *Blackout Period* persists for an indeterminate amount of time.

B. The COMMITTEE experienced a 38-day Blackout Period due to the pre-petition summary approval process.

On July 23, 2019, the Ohio General Assembly passed H.B. 6 and, on the same day, Governor DeWine signed it into law and filed it with the Secretary of State. At that moment, the clock started running against the COMMITTEE to obtain at least 265,774 valid signatures of voters across Ohio, as well as satisfying a minimum number of signatures in 44 of the 88 counties in Ohio, so as to subject H.B. 6 to referendum. The time clock is set in accordance with Ohio Constitution Article II, Section 1c, and, at present, H.B. 6 will go into effect on October 22, 2019. However, when the clock started on the 90-day period, the ability of the COMMITTEE to immediately engage in circulating a referendum petition and exercising their First Amendment rights associated therewith was completely stifled for the next 38 days, all while the 90-day period in which to persuade voters about why H.B.6 should be decided by the voters continued to close.

Upon H.B. 6 being filed with the Ohio Secretary of State, the COMMITTEE immediately started its effort to comply with the extra-constitutional mandates imposed upon the proponents of referendum petitions by the *Summary Statute*. Obtaining a certified copy of the final text of H.B. 6 as filed with the Secretary of State, the COMMITTEE prepared a summary of H.B. 6 for inclusion on the preliminary petition.[3] Once completed, the preliminary petitions were then printed and distributed to start the effort to obtain the valid signatures of at least 1,000 voters required by the *Summary Statute*.

[3] Adding to the time involved in satisfying the pre-approval requirements of the *Summary Statute* was the voluminous size of the bill itself. In its enrolled form, the full text of H.B. 6 amounted to 32 pages in a single-spaced proportionally spaced type. Thus, the summary ended up being five pages in single-spaced 10-point proportionally spaced type

Ultimately, on Monday, July 29, 2019 – just 6 days after H.B. 6 had been signed into law – the COMMITTEE filed a preliminary petition with the Secretary of State and the Attorney General, together with a copy of the measure and 2,866 signatures from registered Ohio voters in 44 different counties.[4] Under the *Summary Statute*, the Ohio Attorney General had 10 business days, *i.e.*, until Monday, August 12, 2019, to determine whether the summary offered in the preliminary petition was a "fair and truthful statement of the measure to be referred".

Waiting until the very last day permitted under the statute, the Attorney General issued a decision on August 12, 2019, wherein he concluded that he was "unable to certify the Summary as a fair and truthful statement of the measure to be referred." *Exhibit A to Lynaugh Declaration* (Doc. No. 4-1, PageID#82-87). The Attorney General's decision letter was six pages long and featured twenty-one bullet points with corrections to the summary.[5] At this stage, 20 days had already elapsed since H.B. 6 had been signed into law and, in light of the Attorney General not certifying the summary, the entire process had to a start anew.[6]

Acting with immediate speed and diligence, the COMMITTEE submitted a second preliminary petition to the Secretary of State and Attorney General only four days later, *i.e.*, on August 16, 2019, together with a revised proposed summary and 2,246 new signatures from Ohio voters in 12 different counties. Under the *Summary Statute*, this started the clock on a new period

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[4] Because, as a matter of course, certain signatures on initiative or referendum petitions will be found to be invalid for a variety of reasons, it is prudent and standard practice to tender a petition with more than the minimum number of valid signatures required.

[5] And in rejecting the summary, while the Attorney General provided some explanation for his decision, he coyly concluded with statement that his explanation "is not intended to be an exhaustive list of all defects in the submitted summary." *Exhibit A to Lynaugh Declaration*, at 6 (Doc. No. 4-1, PageID#87)

[6] With the Attorney General rejecting the summary on the preliminary petition, the Secretary of State did not even report as to the number of valid signatures submitted on the preliminary petition.

of 10 business days, *i.e.*, until Friday August 30, 2019, for the Attorney General and Secretary of State to provide the requisite pre-petition certifications.

