IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Thompson, et al.,

Plaintiffs,

v.

Case No. 20-2129
Judge Sargus

DeWine, et al.,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

In their opposition to Plaintiffs' Rule 12(c) motion (R.73 (hereinafter, "Def. Opp.")), Defendants make no attempt to address Plaintiffs' claims on the merits. Defendants do not address the new facts on which Plaintiffs rely, nor do they address Plaintiffs' argument that those facts entitle Plaintiffs to relief under Supreme Court and Sixth Circuit precedent, including the motions panel's preliminary decisions in this case. Defendants simply fail to present any substantive defense to Plaintiffs' claims. What they proffer instead boils down to the erroneous assertion that the Court should not even reach the merits on various procedural grounds. Specifically, Defendants contend that Plaintiffs' claims are "moot"; that the motions panel's preliminary decisions are "dispositive" of the issues raised in this case; and that Plaintiffs' Rule 12(c) motion is "procedurally flawed." But Defendants are wrong on all points. Consequently, they fail to raise any valid basis for the Court to deny Plaintiffs' motion, and the Court should enter judgment in Plaintiffs' favor.

I. Defendants' Opposition Rests on the Demonstrably False Premise That the COVID-19 Pandemic Is Over and Ohio Has Lifted Its Restrictions.

The false premise that underlies Defendants' position in this case – and which may explain their reluctance to address the merits – is their assertion that the COVID-19 pandemic is effectively over and that "Ohio has reopened." (Def. Opp. at PageID # 907.) Defendants even go so far as to insist that "Plaintiffs must show that they will be subjected to *another* pandemic" in the future in order to avoid dismissal. (Def. Opp. at PageID # 917 (emphasis added).) But these assertions deny reality. They fly in the face of the facts, reported on a daily basis, which establish that the COVID-19 pandemic most certainly is not over – not in Ohio nor anywhere else. *See, e.g.*, New York Times, *Tracking Coronavirus in Franklin County, Ohio* (May 19, 2021), available at https://www.nytimes.com/interactive/2021/us/franklin-ohio-covid-cases.html (accessed May 20, 2021) (reporting that in Franklin County "[c]ases have decreased over the past week *but are still high*"; that hospitalizations have decreased but "*[d]eaths have increased*"; and that "[b]ecause of high Covid-19 transmission in Franklin County, unvaccinated people are at a *high risk*.") (emphasis added).

Furthermore, while Defendants tout the development of a vaccine, that vaccine has not proven to be the panacea for which the world hoped, nor does it appear that it ever will be. On the contrary, the emerging consensus among scientists is that COVID-19 is unlikely to be eradicated at any point in the future. *See, e.g.*, Christie Aschwanden, *Five Reasons Why COVID Herd Immunity Is Probably Impossible*, Nature Magazine (March 18, 2021), available at https://www.nature.com/articles/d41586-021-00728-2 (accessed May 20, 2021) ("Even with vaccination in full force, the theoretical threshold for vanquishing Covid-19 looks to be out of reach."); Geoff Brumfiel, *It's Time for America's Fixation on Herd Immunity to End, Scientists Say*, National Public Radio (May 18, 2021), available at https://www.npr.org/sections/health-

shots/2021/05/18/997461471/its-time-for-americas-fixation-with-herd-immunity-to-end-scientists-say (accessed May 20, 2021) (quoting Harvard epidemiologist Marc Lipsitch, "Based on the best calculations I know how to do, it will be impossible or very difficult to reach [herd immunity] in many parts of the United States."). Thus, not only is the COVID-19 pandemic not over, but the best available evidence suggests that the end is nowhere in sight.

Despite these widely publicized facts, Defendants continue to insist, as they did before the Sixth Circuit at the preliminary stage of these proceedings last year, that the COVID-19 pandemic is effectively over and Ohio is lifting or has lifted its restrictions. This surmise was not true then and it is not true now, as a full year later Ohioans are still suffering the debilitating effects of the pandemic and Ohio has yet to open up. The undisputed facts are that the pandemic did not end in May of 2020, it has not ended in May of 2021, and to this day Ohio has never lifted its COVID-19 restrictions. The restrictions have changed, to be sure, but they have not been lifted. In fact, the opposite is true: not only has Ohio imposed more restrictions since May of 2020, but also, in significant respects the subsequent restrictions were even more onerous, ranging from masking requirements to curfews.

