**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Chad Thompson, William Schmitt, and Don Keeney,**

**Plaintiffs-Appellants,**

**v.** **CASE NO. 21-3514**

**Richard "Mike" DeWine, in his official capacity as Governor of Ohio,**

**Stephanie McCloud, in her official capacity as Director of Ohio Department of Health,**

**and**

**Frank LaRose, in his official capacity as Ohio Secretary of State,**

**Defendants-Appellees.**

**PLAINTIFFS-APPELLANTS' 6TH CIRCUIT RULE 27(f)**
**MOTION TO EXPEDITE BRIEFING AND APPEAL**

Appellants respectfully move to expedite the appeal in this case under Sixth Circuit Rule 27(f). Appellants have contacted Appellees in an effort to develop an expedited briefing schedule, but Appellees stated they oppose this Motion. Good

cause nonetheless exists under Sixth Circuit Rule 27(f) to expedite briefing and consideration of this case, and Appellants propose the following briefing schedule:

Appellants' Brief due June 16, 2021;

Appellees' Brief due June 30, 2021;

Appellants' Reply due July 6, 2021.

In support of this Motion, Appellants attach the Notice of Appeal, Attachment 1, and the Opinion and Order of the District Court. Attachment 2.

## PROCEEDINGS BELOW

### First Round of Proceedings in The District Court

On April 27, 2020, Plaintiffs filed this action requesting a preliminary injunction against Ohio's strict enforcement of its in-person petitioning requirements during the COVID-19 pandemic. Verified Complaint, R.1. Unlike many States, Ohio refused to accommodate Plaintiffs' constitutional right, but instead insisted that Plaintiffs gather hundreds and thousands of supporting signatures by hand through close personal contact with voters.

On May 19, 2020, the District Court employed the Supreme Court's *Anderson-Burdick* framework and this Court's recent decision from Michigan in *Esshaki* v. *Whitmer*, 813 F. Appx. 170 (6th Cir. 2020), to conclude that the combination of Ohio’s strict enforcement of its petitioning requirements and the

pandemic "severely burden [Petitioners'] First Amendment rights *as applied here*. . . ." *Thompson v. DeWine*, 461 F. Supp. 3d 712, 731 (S.D. Ohio 2020) (emphasis original). In an opinion praised by leading election law expert Professor Richard Hasen, the Court "was right to see that normal ballot qualification rules can impose a severe First Amendment burden on direct democracy participants under pandemic conditions." Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative During a Pandemic*, 2020 U. Chi. L. Rev. Online (June 26, 2020).[1]

The District Court accordingly "entered a preliminary injunction in [Plaintiffs'] favor (1) prohibiting enforcement of the in-person, 'wet,' witnessed signature collection requirements, (2) prohibiting enforcement of the July 16, 2020 deadline for the submission of signatures, and (3) direct[ing] 'Defendants to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements.'" *Thompson*, 461 F.Supp.3d at 739. The District Court "did a good job of trying to put the plaintiffs in the position they would have been in if there had been no pandemic," Professor Hasen wrote, *see* Hasen, *supra*, and properly applied *Esshaki* to give "state officials maximum flexibility to cure the constitutional defects created by the confluence of the coronavirus and state law." *Id*.

[1] https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-initiative-hasen/.

**Ohio's Emergency Interlocutory Appeal**

On May 26, 2020 a motions panel of this Court stayed the District Court's preliminary injunction. *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020). In doing so, it applied a "virtual or total exclusion" test to decide whether Ohio's burdens were severe under the *Anderson-Burdick* framework. *Id.* at 808. It also distinguished the Sixth Circuit's recent holding in *Esshaki*: "Michigan's stay-at-home orders [in *Esshaki*] remained in place through the deadline for petition submission," *Thompson*, 959 F.3d at 809, the motions panel stated, and the circulators in Michigan were thus left "with only the signatures that they had gathered to that point." *Id*.

