

## Ohio's Ballot-Petition Signature Requirements During a Pandemic

*Thompson v. DeWine* (Edmund A. Sargus, Jr., 2:20-cv-2129), *Duncan v. LaRose* (Michael H. Watson, 2:20-cv-2295), and *Hawkins v. DeWine* (James L. Graham, 2:20-cv-2781) (S.D. Ohio)

Federal actions sought modifications of Ohio's requirements for getting candidates and measures on the ballot in a time of social distancing to prevent transmission of Covid-19 during a global pandemic: acceptance of electronic signatures, a reduced signature requirement, and extended deadlines. One district judge ordered acceptance of electronic signatures and an extension of the deadline but not a reduction in the number of signatures required. The court of appeals, however, stayed the injunction, finding ballot-access requirements modest even during the pandemic. A second judge denied relief to a pro se minor presidential candidate. A third judge denied relief, reasoning in part that social distancing is not state action.

*Subject:* Getting on the ballot. *Topics:* Getting on the ballot; Covid-19; intervention; ballot measure; pro se party; case assignment.

Federal courts largely denied relief from ballot-petition signature requirements during the global Covid-19 infectious pandemic of 2020.

### *Ballot-Access Requirements for Local Initiatives and Referenda*

Three voters challenged Ohio's ballot-access requirements for local initiatives and referenda during the governor's stay-at-home order issued because of the Covid-19 pandemic, filing a federal complaint in the Southern District of Ohio on Monday, April 27, 2020.<sup>1</sup> Specifically, the complaint challenged the in-person signature and witness requirements and the deadlines.<sup>2</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.<sup>3</sup> The court set the case for a telephone conference with Judge Edmund A. Sargus, Jr., at 10:30 a.m. on April 28.<sup>4</sup> Judge Sargus set another telephone conference for May 8 and ordered a response brief from Ohio by May 7.<sup>5</sup>

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1. Complaint, *Thompson v. DeWine*, No. 2:20-cv-2129 (S.D. Ohio Apr. 27, 2020), D.E. 1 [hereinafter *Thompson* Complaint]; see *Thompson v. DeWine*, 461 F. Supp. 3d 712, 720–21 (S.D. Ohio 2020).

2. *Thompson* Complaint, *supra* note 1, at 1.

3. Motion, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio Apr. 27, 2020), D.E. 4.

4. Notice, *id.* (Apr. 28, 2020), D.E. 5; Docket Sheet, *id.* (Apr. 27, 2020) [hereinafter *Thompson* Docket Sheet] (minutes, D.E. 9).

Tim Reagan interviewed Judge Sargus for this report by telephone on August 24, 2020.

5. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio Apr. 28, 2020), D.E. 12; Notice, *id.* (Apr. 28, 2020), D.E. 10.

On April 30, Ohioans for Secure and Fair Elections moved to intervene as a plaintiff,<sup>6</sup> also filing a motion for a temporary restraining order or a preliminary injunction.<sup>7</sup> On the next day, Ohioans for Raising the Wage and four voters also moved to intervene as plaintiffs.<sup>8</sup> That afternoon, Judge Sargus held another telephone conference and granted both intervention motions.<sup>9</sup>

Judge Sargus modified his conference-and-briefing order:<sup>10</sup> he set another telephone conference for May 6 and ordered a joint status report by then, and he ordered briefing on the injunction motions completed by May 15.<sup>11</sup>

The parties filed stipulated facts on May 6.<sup>12</sup> At the conference, the parties agreed that the injunction motions could be decided without testimony or oral argument.<sup>13</sup> Judge Sargus informed the parties that he would decide the case on live testimony or stipulations but not affidavits, which afford no opportunity for cross-examination.<sup>14</sup>

Judge Sargus issued a preliminary injunction on May 19.<sup>15</sup> He ruled that in light of the stay-at-home order and public-health concerns, it would be unconstitutional not to adopt a procedure for electronic signatures and extend filing deadlines.<sup>16</sup> But with electronic signatures permitted and an extension of deadlines, a change in the number of signatures required was not constitutionally necessary.<sup>17</sup>

The court of appeals stayed the injunction on May 26.<sup>18</sup>

There is no doubt that the COVID-19 pandemic and Ohio's responsive restrictions to halt the spread of that disease have made it difficult for all Ohioans to carry on with their lives. But for the most part we are letting our elected officials, with input from public health experts, decide when and how to apply those restrictions. The election context is no different. And while the Constitution provides a backstop, as it must—we are unwilling to conclude

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6. Intervention Motion, *id.* (Apr. 30, 2020), D.E. 13; *see* Intervention Complaint, *id.* (Apr. 30, 2020), D.E. 14.