As explained in Plaintiffs' Rule 12(c) motion, Ohio's ban on public gatherings currently remains in place. Social distancing is still required. Festivals, parades and fairs are prohibited unless expressly allowed by one of Ohio's many and tedious executive orders. And even where Ohio's ongoing restrictions permit limited exceptions, people still must socially distance and wear masks. The conditions that previously burdened Plaintiffs' right to petition thus persist in one form or another to this day.

Defendants make much of Governor DeWine's purported intention to lift most (but not all) of Ohio's restrictions in the near future. No official order to that effect, however, has been

issued to Plaintiffs' knowledge. As the Supreme Court stated in rejecting an argument based on an anticipated change in federal law, "Our task is to rule on what the law is, not what it might eventually be." *Garcia v. Texas*, 564 U.S. 940, 941 (2011). That Ohio might lift or alter its existing orders is speculative to say the least – especially given that Defendants' prior speculation that Ohio would "open up" proved grievously wrong. Moreover, even if Ohio does alter or lift its restrictions, the COVID-19 pandemic continues, it is inherently unpredictable, and the burden of complying with Ohio's strict enforcement of its in-person petitioning requirements will remain.

More important, even if Ohio were to this time actually lift all of its restrictions, and even if COVID-19 were to miraculously disappear, nothing can change the fact that Plaintiffs have been severely burdened by Ohio's strict enforcement of its in-person petitioning requirements for the past fourteen months. Their collection efforts were placed on a COVID-19-hold in 69 out of the 73 municipalities they had targeted for the November 3, 2020 election.[1] No statewide initiatives were placed on the November 3, 2020 ballot, a fact that Defendants do not deny. Other than the four initiatives Plaintiffs placed on local ballots for the November 3, 2020 election, Defendants have presented no pleading, claim or evidence that any other citizen-sponsored initiatives appeared on any other statewide or local ballots in Ohio on November 3,

[1] Plaintiffs on May 6, 2020 stipulated that they had filed their initiatives with four cities before February 27, 2020, and "intended" to file it (but had not yet done so) with nine additional cities. *See* Stipulated Facts, R.35 at PageID #469. Defendants point to this is as contradicting Plaintiffs' May 5, 2021 declaration that they "and their supporters" intended to circulate their marijuana decriminalization initiative in 73 cities. *See* Thompson Declaration, R.71-1, at PageID #870. No contradiction exists. Plaintiffs (Thompson, Schmitt and Keeney) themselves intended to circulate in 14 cities, which is what they stipulated to. Using additional "supporters" (who are not named Plaintiffs), the plan was by May 6, 2020 to circulate in 73 cities (including the original 14 Plaintiffs indicated they would circulate in). Of course, this did not happen because of the pandemic, the Sixth Circuit's stay of this Court's preliminary injunction and Plaintiffs' unwillingness after that to ask their supporters to put themselves in harm's way.

2020. It is thus uncontested that COVID-19, Ohio's various restrictions and its strict enforcement of its in-person petitioning requirements prevented all statewide initiatives from qualifying for the November 3, 2020 ballot and prevented at least 69 local initiatives from qualifying for the November 3, 2020 ballot. Meanwhile, only four citizen-sponsored local initiative ballots in small villages made the ballot.

Defendants ask the Court to ignore the undisputed facts demonstrating the persistence and severity of the COVID-19 pandemic, and accuse Plaintiffs of manufacturing a dystopia "straight out of a post-apocalyptic fiction novel." (Def. Opp. at PageID # 912.) Such hyperbole is unwarranted. Plaintiffs neither invented the pandemic nor its disruptive and fatal impact on Ohio and the world. And contrary to Defendants' assertion, Defendants fail to identify a single fact cited by Plaintiffs that is either "entirely untrue, skewed, or incomplete." (Def. Opp. at PageID # 912.)