As later developments have made clear, the record in *Esshaki* does not support the *Thompson* panel's factual conclusion. A co-plaintiff (Hawkins) of Esshaki's in that case who had collected 3000 signatures before Michigan's first Stay-at-Home Order was announced went on to collect an additional 1283 signatures after the challenged Order in Michigan was put in place. *Esshaki v. Whitmer*, 461 F. Supp.3d 646, 648 (E.D. Mich. 2020).[2] Consequently, contrary to the *Thompson* panel's distinction, circulators in Michigan, including one of

[2] This fact was not reported by the District Court in *Esshaki* until May 20, 2020, two weeks after the Sixth Circuit panel in *Essahki* rendered its decision and after the interlocutory appeal was lodged in this case. This might explain the *Thompson* panel's factual error.

Esshaki's co-plaintiffs (Hawkins), were no more prevented from collecting signatures than those in Ohio over the same time frame. The cases are indistinguishable in this regard.

The *Thompson* motions panel also concluded that "sterilizing writing instruments between signatures" might be an effective measure to prevent the transmission of COVID. *Thompson*, 959 F.3d at 810. We know today that is not true. While surfaces can convey COVID, and wiping them down is wise, COVID is spread largely through aerosol. Standing anywhere near an infected person, even outside, while discussing the merits of a ballot initiative, was and remains a direct threat for the transmission of COVID. It was not until July of 2020 that this came to light and the CDC and government began requiring masks inside and outside. *See* Centers for Disease Control and Prevention, Press Release, *CDC calls on Americans to wear masks to prevent COVID-19 spread*, July 14, 2020.[3] Even then social distancing is required. The panel's premise that sterilizing pens is effective to prevent transmission of COVID has proved incorrect.

The panel declined to lift its stay as the COVID-19 crisis intensified over the summer and then on September 16, 2020 reversed the District Court's preliminary injunction. *Thompson v. DeWine*, 976 F.3d 610 (6th Cir. 2020). It stated that it saw "no reason to depart from [its] previous holding that Ohio's ballot-access

[3] https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html.

restrictions impose, at most, only an intermediate burden on [Plaintiffs-Appellants'] First Amendment rights, even during COVID-19." *Id*. at 616.

**Plaintiffs' Interlocutory Attempt to Obtain Certiorari**

Following the Sixth Circuit panel's reversal of the District Court's preliminary injunction, Plaintiffs-Appellants, with the assistance of the Northwestern University Supreme Court Clinic, sought interlocutory review of the panel's decision in the Supreme Court of the United States. On April 19, 2021, the Supreme Court denied certiorari. *See Thompson v. DeWine*, No. 20-1072 (U.S., April 19, 2021).

**Second Round of Proceedings in the District Court**

Following the Supreme Court's denial of certiorari, Plaintiffs-Appellants on April 21, 2021 moved for a status conference in the District Court to discuss how to proceed. *See* Motion, R.65. The Court granted that motion on April 22, 2021, *see* Order, R.66, and scheduled a conference for April 28, 2021. *Id*. The day before that conference, Defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6). *See* Motion to Dismiss, R.68.

At its status conference, the District Court granted Plaintiffs' request to expedite briefing on Defendants' Rule 12(b) motion and Plaintiffs' proposed Rule 12(c) motion for judgment on the pleadings in response. Briefing was completed on May 21, 2021. *See* Plaintiffs' Reply, R.74.

The District Court rendered final judgment in favor of Defendants on June 3, 2021. *See* Opinion and Order, R.78 (Attachment 2). It first concluded that Defendants' belated Rule 12(b) motion was procedurally proper, and that it would "look to the pleadings, the stipulated facts in the record, and facts of which the Court will take judicial notice," Opinion and Order, R.78 at PageID# 959, in rendering its decision. Under both Rule 12(b) and Rule 12(c), the District Court explained, it was required to accept all factual allegations in the Complaint as true anyway, *id*. at PageID# 957, so the use of one rule as opposed to another was not important. *Id*. Both parties introduced facts outside the pleadings in their Rule 12 motions, and District Court ruled that it could consider these facts in resolving the case under Rule 12 to the extent they were either public documents or "matters of which a court may properly take notice, …" *Id*. at PageID# 959.