On Thursday, August 29, 2019, the Attorney General issued his decision on the summary submitted with the second preliminary petition, concluding that "that the relevant summary is fair and truthful." *Exhibit B to Lynaugh Declaration* (Doc. No. 4-2, PageID#88-89). And even though the Secretary of State had instructed the boards of elections to notify him of the signature counts by Monday August 26, 2019, the Secretary inexcusably waited until the last possible moment – late in the afternoon on August 30, 2019 – to notify the COMMITTEE that it had tendered a sufficient number of valid signatures with the second preliminary petition. In fact, the Secretary had certifications of over 1,000 valid signatures on August 23. *Second Lynaugh Declaration* ¶¶*22-23 and Exhibit A* (Doc. No. 30 and 30-1, PageID#528 & 530).

After the Attorney General and the Secretary of State provided their required certifications under the *Summary Statute*, the COMMITTEE was finally authorized to engage voters with their message about H.B. 6 by seeking signatures on the referendum petition. But by this time, however, 38 days had already elapsed since H.B. 6 had been signed by the governor and the 90-day period in which to persuade voters that HB 6 should be decided by the voters had now been reduced to only 52 days.[7]

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[7] To provide context, with a 90-day window in which to obtain 265,774 valid signatures, the COMMITTEE would need to obtain on average just over 2,953 valid signatures every day; with that window now reduced to 52 days, that number increases to just over 5,111 valid signatures every day. But these numbers do not tell the whole story because there is an inherent rate of error with any signature gathering effort resulting from human error despite best efforts. A typical return rate for positive signatures hovers around 60%. Accordingly, the Committee must collect a gross of more like 440,000 signatures in order to have an adequate number of *valid* signatures at the end of the day. In only 52 days, this works out to more approximately almost 8,500 signatures per day. *Second Lynaugh Declaration* ¶¶*13-17* (Doc. No. 31, PageID#527). Furthermore compounding

II. Argument

A. The standard for issuance of a preliminary injunction.

When considering whether a preliminary injunction is proper, this Court is to consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury if a preliminary injunction is not granted; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n,* 119 F.3d 453, 459 (6th Cir. 1997)(*en banc*). These factors are to be balanced against one another and should not be considered prerequisites to the issuance of a TRO or preliminary injunction. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth*., 163 F.3d 341, 347 (6th Cir. 1998).

B. The COMMITTEE are entitled to a preliminary injunction enjoining the *Summary Statute* and remedying its constitutional violations.

1. The COMMITTEE have a strong likelihood of success on the merits of their First Amendment challenge to the *Summary Statute*.

As the Supreme Court has held that petition circulation is "core political speech" involving "interactive communication concerning political change" for which First Amendment protection is "at its zenith", *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-87 (1999)("*ACLF*")(quoting *Meyer v. Grant,* 486 U.S. 414, 422 & 425 (1988)), it should be beyond

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the challenge is the additional requirement that a certain minimum number of signatures must be obtained in 44 of the 88 counties also during the shorted 52-day window.

While obtaining a sufficient number of valid signatures in the 90-day period was daunting in its own right, to obtain the same number of valid signatures in the 52-day period resulting from the *Summary Statute* can only be described as Herculean. This notwithstanding, OHIOANS AGAINST CORPORATE BAILOUTS has diligently pursued the efforts to clean the Augean Stables that the Ohio General Assembly has placed in front of any citizens who might dare seek to let the people have a say on legislation passed by that same Ohio General Assembly.

cavil that involvement in a referendum-petition process involves expressive conduct and, thus, regulations thereof are subject to the protections afforded by the First Amendment. *See Wirzburger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005)("[t]he first step in our free speech analysis must be to determine whether citizens' use of the initiative process constitutes expressive conduct, permitting appellants to invoke the First Amendment to challenge the Massachusetts initiative exclusions. We do not find that there is any serious debate as to this point…. The Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech").

"[A]lthough the Constitution does not require a state to create an initiative [or referendum] procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *accord Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999)("where the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment applied to the States through the Fourteenth Amendment"). Thus, "[i]t is fundamental that in authorizing a referendum …, the legislation governing such a process may not run afoul of constitutional safeguards." *New Progressive Party (Partido Nuevo Progresista) v. Hernandez Colon*, 779 F.Supp. 646, 659 (D.P.R. 1991); *see also Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1211 (10th Cir. 2002)(the right to free speech and the right to vote are implicated "by the state's attempts to regulate speech associated with an initiative procedure"). Stated otherwise, "states may not place overly restrictive conditions on citizens attempting to exercise initiative or referendum rights." *Stone*, 173 F.3d at 1175.