Plaintiffs here need not belabor the obvious: COVID-19 has imposed an incalculable burden on American business, American government, America's economy and the daily life of every American citizen. It has also severely burdened Plaintiffs' First Amendment activities under these extraordinary circumstances. Defendants' rosy pronouncements to the contrary, like their prior predictions, cannot be reconciled with the facts as they now exist.[2]

[2] Defendants incorrectly assert that "Plaintiffs' 12(c) motion is based entirely on baseless 'facts' outside the record," (Def. Opp. at PageID # 912), but to the extent that Plaintiffs have cited to any such fact they have done so in refutation of Defendants' own repeated citations to materials outside the record. *E.g.*, Defendants' Motion to Dismiss, R.68, at PageId # 808-09. Plaintiffs submitted this Declaration to rebut Defendants' argument in their Motion to Dismiss, R.68, at PageId # 808-09, that the pandemic is over and does not prohibit Plaintiffs from collecting signatures. By making extra-record claims about the pandemic and introducing matters outside the pleadings to support their Motion to Dismiss, Defendants necessarily "opened the door" to Plaintiffs' rebuttal evidence in its Response. *See, e.g.*, *Bricklayers and Allied Craftsmen Local Union No. 3 v. Union Stone, Inc.*, 2013 WL 5701851, *3 (D.R.I. 2013). In the event, under Rule 12(d) the Court may consider such facts and convert the parties' Rule 12 motions to cross-

II. Defendants Fail to Present Any Defense on the Merits of Plaintiffs' Claim to Relief Under New Facts That Were Not Available at the Preliminary Stage of These Proceedings.

In a striking omission from a filing that purports to oppose Plaintiffs' dispositive motion for judgment on the pleadings following Defendants' admission of all pleaded facts, Defendants make no attempt to address the merits of Plaintiffs' claim that they are entitled to relief under the facts as pleaded and as they now exist. As Plaintiffs have explained, such facts stand in stark contrast to the record as it existed during the preliminary proceedings. For instance, it cannot seriously be disputed, as it was at the preliminary stage, that the COVID-19 pandemic did not effectively end soon after May 2020, nor that Ohio did not "open up" at that time. These things did not happen.

Furthermore, it cannot seriously be disputed that the pandemic has not yet ended, nor that any such end remains speculative and cannot be predicted with any certainty even now. It is also undisputed that, unlike other even-numbered election years when Ohio has an average of two statewide initiatives on the ballot, in 2020 there were none. And, despite their citation to a stipulated fact that was superseded by subsequent developments, *see supra* n.1, Defendants do not dispute that only four of the 73 local initiatives that Plaintiffs and their supporters anticipated

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motions for summary judgment under Rule 56. *See* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 273 (2014) ("If the parties submit materials outside the pleadings, the court has discretion to either disregard the materials or convert the motion to one for summary judgment.").

placing on ballots in 2020 succeeded, and those rare exceptions all occurred in small villages where signature requirements were correspondingly small.[3]

Based on these and other facts now available, Plaintiffs argue that they are entitled to relief under the "exclusion or virtual exclusion" standard that the motions panel applied to determine the severity of the burden on Plaintiffs' First Amendment rights. *See Thompson v. DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.") (citation omitted). Specifically, it is undisputed that statewide initiatives were in fact excluded from Ohio's ballot in 2020, and local initiatives were virtually excluded (excepting the filings in four small villages). Thus, while it may have appeared in the spring of 2020 that the burden imposed by Ohio's strict enforcement of its in-person petitioning requirements only imposed an "intermediate" burden on Plaintiffs' First Amendment rights, the evidence now available indicates that the burden was and remains severe, one that warrants relief under the standard the motions panel adopted. Defendants fail to address this critical point.