The District Court next correctly concluded that the case was not mooted by either the November 3, 2020 election or various additions and changes to Ohio's emergency COVID-19 orders over the course of the last year. "While the 'Defendants' orders described' in the Complaint have changed, the Ohio laws requiring in-person signature collection remain in place. And the COVID-19 pandemic is ongoing." *Id*. at PageID# 962 (footnote omitted). It explained:

> One year ago, society was optimistic that the worst of the pandemic passed and that emergency public health restrictions would lessen. In this case, the Court of Appeals observed on May 26, 2020, "What's more, Ohio is beginning to lift their stay-at-home restrictions." *Thompson*, 959 F.3d at 810.

> Instead, the pandemic worsened. In November 2020 amid an acceleration of COVID-19 cases in the State, the Ohio Department of Health imposed a new stay-at-home order. This time does seem different. But the previous year illustrates the difficulty in predicting the high and low tides of a once-in-a-century pandemic. So long as a global pandemic is present, there is a "demonstrated possibility" that Plaintiffs will be again subject to public health orders of the type they challenge in the Complaint.

*Id.* "Plaintiffs' claims therefore fall within the 'capable of repetition, yet evading review' exception to mootness." *Id*. at PageID# 963.

Finally, the District Court recognized that while interlocutory decisions like those handed down by the motions panel are ordinarily not precedential and are not the law of the case, the panel's decisions here could still be treated as persuasive authority supporting dismissal. *Id*. at PageID# 965. It stated:

> The Sixth Circuit—in both its opinion granting a stay and its opinion reversing this Court—concluded that "Ohio's ballot-access restrictions impose, at most, only an intermediate burden on plaintiffs' First Amendment rights, even during COVID-19." The Court will adhere to the Sixth Circuit's reasoning. In weighing the burdens Ohio's ballot-initiative laws impose on Plaintiffs during the COVID-19 pandemic against Ohio justifications for those laws, Ohio's justifications come out on top.

*Id*. at PageID# 966 (citations omitted).

Applying the panel's "total or virtual exclusion" logic, the District Court erroneously concluded that because Plaintiffs-Appellants could continue to collect signatures "following the panel's decision in September," *id*., they were not totally excluded from the ballot. *Id*. "[E]ven though the conditions as a result of COVID-19 may make it harder for Plaintiffs to obtain signatures, that does not mean 'that

Plaintiffs are excluded from the ballot.'" *Id*. The burden placed upon them under the panel's conclusion, the District Court explained, therefore could not be severe. *Id*.

The District Court reached this conclusion notwithstanding several recent factual developments demonstrating that the burden on Plaintiffs' rights was and remains severe. In particular, "[n]o statewide initiatives appeared on Ohio's November 2020 general election ballot, and Plaintiffs succeeded in placing only 4 out of the 73 initiatives they reasonably anticipated placing on local ballots." Opinion and Order, R.78, at 968. Additionally, "contrary to the State's representations to the Sixth Circuit in 2020, the state did not 'open up,' instead shutting down even further" following the panel's May 26, 2020 stay of the District Court's preliminary injunction. *Id*. at 968-69.

These developments, the District Court stated, "do not persuade the Court that Plaintiffs are now entitled to a higher level of scrutiny than the Sixth Circuit applied in its September 16, 2020 opinion." *Id*. at PageID# 969. '"Plaintiffs [had] months to gather signatures' after April 30, 2020," *id*., and "even if 'prospective signatories were deciding to stay home or avoid strangers—thus reducing Plaintiffs' opportunities to interact with them—we don't attribute those decisions to Ohio' because 'First Amendment violations require state action.'" *Id*. (citations omitted). "There is no telling from the facts Plaintiff[s] cite[]," the District Court

stated, "whether the lack of ballot initiatives on the 2020 general election ballot were the result of Ohio's public health orders or private 'prospective signatories [ ] deciding to stay home or avoid strangers' due to the risks of COVID-19." *Id.* (citation omitted).