7. Motion, *id.* (Apr. 30, 2020), D.E. 15; *see* Thompson v. DeWine, 461 F. Supp. 3d 712, 721 (S.D. Ohio 2020).

8. Intervention Motion, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 1, 2020), D.E. 17; *see Thompson*, 461 F. Supp. 3d at 721.

9. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 4, 2020), D.E. 29; *Thompson* Docket Sheet, *supra* note 4 (minutes, D.E. 22); *see* Notice, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 1, 2020), D.E. 21.

10. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 7, 2020), D.E. 37.

11. Order, *id.* (May 4, 2020), D.E. 28; Order, *id.* (May 1, 2020), D.E. 28; *see* Notice, *id.* (May 1, 2020), D.E. 23.

12. Stipulations, *id.* (May 6, 2020), D.E. 35; *see Thompson*, 461 F. Supp. 3d at 717.

13. Order, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 6, 2020), D.E. 36.

14. Interview with Hon. Edmund A. Sargus, Jr., Aug. 24, 2020.

15. *Thompson*, 461 F. Supp. 3d 712; *see* Opinion, *Thompson*, No. 2:20-cv-2129 (S.D. Ohio May 22, 2020), D.E. 50, 2020 WL 2614447 (denying a stay pending appeal).

16. *Thompson*, 461 F. Supp. 3d at 733–36.

17. *Id.* at 734–36.

18. *Thompson v. DeWine*, 959 F.3d 804 (6th Cir.), *vacation denied*, 591 U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, 2020 WL 3456705 (2020).

that the State is infringing upon Plaintiffs' First Amendment rights in this particular case.<sup>19</sup>

The court of appeals concluded that the burdens on collecting signatures during the pandemic were modest:

Plaintiffs' claim effectively boils down to frustration over failing to procure as many signatures for their petitions (because of social distancing and reduced public crowds) as they would without the pandemic. But that's not necessarily true. There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation such as through social or traditional media inviting interested electors to contact them and bring the petitions to the electors' homes to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.<sup>20</sup>

On July 13, the court of appeals declined to modify its stay,<sup>21</sup> and on September 16, the court of appeals reversed Judge Sargus's injunction.<sup>22</sup> Among other things, voluntary social distancing is not state action.<sup>23</sup> Also, "We don't have the power to tell states how they should run their elections. . . . So when the district court here ordered Ohio to accept electronically signed and witnessed petitions and extended the deadline for submitting petitions, it overstepped its bounds."<sup>24</sup>

On August 6, 2021, the court of appeals endorsed Judge Sargus's June 3, 2021, dismissal of the action.<sup>25</sup>

#### *Pro Se Minor Presidential Candidate*

On May 6, 2020, a prospective presidential candidate, claiming a ninth-place finish in the most recent presidential election, filed a pro se federal complaint in the Southern District, seeking relaxation of the signature requirements for getting on the ballot because of Covid-19.<sup>26</sup> One week later, the plaintiff filed a motion for an emergency preliminary injunction.<sup>27</sup> Because the one-page

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19. *Id.* at 813.

20. *Id.* at 810.

21. Order, *Thompson v. DeWine*, No. 20-3526 (6th Cir. July 13, 2020), D.E. 71.

22. *Thompson v. DeWine*, 976 F.3d 610 (6th Cir. 2020), *cert. denied*, 593 U.S. \_\_\_, 41 S. Ct. 2512 (2021).

23. *Id.* at 617.

24. *Id.* at 620.

25. *Thompson v. DeWine*, 7 F.4th 521 (6th Cir. 2021) ("[The] election has come and gone—and with it the prospect that plaintiffs can get any of the relief they asked for. This case is thus moot."), *amending* Opinion, *Thompson v. DeWine*, No. 21-3514 (6th Cir. July 28, 2021), D.E. 27, 2021 WL 3183692 (originally expressed as an affirmance instead of as a vacation with instructions to dismiss), *and affg in substance* Opinion, *Thompson v. DeWine*, No. 2:20-cv-2129 (S.D. Ohio June 3, 2021), D.E. 78, 2021 WL 2264449, *cert. denied*, 595 U.S. \_\_\_, 142 S. Ct. 1233 (2022); *see* Order, *Thompson*, No. 21-3514 (6th Cir. Aug. 18, 2021), D.E. 42 (denying the appellants' bill of costs).