Plaintiffs also argue that they are entitled to relief under long-standing Supreme Court and Sixth Circuit precedent, and that the facts now available make this case materially indistinguishable from two other COVID-19 cases in which the Sixth Circuit affirmed judgments in the plaintiffs' favor. *See SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020); *Esshaki v. Whitmer*, 813 F. App'x 170 (6th Cir. 2020). Defendants avoid this argument, too. Indeed,

[3] Other than erroneously claiming that Plaintiff-Thompson's Declaration contradicted a previous Stipulation, (*see* Def. Opp., at PageID # 912, Defendants do not contest Plaintiffs' factual support for their claim that the number of citizen-initiatives were markedly reduced in Ohio and across the United States. In particular, even though the information would certainly be within their control, Defendants do not claim that any citizen-initiatives, other than the four identified by Thompson as being placed on the 2020 ballot, qualified in Ohio during the 2020 election. Thus, Plaintiffs and Defendants are in agreement and no material factual question exists in regard to the effects of COVID and Ohio's emergency restrictions on citizen-initiatives in Ohio in 2020.

Defendants do not even mention *SawariMedia* or *Esshaki* except in passing, (Opp. at PageID # 913), much less do they offer any support for their insistence that those cases are distinguishable under the facts that have been established today.

Defendants apparently believe that they can prevail in this case without even attempting to address the merits. As explained below, however, their assertions that the Court should avoid the merits by invoking various procedural grounds are spurious. Defendants' failure to offer any defense on the merits of this case is therefore fatal to their position. Plaintiffs are entitled to litigate their claims to a final judgment based on the facts now available, even if Plaintiffs were denied preliminary relief based upon an incomplete record. *See generally Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985) (explaining that prior decisions upholding a statutory scheme "do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*"). Defendants fail to address, much less refute, Plaintiffs' argument that the evidence establishes a severe burden on their First Amendment rights that warrants immediate relief. The Court should therefore grant judgment in Plaintiffs' favor.[4]

III. This Case Is Not Moot.

As Plaintiffs explain in their Rule 12(c) motion, R.45 at PageID # 845-50, Defendants' assertion that this case is moot contradicts well-settled Supreme Court and Sixth Circuit

[4] Whether the Court considers Plaintiffs' motion under Rule 12(c) or Rule 56, the relevant facts remain the same, and many if not most are uncontested public record and subject to judicial notice. The remainder have either been admitted through pleadings, stipulated to by the parties, conceded, or otherwise left unchallenged by Defendants and rightly deemed admitted within the meaning of Rule 56(e)(2) (stating that a party's failure "to properly respond to another party's assertions of fact" may result in the fact being "undisputed for purposes of the motion"). *See* S. GENSLER, *supra*, at 1112 ("The choice of how to proceed is left to the court's discretion.") (citing *Beard v. Banks*, 548 U.S. 521 (2006)).

precedent. Notably, Defendants do not cite to that controlling precedent, but rather invoke two District Court decisions and one unpublished decision from the Ninth Circuit, none of which are controlling and all three of which are distinguishable. Further, all three have been superseded by more recent Supreme Court decisions, which recognize the "constant threat" posed by the ongoing COVID-19 pandemic. Contrary to the optimistic conclusion of a handful of District Courts last year, therefore, challenges to COVID-19 restrictions are not moot.

The lone appellate decision cited by Defendants, *Common Sense Party v. Padilla*, 834 Fed. Appx. 335 (9th Cir. 2021), for example, was handed down on January 21, 2021 and was premised on an assumption that the public health crisis had passed. As made plain by the Supreme Court in more recent opinions, this assumption is incorrect. Indeed, in two such cases the Supreme Court has reversed the Ninth Circuit and in doing so rejected mootness arguments. In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), handed down on April 9, 2021, the Supreme Court recognized that neither the fluid nature of COVID-19 restrictions nor the alleged conclusion of the pandemic mooted First Amendment Free Exercise challenges.[5] It stated that "even if the government withdraws or modifies a COVID-19 restriction in the course of litigation, that does not necessarily moot the case." *Id.* at 1297. Instead, "so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief

[5] That *Tandon* involved a First Amendment Free Exercise challenge as opposed to a First Amendment Free Speech challenge is irrelevant for purposes of Article III subject matter jurisdiction matters, including standing, ripeness and mootness. Article III, after all, presents a constitutional question separate and apart from the merits of the case. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. 490, 500 (1975), "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal …." *See also Cottrell v. Alcon Laboratories*, 874 F.3d 154, 162 (3d Cir. 2017) ("we separate our standing inquiry from any assessment of the merits of the plaintiff's claim"). The Supreme Court's analysis of mootness in the face of the COVID-19 crisis and changing COVID-19 restrictions in *Tandon* and *South Bay Pentecostal* therefore pertains equally to all constitutional challenges, especially speech challenges under the First Amendment.