Lastly, the District Court erroneously dismissed as irrelevant the past obstacles Ohio's emergency orders and COVID-19 crisis placed in the path of Plaintiffs. Contrary to the rationale behind the capable of repetition yet evading review exception to the mootness doctrine, the District Court concluded that because the crisis is improving Plaintiffs-Appellants' face an "even steeper [hill] now." *Id.* at PageID# 970.[4] But even assuming the crisis is improving, constitutional violations that occurred before this improvement are subject to redress. The capable of repetition yet evading review exception demands that past (in addition to future) constitutional violations be remedied.

Plaintiffs noticed their appeal on June 4, 2021. *See* Attachment 1.

## REASONS TO EXPEDITE

Plaintiffs respectfully ask the Court to expedite this appeal so that it can be resolved before the November 2, 2021 election. Ohio's certification deadline for local initiatives seeking access to the November 2, 2021 ballot is August 4, 2021.

[4] The District Court also accepted the motions panel's interlocutory conclusion that *Esshaki v. Whitmer*, 813 F. App'x 170 6th Cir. 2020) and *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020), were distinguishable. *See* Opinion and Order, R.78, at PageID# 970.

Due to two antecedent steps beyond the control of initiative-sponsors, signatures supporting citizen-initiatives must be turned in to municipal authorities no later than July 15, 2021. Time is therefore of the essence. As the Supreme Court noted in *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), the capable of repetition yet evading review doctrine is designed to enable Courts to "simplify[] future challenges" to elections, "thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." By resolving this capable of repetition case now, Ohio's November 2, 2021 election will benefit.

Furthermore, it is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Kiser v. Reitz*, 765 F.3d 601, 607 n.2 (6th Cir. 2014) (quoting *Elrod v. Burns*, 427 U.S 347, 373 (1976)). This case involves important First Amendment questions, including (1) whether an exclusive "total or virtual exclusion" standard for severity is consistent with *Anderson-Burdick* balancing, and (2) whether factual realities such as catastrophes and natural disasters should be factored into the *Anderson-Burdick* calculus. The proper resolution of those questions demonstrates that Plaintiffs-Appellants have suffered injury to their First Amendment rights, and will continue to incur such injury in the absence of judicial relief. Good cause therefore exist to expedite the appeal. *See* Sixth Circuit Rule 27(f).

## I. The Evidence Now Establishes That Plaintiffs Experienced a Severe Burden Under an "Exclusion or Virtual Exclusion" Standard.

This case now stands in stark contrast to the case as it existed when the preliminary proceedings were litigated a year ago. The record now includes undisputed facts that establish Plaintiffs-Appellants' entitlement to relief, even under the singular "exclusion or virtual exclusion" standard that the motions panel adopted and which the District Court thereafter employed.

First, and most important, Ohio's strict enforcement of its in-person petitioning requirements has in fact resulted in the total or virtual exclusion of initiatives from Ohio's statewide and local ballots. No statewide initiatives appeared on Ohio's November 2020 general election ballot (even though on average two state-wide initiatives tend to make the ballot and at least two were attempted in 2020), and Plaintiffs-Appellants succeeded in placing only 4 out of the 73 initiatives they reasonably anticipated placing on local ballots – and these rare exceptions appeared exclusively in small villages with correspondingly low signature requirements.

Second, science has learned that COVID is airborne and primarily transmitted through aerosol. Contrary to the motions panel's assumption when it issued its stay, *see Thompson*, 959 F.3d at 810, the use of sanitizer on surfaces (like pens and tables) is not an effective means of preventing transmission of the virus between petition circulators and signers. Far more important than avoiding

contaminated surfaces is avoiding infected people, whose mere presence and breathing spreads the disease – even when they exhibit no symptoms. Social distancing, we have learned, is the key.