26. Complaint, *Duncan v. LaRose*, No. 2:20-cv-2295 (S.D. Ohio May 6, 2020), D.E. 1.

27. Preliminary-Injunction Motion, *id.* (May 13, 2020), D.E. 5.

motion was not accompanied by a brief explaining the plaintiff's claimed right to relief, Judge Michael H. Watson denied it two days later.<sup>28</sup>

The plaintiff tried a preliminary-injunction motion again on May 29, with a seven-page brief.<sup>29</sup> Judge Watson conducted a telephone conference on June 3 and, relying on the court of appeals' decision in Judge Sargus's case, orally denied the plaintiff immediate relief.<sup>30</sup> A written opinion followed on the next day.<sup>31</sup> The pro se plaintiff preferred a conference by telephone to one by video, and the remote conference went well.<sup>32</sup>

On July 1, the district court decided that the plaintiff's case was not so related to an unsuccessful 2013 case decided in 2015 by Judge Algenon L. Marbley, a case that also challenged Ohio's signature requirements, so that the 2020 case should have been reassigned to Judge Marbley.<sup>33</sup> The district generally did not designate election cases from different election cycles as related.<sup>34</sup>

Judge Watson granted the defendants' motions to dismiss the case on August 24, 2020.<sup>35</sup>

### *Candidate Qualifications*

Two prospective candidates for President and five voters with experience obtaining signatures for ballot petitions filed a federal complaint in the Southern District on Friday, May 29, 2020, challenging Ohio's requirements for in-person signatures for party recognition and candidate qualification during the Covid-19 pandemic, seeking certification of the presidential aspirants for the November 3 general-election ballot and recognition of the Green Party as an established minor party.<sup>36</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order or a preliminary injunction.<sup>37</sup>

On Monday, the court set the case for a telephone conference with Judge James L. Graham on Tuesday morning.<sup>38</sup> At the conference, Judge Graham decided that briefing on the plaintiffs' motion and the defendants' planned

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28. Order, *id.* (May 15, 2020), D.E. 6.

Tim Reagan interviewed Judge Watson for this report by telephone on August 26, 2020.

29 Preliminary-Injunction Motion, *Duncan*, No. 2:20-cv-2295 (S.D. Ohio May 29, 2020), D.E. 13.

30. Opinion at 1, *id.* (June 4, 2020), D.E. 16 [hereinafter *Duncan* Opinion], 2020 WL 660627; see Docket Sheet, *id.* (May 6, 2020) (notice of hearing, June 1, 2020).

31. *Duncan* Opinion, *supra* note 30.

32. Interview with Hon. Michael H. Watson, Aug. 26, 2020.

33. Related-Case Memorandum, *Duncan*, No. 2:20-cv-2295 (S.D. Ohio July 1, 2020), D.E. 20; see *Duncan v. Husted*, 125 F. Supp. 3d 674 (S.D. Ohio 2015), *aff'd*, Opinion, *Duncan v. Husted*, No. 15-4017 (6th Cir. Mar. 7, 2016), D.E. 10; Docket Sheet, *Duncan v. Husted*, No. 2:13-cv-1157 (S.D. Ohio Nov. 18, 2013).

34. Interview with Hon. Michael H. Watson, Aug. 26, 2020.

35. Opinion, *Duncan*, No. 2:20-cv-2295 (S.D. Ohio Aug. 24, 2020), D.E. 21, 2020 WL 4933914.

36. Complaint, *Hawkins v. DeWine*, No. 2:20-cv-2781 (S.D. Ohio May 29, 2020), D.E. 1; see *Hawkins v. DeWine*, 968 F.3d 603, 604 (6th Cir. 2020).

37. Motion, *Hawkins*, No. 2:20-cv-2781 (S.D. Ohio May 29, 2020), D.E. 2.

38. Docket Sheet, *id.* (May 29, 2020) (D.E. 5).

motion to dismiss the complaint would be completed by June 17.<sup>39</sup> Following the plaintiffs' filing on June 9 an amended complaint<sup>40</sup> and an amended motion for a temporary restraining order or a preliminary injunction,<sup>41</sup> Judge Graham extended the briefing deadline by two days.<sup>42</sup>

On June 24, Judge Graham denied the plaintiffs immediate relief.<sup>43</sup> The state's social-distancing orders issued to protect the public from infection and spread of the virus explicitly exempted First Amendment activity, and voluntary social distancing is not state action.<sup>44</sup> The court of appeals affirmed the decision on August 3.<sup>45</sup>

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39. Order, *id.* (June 2, 2020), D.E. 7.

40. Amended Complaint *id.* (June 9, 2020), D.E. 8.

41. Amended Motion, *id.* (June 9, 2020), D.E. 9.

42. Order, *id.* (June 9, 2020), D.E. 10.

43. Opinion, *id.* (June 24, 2020), D.E. 14, 2020 WL 3448228.

44. *Id.* at 7–9.

45. *Hawkins v. DeWine*, 968 F.3d 603 (6th Cir. 2020).