where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id*. That a State's COVID-19 restrictions prove temporary, are issued with promises of future rescission, and in fact are rescinded, does not moot the case. None of this, after all, prevented the Supreme Court from addressing and enjoining California's restrictions in *Tandon*. COVID-19, when combined with California's prior restrictions and the "constant threat" of future COVID-19 restrictions, kept the case alive as recently as April 9, 2021.

Justice Gorsuch anticipated this conclusion on February 5, 2021 in *South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021), (Gorsuch, J.). "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner," Justice Gorsuch reasoned. Thus, neither the fluid nature of COVID-19 restrictions nor an alleged conclusion to the COVID-19 pandemic mooted that case. On the contrary, the Supreme Court granted injunctive relief on February 5, 2021, then granted certiorari on April 26, 2021, vacating the Ninth Circuit's decision and remanding for further review under *Tandon v. Newsom*. *See South Bay Pentecostal*, 2021 WL 1602607 (U.S. April 26, 2021). Like *Tandon*, that case therefore remains alive to this day and, notwithstanding the fluid nature of events, is not moot.

Defendants' citation to a district court decision in *Wright v. Ziriax*, 2020 WL 6736427, *4 (W.D. Okla., Nov. 2, 2020), is therefore inapposite. That case was a pro se in forma pauperis action where the plaintiff did not file "the operative complaint … until over three months after the filing deadline, and … [did] not [seek] relief from the statutory filing deadlines." He instead sought money damages, which were obviously prohibited by the Eleventh Amendment. *Id*. at *6. The Court thus concluded that after the election there was nothing it could do for the plaintiff

and dismissed the case as moot. Had the pro se plaintiff filed before the filing deadlines and challenged them, as Plaintiffs did here, his case would not have been moot.

Defendants' citation to *People First of Ala. v. Merrill*, 479 F. Supp. 3d 1200, (N.D. Ala. 2020), is similarly unavailing. That case was handed down on August 7, 2020, at a time when most Americans were hoping the pandemic had run its course. This optimism, we now know, proved unfounded. More important, the Court only concluded the case was moot because the Secretary of State agreed to grant the relief the plaintiffs had requested. Here, by contrast, Defendants have declined to do so. This case therefore remains very much alive.

IV. The Sixth Circuit's Interlocutory Decisions Are Not the Law of this Case.

Defendants' assertion that the Sixth Circuit's interlocutory decisions are binding and represent the law of this case also contradicts well-settled Supreme Court and Sixth Circuit precedent. And once again, Defendants conspicuously fail to cite any Supreme Court or Sixth Circuit precedent that supports their position. Nor could they: the Supreme Court has expressly concluded that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Likewise, the Sixth Circuit has expressly concluded that:

> [a]s a general rule, decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.' "Refusal to stay a preliminary injunction pending appeal does not establish the law of the case since it rests on nothing more than a tentative appraisal of the probable result on the merits."

Wilcox v. United States, 888 F.2d 1111, 1114 (6th Cir. 1989) (citations omitted). The rationale for this conclusion is simple: "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on

the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing." *Camenisch,* 451 U.S. at 395.

This is certainly true in the present case. Plaintiffs filed their case on April 27, 2020. *See* Verified Complaint, R.1. The Court issued its preliminary injunction on May 19, 2020. *See* Opinion and Order, R.44. As with all preliminary injunctions, the procedures involved were much less formal than needed for final judgment. Evidence, in particular, was less complete than it is now. That was true not only in this Court, but also in the Sixth Circuit. The Sixth Circuit's stay and subsequent reversal of the preliminary injunction were both premised on assumptions about what circulators could accomplish during the crisis. Those assumptions were not borne out by the subsequent facts.