With respect to the pre-approval requirements imposed on all referendum-petition efforts by the *Summary Statute*, two distinct aspects run afoul of the First Amendment as they directly

impact and unconstitutionally burden the 90-day period in which to circulate a referendum petition: (i) the *Blackout Period* during which no signatures may be obtained on a referendum petition operates as an absolute ban on core political speech during the constitutionally-mandated 90 days in which to circulate a referendum petition and during which the law that is the target of the referendum is not yet effective; and (ii) because of the inherent delay resulting while awaiting governmental pre-approval of a referendum-petition effort, an undue and constitutional burden is imposed upon the 90-day period which, in fact, results in a significantly more narrow period of time to advocate in favor of a referendum effort.

a. The *Blackout Period* operates as a complete ban on core political speech as no signatures may be obtained on a referendum petition yet the 90-day period continues to elapse.

"[A] state that adopts an initiative [or referendum] procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United for Assessment Cuts*, 994 F.2d at 295. Yet, through enactment of the *Summary Statute*, the Ohio General Assembly has imposed a *sine qua non* before a single signature can be affixed to a referendum petition – the submission to and requirement of pre-approval from the Attorney General as to the content of the proposed referendum petition, as well as certification by the Secretary of State as to whether 1,000 valid signatures were tendered with the preliminary petition. And during the period of time that the Attorney General and the Secretary of State are engaged in this pre-approval process, *i.e.*, the *Blackout Period*, the proponents of a referendum are precluded from attempting to persuade voters to sign the referendum petition.

As envisioned by the people of Ohio in 1912 in reserving unto themselves the right to subject any law or part of a law to referendum, upon enactment of a bill and the governor's signature, the people of the State of Ohio could immediately start the process of circulating a

referendum petition to subject the law to a vote of the people. However, in reserving this power, the people also imposed a definitive temporal limit on such efforts, *i.e.*, 90 days, in which to obtain a sufficient number of signatures. *See Thornton v. Salak*, 112 Ohio St.3d 254, 858 N.E.2d 1187, 2006-Ohio-6407 (syllabus). During that 90-day period, the proponents of subjecting a law or portion of a law to referendum could freely engage their fellow citizens by seeking a signature upon the referendum petition.

However, with the enactment of the first summary requirement in 1931, the Ohio General Assembly effectively imposed a *Blackout Period*, an absolute ban on the core political speech that occurs with respect seeking a signature on a referendum petition and the placement of a supporter's signature on such a petition. A petition-circulating effort "involves an encounter in which the petitioner advocates a position, seeking to persuade the listener to sign on to the cause. In response, the signer expresses his support for the position expressed. The petition creates an environment that encourages speech of a kind central to the First Amendment's concern." *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 418 (3rd Cir. 2003); *accord Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985)("we agree with the district court that 'asking a voter to sign a petition' is protected 'speech'"). Yet, during the *Blackout Period*, such interactive communication does not occur and the reason it does not occur is solely due to the *Summary Statute* and its imposition of the *sine qua non* of pre-approval (though the 90-day period to collect signatures continues to elapse).

"When the government restricts speech, the government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). And with respect to the *Blackout Period* and the effective ban on core political speech

wrought by it as it concerns seeking signatures on a petition, the State of Ohio must satisfy the requirements of strict scrutiny. As Justice Kennedy explained:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it….
>
> For these reasons, *political speech must prevail against laws that would suppress it, whether by design or inadvertence*. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."

Citizens United v. Federal Elec. Comm'n, 558 U.S. 310, 339-40 (2010)(emphasis added and quoting *Federal Elec. Comm'n v. Wisconsin Right to Life, Inc.*, 551 U. S. 449, 464 (2007)).