Third, contrary to Ohio's representation to the motions panel, Ohio did not "open up" before the November 3, 2020 election. Instead, Ohio was shut down for more than a year. Indeed, the restrictions were more severe, including not only bans on gatherings of more than ten people and mandated social distancing, but also curfews. *See* Ben Axelrod, *Ohio lifts COVID-19 curfew effective Thursday; ends last call restrictions*, WKYC, Feb. 11, 2021.[5]

Fourth, we now know how deadly COVID-19 is. As of June 7, 2021, 594,381 Americans have died from COVID. *See* Centers for Disease Control and Prevention, Covid-19, April 29, 2021.[6] That figure includes 19,980 Ohioans. *See* Ohio Department of Health, COVID-19 Dashboard, June 7, 2021.[7] And those numbers keep rising, with no clear end in sight. According to the Centers for Disease Control and Prevention, as of April 29, 2021 there have been 33 million COVID cases in the United States, with the number increasing at a steady rate. Centers for Disease Control, *supra*.

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[5] https://www.wkyc.com/article/news/health/coronavirus/ohio-covid-19-curfew-midnight/95-754a8fe7-41c5-48fe-9a8b-b311ecbd7329.

[6] https://www.cdc.gov/coronavirus/2019-ncov/index.html.

[7] https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/overview.

Fifth, given the procedural posture of this case and Defendants' failure to answer the Complaint, it must now be accepted as true that collecting signatures at the start of the COVID-19 crisis in March 2020 and for six weeks thereafter until April 30, 2020 (when Ohio added an express exception for circulators) was both physically impossible and illegal under Ohio's emergency orders. These facts were specifically pleaded, were never denied, and are taken as true for purposes of Rule 12 motions.

Taken together, the foregoing facts demonstrate that Ohio's strict enforcement of its in-person petitioning procedures has resulted and will continue to result in "the exclusion or virtual exclusion" of initiatives from Ohio's ballot. *Thompson*, 959 F.3d at 808. It did so in 2020. That is now a matter of historical fact. Furthermore, whatever the record may have disclosed in May 2020, when the motions panel stayed the District Court's preliminary injunction, it is now also a matter of historical fact that Ohio was not in May of 2020 "beginning to lift their stay-at-home restrictions," *id.* at 810 – not, at least, in any meaningful sense that would enable Plaintiffs-Appellants to resume their petitioning efforts in a lawful and safe manner.

Consequently, if it were not clear in May of 2020, the undisputed facts in the record now demonstrate that Ohio's strict enforcement of its in-person petitioning procedures imposed severe burdens on Plaintiffs-Appellants' First Amendment

rights. *See id*. at 808 ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot.") (citation omitted). Yet, while Ohio has adopted reasonable modifications to certain election laws in response to the COVID pandemic – for example, it postponed its 2020 primary election – Ohio continues to demand strict compliance with its in-person petitioning procedures. *See id.* at 807. Ohio still requires that circulators collect "wet" signatures in-person and witness them. The numbers of signatures required remains the same, as do the deadlines and temporal limitations. Unlike just about every other facet of life in Ohio, including shopping, litigating, voting, and entertaining, with popular democracy Ohio has acted like COVID-19 never happened.

When a plaintiff's "rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) (citation and quotation marks omitted). In such cases, a state may not rely upon "generalized and hypothetical interests identified in other cases" to justify the burdens that its regulations impose, but rather must demonstrate with specificity that the regulations are necessary to further its compelling interests. *Id.* at 593-95. In light of the evidence now available from the 2020 election cycle, Ohio cannot make such a showing. It cannot demonstrate that strict enforcement of its in-person petitioning requirements is necessary in the context of the COVID pandemic.