As Defendants do not dispute, no statewide citizen initiatives made the ballot in 2020. Ohio averages two during even-numbered election years. Only four local initiatives made the ballot. At least 69 failed. Had more local initiatives succeeded Defendants undoubtedly would have cited to them. They did not. Defendants have conceded that only four of 73 initiatives qualified for local ballots in 2020.[6] The evidence now available thus supports Plaintiffs' claim that Defendants' strict enforcement of Ohio's in-person petitioning requirements as applied during the ongoing COVID-19 pandemic severely burdens their First Amendment rights.

Defendants cite to *Sherley v. Sebelius,* 689 F.3d 776 (D.C. Cir. 2012), to support their claim that the law of the case doctrine overrides the Supreme Court's decision in *Camenisch* and the Sixth Circuit's decision in *Wilcox*. It does not. In fact, that case reaffirmed the conclusions of *Camenisch* and *Wilcox* that where "a determination had been made without discovery or the other full range of exploratory and preparatory pretrial procedures and without a full trial on the

[6] *See supra* n.1.

merits," and on "appellate review, the court of appeals … consider[ed] such preliminary relief without the benefit of a fully developed record and often on briefing and argument abbreviated or eliminated by time considerations," the law of the case doctrine would not apply. *Id.* at 782. By way of contrast, "[a]n appellate court in a later phase of the litigation with a fully developed record, full briefing and argument, and fully developed consideration of the issue need not bind itself to the time-pressured decision it earlier made on a less adequate record." *Id.* Only in this latter later-stage, fully-developed-record context could the law of the case doctrine be employed. *Id.*

The other cases cited by Defendants are in accord. (Def. Opp. at 19, citing *This That & The Other Gift & Tobacco, Inc. v. Cobb Cnty.*, 439 F.3d 1275, 1284-85 (11th Cir. 2006); *Entergy, Ark., Inc. v. Nebraska*, 241 F.3d 979, 987 (8th Cir. 2001), and *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 880-81 (5th Cir. 1993). Only in "a later phase of the litigation with a fully developed record," an interlocutory decision reversing or sustaining a preliminary injunction can be afforded law of the case effect. *Sherley v. Sebelius*, 689 F.3d at 782. That is not the case here. The preliminary injunction stayed and reversed here did not follow full discovery, was not issued in a "later phase of litigation," and did not involve a "fully developed record." Thus, even assuming this line of cases were recognized by the Sixth Circuit, it would not support Defendants' argument.

V. Defendants Admitted the Impossibility of Collecting Signatures for Six Weeks.

Defendants attempt to walk back their failure to answer the Verified Complaint and resulting admission that circulating petitions before April 30, 2020 was both illegal and physically impossible by pointing to a footnote in the motions panel's opinion acknowledging the critical nature of that admission. *See Thompson v. DeWine*, 976 F.3d 610, 616 n.5 (6th Cir.

2020) ("If this were true, perhaps stricter scrutiny would be appropriate."). The Sixth Circuit, however, went on to discount the admissions because "[i]n any event, Ohio has consistently argued, both before the district court and before us, that it wasn't impossible for Plaintiffs to collect signatures." *Id.*

For purposes of a preliminary injunction, of course, parties are not strictly bound by the Rules of Evidence and the Rules of Pleading. Parties often argue tentative positions that they may not formally and finally choose to take in a case. That is exactly what happened here. At the preliminary injunction stage, and later on interlocutory appeal, Defendants claimed that it was both legally and physically possible to circulate signatures before April 30, 2020. However, they were never so certain of that tentative argument that they were prepared to deny the allegations in the Verified Complaint. Defendants recognized that they would be forced to explain formal denials, something they could avoid in preliminary and interlocutory stages. They thus chose to tentatively and preliminarily claim that it was possible to collect signatures, while avoiding denying that it was impossible in an answer to the Verified Complaint.