Under strict scrutiny, the State is required "to demonstrate" that the content-based regulation "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed v. Town of Gilbert*, 576 U.S. __, __, 135 S.Ct. 2218, 2231 (2015). Because the strict scrutiny test is an exacting inquiry, "it is the rare case in which ... a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992). And while "the term 'compelling interest' is not readily defined", "[i]t has been described as an 'interest of the highest order,' 'overriding state interest,' and 'unusually important state interest'." *American Broadcasting Co., Inc. v. Blackwell*, 479 F.Supp.2d 719, 739-40 (S.D. Ohio 2006).

Additionally, for a law to be "narrowly tailored", it must actually advance the compelling interest it is designed to serve, and it must be the least-restrictive method of serving that interest-indeed. As explained by the Eighth Circuit:

> As with the compelling interest determination, whether a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance

> the interest as well with less infringement of speech (is the least-restrictive alternative).

Republican Party of Minn. v. White, 416 F.3d 738, 751 (8th Cir. 2005)(internal citations omitted); *see United States v. Alvarez*, 567 U.S. 709, 725 (2012)("to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented"); *see also California Democratic Party v. Jones*, 530 U.S. 567, 584 (2000)(the compelling-interest determination "is not to be made in the abstract, by asking whether [such interest] are highly significant values", but, instead, by considering "whether the aspect of [such interests] addressed by the law at issue is highly significant").

Regardless of what interest the State of Ohio may proffer to justify the absolute ban on core political speech effectuated by the *Blackout Period*, such an interest cannot be so compelling and narrowly drawn to warrant such a ban on core political speech. Furthermore, Ohio already has criminalized, as a felony, to "[m]isrepresent the contents, purport, or effect of [a] petition…for purpose of persuading a person to sign…the petition." *Ohio Rev. Code § 3519.14(A)(1)*. In addressing a comparable criminal provision relating to petition-circulating, the Sixth Circuit declared "[t]his and other criminal provisions of Ohio election law are the types of protections that the Supreme Court has found 'adequate' to deter improper conduct with regard to petition circulation, 'especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.'" *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 388 (6th Cir, 2008)(quoting *Meyer*, 486 U.S. at 427).

Clearly, the State of Ohio cannot and will not be able to meet its burden of establishing that the ban on core political speech during the *Blackout Period* resulting from the pre-approval

requirements in the *Summary Statute* meets and satisfies the requirements of strict scrutiny. Accordingly, the COMMITTEE have a substantial likelihood of success on the merits.

b. Because the 90-day period for a referendum petition continues to elapse during the *Blackout Period*, once pre-approval is finally received from the government, the period of time remaining in which to obtain a sufficient number of signatures results in an impermissible burden on the exercise of First Amendment rights.

In addition to the effective ban on core political speech resulting from the *Blackout Period*, because the 90-day period for a referendum petition continues to elapse throughout the *Blackout Period*, proponents of a referendum petition are severely hampered and burdened in the full and robust exercise of their First Amendment rights inherent in the referendum process even once pre-approval is obtained from the Attorney General and the Secretary of State.

With respect to the current effort to subject portions of H.B. 6 to referendum, because of the delay resulting from the pre-approval mandate within the *Summary Statute*, the COMMITTEE will only have 52 days to obtain at least 265,774 valid signatures of voters across Ohio, as well as satisfying a minimum number of signatures in 44 of the 88 counties in Ohio. The ability to satisfy these signatures requirements in 90 days is feasible; but to do so within the 52 days resulting because of the *Summary Statute* and the *Blackout Period* is, at best, extremely difficult. *Second Lynaugh Declaration* ¶*23* (Doc. No. 30, PageID#528).

The constitutionally provided 90-day period for circulating a referendum petition has been described as "relatively short", *Barren*, 51 Ohio St.2d at 171, or characterized as an "arduous requirement". *State ex rel. Ohio Gen. Assembly v. Brunner*, 115 Ohio St.3d 103, 873 N.E.2d 1232, 2007-Ohio-4460 ¶19 (Pfeifer, J., concurring in part, dissenting in part). *Quære*, what appellation should then attend a 52-day period to do that which the Ohio Constitution provides for 90 days. In *Ohio General Assembly*, Justice Pfeifer characterized a 60-day window as "shortchange[ing]

Ohioans". *Id.* Today, it is appropriate to characterize the 52-day period afforded to the COMMITTEE as an undue and extreme burden on their First Amendment rights.