In 2020, many other states adopted reasonable modifications to their petitioning requirements to alleviate the burdens they imposed as applied in the extraordinary circumstances presented by the pandemic. *See* Scholars' Brief at 15. Such modifications typically took the form of reduced signature requirements, extended filing deadlines, suspended witness and notarization requirements, and the adoption of electronic petitioning procedures, among others. *See*, *e.g.*, *Libertarian Party of Il. v. Pritzker*, 455 F.Supp.3d 738 (N.D. Ill. 2020) (reducing signature requirement by 90 percent, extending filing deadline, enjoining notarization requirement and authorizing electronic petitioning procedures), *aff'd*, *Libertarian Party of Il. v. Cadigan*, 2020 WL 5104251 (7th Cir. 2020); *Green Party of Md. v. Hogan*, No. 1:20-cv-1253 (D. Md., June 19, 2020) (reducing signature requirement by 50 percent and authorizing electronic petitioning procedures); *Goldstein v. Sec. of the Commonwealth*, 142 NE 3d 560 (Mass. 2020) (reducing signature requirement by 50 percent and authorizing electronic petitioning procedures). None of these states reported significant problems with fraud prevention or the verification of signatures in a timely and orderly fashion (the interests asserted by Defendants here), nor with any other aspect of the administration of their elections.

Ohio, by contrast, has been "unbending" in its enforcement of its in-person petitioning requirements. *See Thompson*, 959 F.3d at 806. But as the Supreme Court has emphasized:

> [E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty, and we have required that States adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved.

*Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (citations and quotation marks omitted). Here, Ohio cannot show that strict enforcement of its in-person petitioning requirements during the COVID pandemic is "the least drastic means" to protect its regulatory interests – not when numerous other states have demonstrated that less burdensome alternatives are available. Consequently, Plaintiffs are entitled to relief, even under the exclusion or virtual exclusion standard that the motions panel adopted in this case.

## II. Total or Virtual Exclusion Is Not A Necessary Requirement for a Burden to be Considered Severe.

Under the *Anderson-Burdick* analysis, "exclusion or virtual exclusion from the ballot" may be "the hallmark of a severe burden," *Thompson*, 959 F.3d at 808 (citation omitted), but it is not a prerequisite to the finding of a severe burden. As the Supreme Court has plainly stated, there is no "litmus test for measuring the severity of a burden that a state law imposes." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008). Consequently, exclusion or virtual

exclusion from the ballot is a sufficient condition for finding a severe burden under the Sixth Circuit precedent cited by the motions panel, but it is not a necessary condition. Otherwise, such precedent would run afoul not only of *Crawford*, but also *Anderson* and *Storer*, both of which reaffirm that lower courts must not apply litmus tests to "separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789 (quoting *Storer*, 415 U.S. at 730).

In *Anderson*, for instance, independent candidates were not excluded or virtually excluded from Ohio's ballot – on the contrary, as the Court expressly acknowledged, "[f]ive individuals were able to qualify as independent Presidential candidates in Ohio in 1980." *Anderson*, 460 U.S. at 792 n.12. The Court nonetheless found that Ohio's restrictions on John Anderson's independent candidacy in that same year were severe. *See id*. at 792-93.

John Anderson challenged Ohio's March filing deadline—a mere "limit" on ballot access—yet the Court struck it down. It did so because "not only" did it "totally exclude" any candidate who decided to run after the March deadline, but because "[i]t also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline." *Id*. at 792. Either exclusion of candidates who decided to run after March, or a burden on the signature-gathering efforts of those who decided to run before then was sufficient to establish a severe burden. But neither was necessary.

Thus, while Plaintiffs are entitled to relief based on the undisputed facts demonstrating that Ohio's strict enforcement of its in-person petitioning requirements has caused the exclusion or virtual exclusion of initiatives from Ohio's ballots, they are also entitled to relief under the well-settled precedent recognizing that "[i]n some circumstances, the 'combined effect' of ballot-access restrictions can pose a severe burden." *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016).

In *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 694 (6th Cir. 2015), for example, the Sixth Circuit deemed "severe" a requirement that recognized minor parties "obtain 5% of the total number of votes cast for gubernatorial candidates in the last gubernatorial election" because "established major parties were given four years to obtain the same level of electoral access." Although the state did not totally or virtually deny ballot access to minor parties, the Court concluded that the challenged restriction imposed a severe burden. *See also Libertarian Party of Ohio*, 462 F.3d 579 (holding that a combination of Ohio laws regulating early-filing and the number of signatures was a severe burden on a minor party).