Critically here, Defendants in the end chose to close out the pleading period by not denying that it was impossible to collect signatures. They had 13 months to do so and never did. The reason is simple; the allegation is true and Defendants know it. It is one thing for parties' lawyers to make tentative and preliminary arguments (as Defendants did here), and quite another for those parties themselves to admit or deny facts in pleadings. Here, Defendants did not deny the allegation that it was impossible to collect signatures because they could not truthfully deny it. Their failure to deny that allegation constitutes an admission. While Defendants could escape the consequences of their admission in preliminary and interlocutory proceedings because of the relaxed rules, they cannot now as the case moves to final judgment.

Of course, all of this assumes that the admitted allegations are about factual matters. As the motions panel observed in its footnote, pure "legal conclusions" cannot be admitted. *Thompson*, 976 F.3d at 616 n.5 (citing *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016)). They are for the Court to decide. Applying this principle without elaboration, the motions panel concluded that "we don't think 'impossibility' here is a factual allegation that can be admitted in pleadings." *Id.*

Like its other interlocutory conclusions, however, the Sixth Circuit panel's tentative preliminary conclusion on this matter is not binding at this stage of proceedings. In fact, the Sixth Circuit's tentative claim that physical impossibility could likely not be admitted is simply incorrect.[7] A proper application of the distinction between facts and legal conclusions reveals that whether circulation was possible in Ohio before April 30, 2020 is a factual question that can be admitted like any other factual matter. Whether this fact, when coupled with others, amounted to a severe burden under the First Amendment, on the other hand, is a legal conclusion that cannot. *See Ohio Democratic Party*, 834 F.3d at 628 ("the district court's characterization of the resultant burden as 'modest' is not a factual finding, but a legal determination subject to de novo review.").

Here, Defendants are bound by their factual admission that it was not possible to collect signatures in Ohio from March 23, 2020 until April 30, 2020 (when they changed their

[7] Even Supreme Court Justices make meaningful mistakes in interlocutory, expedited election matters. *See, e.g.*, Maria Cramer, *Kavanaugh Fixes Error in Election Opinion After Vermont Complaint*, N.Y. Times, Oct. 29, 2020, https://www.nytimes.com/2020/10/29/us/politics/kavanaugh-vermont.html (last visited May 20, 2021) (describing how Justice Kavanaugh in his concurring opinion refusing to stay a preliminary injunction in *Democratic National Committee v. Wisconsin State Legislature*, 592 U.S. __ (2020), incorrectly reported Vermont's COVID reaction and later altered his opinion to correct his mistake). The reason is simple: in emergency election matters temporal limitations compromise certainty. That is why emergency factual and legal conclusions are not the law of the case.

restrictions and made it clear petition circulators could begin to gather signatures). Whether this, when coupled with other facts, amounts to a severe burden is for the Court to decide.

VI. Rule 12(b) Motions Are Improper Following the Close of Pleadings.

Defendants insist that they are free to file Rule 12(b) motions to dismiss at any time they want at any stage of the proceedings. So long as they have yet to file an answer, even 14 months later (as here), they contend that such a motion is proper. Defendants also insist that they are permitted to file an answer whenever they want, and that their failure to do so has no consequences. According to Defendants, the only consequence attached to their failure to file an answer is default judgment, and if a plaintiff fails to move for a default judgment, they claim, the defendant is not bound by its failure to answer the plaintiff's allegations.

Defendants reading of the Federal Rules of Civil Procedure is obviously incorrect. As for admitting allegations by failing to answer, the Federal Rule of Civil Procedure 8(b)(6) states that "[a]n allegation … is admitted if a responsive pleading is required and allegation is not denied." Federal Rule of Civil Procedure 12(a)(1) requires an answer "within 21 days after being served with the summons and complaint …." A failure to timely answer under Rule 12(a) leads under Rule 8(b)(6) to an admission, as many Courts have recognized. *See, e.g.*, *Burlington N. R.R. Co.* v. *Huddleston*, 94 F.3d 1413, 1415 (10th Cir. 1996) ("By failing to submit an answer or other pleading denying the factual allegations of Plaintiff's complaint, Defendant admitted those allegations, thus placing no further burden upon Plaintiff to prove its case factually.").[8]