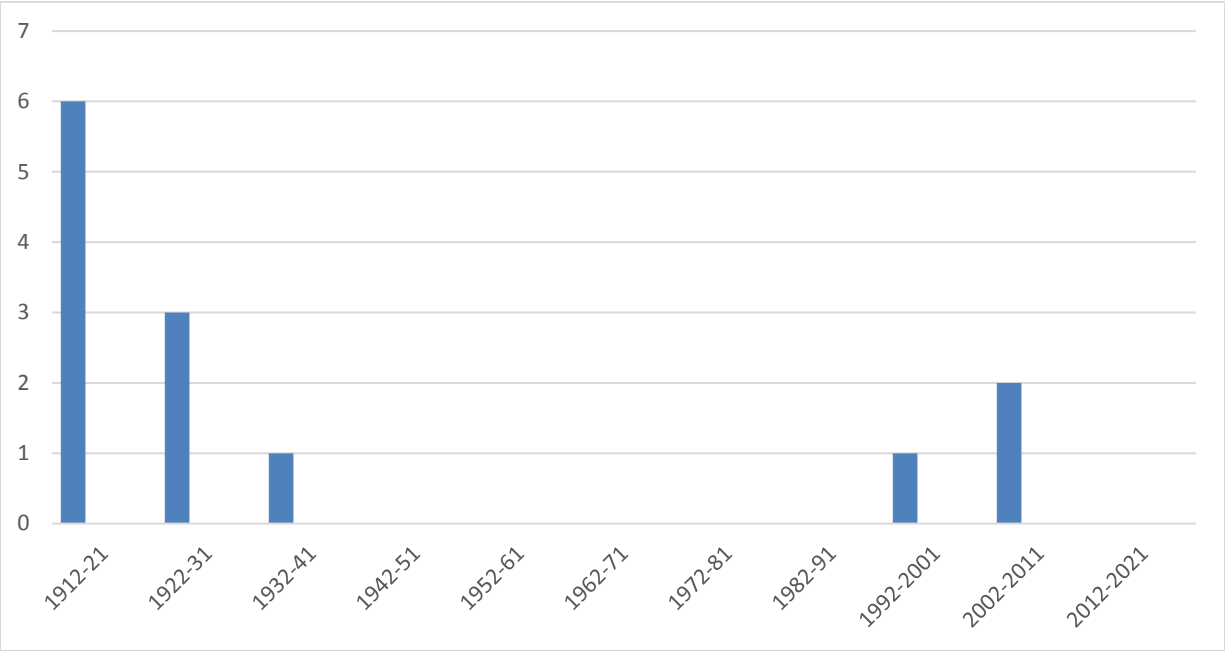
And history confirms that, as the Ohio General Assembly impose more and more onerous pre-approval requirements before a referendum petition could even be circulated, the number of referenda declined. In *Schaller v. Rogers*, 2008-Ohio-4464 (10th Dist.), Ohio's Tenth District Court of Appeals provided a lengthy history of the *Summary Statute* and the requirement of pre-approval by the Attorney General and the Secretary of State:

> [The] initiative and referendum clauses were inserted into the Ohio Constitution in 1912. As appellants point out, the Constitution contains no requirements for submission of a preliminary petition to the secretary of state or the attorney general.
>
> In 1929, however, the General Assembly passed G.C. 4785-175, which it titled "NOTICE OF INTENTION TO CIRCULATE PETITIONS." The section required anyone…filing a referendum petition to repeal a law, to file a copy of the relevant law or amendment, "together with a synopsis of the same,' with the secretary of state before circulating a petition.…
>
> In 1931, the General Assembly made additional changes to G.C. 4785-175. These changes added a requirement that the 100 or more electors submit a proposed law or amendment "or measure to be referred, and a summary of same to the attorney general for examination. If in the opinion of the attorney general the summary is a fair and truthful statement of the proposed law, constitutional amendment or measure to be referred, he shall so certify." In Section 4785-176, the General Assembly added more specific requirements for the form of a petition.
>
> In 1989, the General Assembly again changed these sections, which had by then become R.C. 3519.01 and 3519.05, respectively. In R.C. 3519.01, the General Assembly added a requirement that the attorney general and secretary shall act on a submitted referendum petition within ten business days. The General Assembly did not add a similar time requirement for initiative petitions.
>
> Finally, in 2006, the General Assembly…changed the 100-elector requirement to a 1,000-elector requirement for both initiative and referendum petitions.

Id. ¶¶12-16 (internal citations omitted).

When consideration is given to the history of referenda successfully making it to the ballot, it becomes readily apparent that the more pre-approval restrictions the Ohio General Assembly imposed before a referendum petition could be circulated (but the short 90-day period to collect

signatures continued to elapse), the less the people of Ohio were able to hold the Ohio General Assembly to account through referendum. The following chart shows the dramatic decline in referenda making the ballot after the installment of the summary prerequisite in 1931:



Source: Compiled from *Proposed Constitutional Amendments, Initiated Legislation and Laws Challenged By Referendum, Submitted To The Electors*, published by Ohio Secretary of State, table of information available through link at State Library of Ohio, https://www.ohiomemory.org/digital/collection/p267401ccp2/id/1370.

Once the *Blackout Period* has passed (though only after the indefinite time it takes to obtain the pre-approval of the Attorney General and Secretary of State), the remaining and narrow time left to engage in a successful referendum-petition effort is so constrained and limited that the core political speech of those advocating for a referendum, *i.e.*, advocating for governmental change and accountability, has been and will continue to be unduly and significantly burdened. And even though it may not, at that time, constitute an absolute ban on speech, the nature and significance of that burden still demands that, even in that context, the *Summary Statute* and the resulting burden is subject to strict scrutiny. *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015)("[l]aws that burden political speech are subject to strict scrutiny, which requires the Government to prove

that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (quoting *Citizens United*, 558 U.S. at 340)).

Comparable to the inability of the State of Ohio to meet its burden of demonstrating that the ban on speech during the *Blackout Period* does not satisfy strict scrutiny, the State of Ohio similarly cannot and will not be able to meet its burden on the burden on core political speech occurring after the *Blackout Period.* The resulting narrow temporal window on the core political speech of those advocating for a referendum petition even after the *Blackout Period* is not justified by any compelling interest that is narrowly tailored to such interest. Thus, once again, the COMMITTEE have a substantial likelihood of success on the merits in its challenge to the *Summary Statute.*

2. The COMMITTEE has and will continue to suffer irreparable injury, substantial harm will not inure to others, and the public interest supports the issuance of a preliminary injunction.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1973). And the Ohio Supreme Court has declared that "[t]he constitutional right of citizens to referendum is of paramount importance." *Ohio Gen. Assembly*, 115 Ohio St.3d 103, 873 N.E.2d 1232, 2007-Ohio-4460 ¶8. As this case involves the coalescing of both federal and state constitutional rights, to which courts afford great significance and protection, the injury resulting from the *Blackout Period* – both during that period and afterwards – cannot be understated. The *Blackout Period*, being the result of the *Summary Statute*, has clearly caused and will continued to cause irreparable injury to the COMMITTEE, as well as those who seek to subject H.B. 6 to referendum. Furthermore, in light of the paramount importance afforded to the full rights of referendum, as well as "it … always [being] in the public interest to prevent the violation of a party's constitutional rights", *G&V*

Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994), all the other preliminary-injunction factors favor issuance of a preliminary injunction.

IV. Conclusion

All four factors to consider militate in favor of the issuance of a preliminary injunction. As established above, the Court should issue an injunction affording the COMMITTEE an additional 38 days in which to continue its referendum-petition efforts for an additional 38 days and, should the COMMITTEE not have a sufficient number of signatures to tender to the Ohio Secretary of State on October 21, 2019, they request the Court retroactively stay the effective date of H.B. 6 or otherwise provide that the COMMITTEE is afforded the full 90-day period provided for in the Ohio Constitution for the circulation of referendum petitions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon all counsel of record via the Court's ECF system on the date of filing.

/s/ Curt C. Hartman