[8] Default judgment is also a possibility under Federal Rule of Civil Procedure 55. However, a failure to answer (though absolutely acting as an admission) does not automatically justify default judgment. Rule 55(a) states that a failure "to plead or otherwise defend" is required. Here, Defendants arguably "otherwise defend[ed]" by successfully resisting Plaintiffs' motion for preliminary injunction. Thus, although Defendants arguably are not in default, they still have admitted the factual allegations in the Complaint by not answering before the time for pleading closed. Of course, if Defendants are willing to admit that they did not "otherwise defend" the

As for Defendants' assertion that they may also file a Rule 12(b) motion whenever they like so long as they have failed to answer, again the law is squarely against them. Rule 12(b) expressly requires that motions must be filed before the answer. As Courts have uniformly recognized, this temporal limitation builds in the time limitations for answers. Thus, Rule 12(b) motions must be filed before answers and before the time for answering has expired or closed. As courts have concluded time and again, Rule 12(b) motions must be filed "before answering the complaints *or at the close of pleadings*." *Sanders v. Wal-Mart Stores East*, 2018 WL 3190915, *9 (M.D. Ala. 2018) (emphasis added); *see also Stabile v. United Recovery Systems*, 2011 WL 5578981, *1 (E.D.N.Y. 2011) ("a Rule 12(b)(6) motion comes *before the close of pleadings*") (emphasis added).

Here, the time for pleading closed several months ago. Therefore, the time for filing Rule 12(b) motions closed several months ago. This does not mean the substance of the motion cannot be conveyed to the Court. It simply must be conveyed through a different mechanism, like Rule 12(c) or Rule 56. Courts often construe belated Rule 12(b) motions as Rule 12(c) motions, after all, and just as often construe Rule 12(c) motions as Rule 56 motions for summary judgment, *see supra* notes 2 and 4, when uncontested evidence is presented from outside the pleadings. Plaintiffs respectfully suggest that the Court should exercise that discretion here in order to expeditiously resolve this case.

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action, Plaintiffs are more than happy to agree with them and have them held in default under Rule 55.

VI. Defendants Incorrectly State that Plaintiffs Have Until August 4, 2021 To Collect Signatures.

Defendants incorrectly state that Plaintiffs have until August 4, 2021 to collect signatures for the November 2, 2021 election. The true deadline for the submission of signatures is July 15, 2021.

In order for a citizen-initiative to appear on a local election ballot, it must be certified by the relevant Boards of Elections ninety days before the general election, meaning August 4, 2021 for the November 2, 2021 election. *See* Ohio Secretary of State, 2021 Ohio Elections Calendar. Circulators cannot collect signatures up until the certification date, however. Instead, under Ohio law there are two significant steps that must be accomplished, both of which are outside a circulator's control. These two steps dictate that signatures must be submitted twenty days before the certification date (a fact that Defendants admitted in prior proceedings in this Court). Twenty days before the August 4, 2021 certification date is July 15, 2021.

First, the circulators must submit their collected signatures to the city which is the focus of their effort. The city then, "*after ten days*," *State ex rel. Harris v. Rubino*, 119 N.E.3d 1238, 1242-43 (Ohio 2018) (italics original), must submit the signatures for verification to the relevant Board of Elections. The Board of Elections itself then has 10 more days to verify the signatures. *Id*. ("The board shall return the petition to the auditor or clerk *within ten days after receiving it*") (italics original). If all this happens ninety days before the general election on August 4, 2021, then the initiative appears on the ballot.

What this means is that circulators must submit their signatures at least 20 days before the certification date in order to ensure the initiative appears on the ballot (as Defendants stipulated to for purposes of the November 3, 2020 election when the certification deadline was August 5, 2020). For the November 3, 2020 election, this translated to a filing deadline of July

16, 2020, as stipulated to by the parties. *See* Stipulations, R.35, at PageID # 471. For the November 2, 2021 election, which is one calendar day sooner, this translates to a filing deadline of July 15, 2021. Consequently, contrary to Defendants' claim, Plaintiffs have only until July 15, 2021 to collect signatures in order to have their initiatives placed on the November 2, 2021 ballot, as opposed to August 4, 2021.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request judgment in their favor and accompanying declaratory and injunctive relief.

Respectfully submitted,

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