As *Green Party of Tennessee* and *Libertarian Party of Ohio* demonstrate, the severity of the burden on a plaintiffs' constitutional rights must be determined not based upon any categorical litmus test, but rather based upon a "practical

assessment of the challenged scheme's justifications and effects." *Storer*, 415 U.S. at 730; *see generally Arizona Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016) ("the Supreme Court and our sister circuits have emphasized the need for context-specific analysis in ballot access cases") (citations omitted). Here, such an assessment, including the existence of the COVID-19 pandemic, demonstrates that the burden on Plaintiffs' rights is severe and warrants relief.

Not only did Ohio's emergency orders beginning in March of 2020 and extending throughout the summer and fall burden Plaintiffs-Appellants' ability to place their initiatives on the November 3, 2020 ballot, those same restrictions have continued to burden Plaintiffs-Appellants' ability to place dozens of initiatives on the November 2, 2021 general election ballot. Signatures collected during 2020 in Ohio, after all, could have been used to support local initiatives destined for the November 2, 2021 ballot. Prohibiting the collection of these signatures, as Ohio did in March of 2020, therefore necessarily burdened Plaintiffs' ability to place their initiatives on the upcoming ballot. Indeed, the burden is even greater since it has now extended over a longer time period and was magnified by new and increasing forms of emergency restrictions.

The Sixth Circuit's decisions in related actions arising under the COVID pandemic bolster that conclusion. For example, in *Esshaki v. Whitmer*, 813 Fed. Appx. 170, 171 (6th Cir. 2020), *affirming in part* 455 F. Supp.3d 367 (E.D. Mich.

2020), the Sixth Circuit held that the combined effect of a "State's strict enforcement of ballot-access provisions and [its] Stay-at-Home Orders impose[s] a severe burden on the plaintiffs' ballot access, so strict scrutiny applie[s]." In *Esshaki*, 455 F. Supp.3d at 372, Michigan's Governor had issued two executive orders on March 23 and April 9, 2020 that were virtually identical to those issued in Ohio at the same time. Notwithstanding the COVID crisis and the State's Stay-at-Home Orders, Esshaki had registered as a candidate on October 31, 2019 and by March 23, 2020 "already collected approximately seven hundred signatures." *Id*. at 371. He needed only three hundred more to qualify when the first Stay-at-Home Order was announced. *Id*. at 370.

Michigan, like Ohio, "insist[ed] on enforcing the signature-gathering requirements as if its Stay-at-Home Order … had no impact on the rights of candidates and the people who may wish to vote for them." *Id*. at 370. Michigan also argued precisely what Ohio argues here, that circulators should have braved the crisis and gathered signatures. The District Court disagreed. It rejected Michigan's argument as "both def[ying] good sense and fl[ying] in the face of all other guidance that the State was offering to citizens at the time." *Id*. at 375. "[P]rudence at that time counseled in favor of doing just the opposite." *Id*.

Applying *Anderson-Burdick*, the District Court found a severe burden and applied strict scrutiny to conclude that an injunction was warranted. *Id*. at 377

("[T]his Court has little trouble concluding that the unprecedented— though understandably necessary—restrictions imposed on daily life by the Stay-at-Home Order, when combined with the ballot access requirements … have created a severe burden on Plaintiff's exercise of his free speech and free association rights under the First Amendment ….") (emphasis added). The Sixth Circuit refused to stay the District Court's preliminary judgment:

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

813 F. App'x at 171 (emphasis added).

This Court accordingly affirmed "the district court's order enjoin[ing] the State from enforcing the ballot-access provisions at issue unless the State provides some reasonable accommodations to aggrieved candidates." *Id.* Notably, neither the District Court nor this Court applied an "exclusion or virtual exclusion" test to reach its conclusion.

The Sixth Circuit reached a similar result in *SawariMedia LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020), on July 2, 2020 (several weeks after the Thompson motions panel's stay was put in place). There, Michigan (like Ohio) had fully implemented emergency Stay-at-Home orders by March 23, 2020. Initiative circulators in Michigan, just like in Ohio, accordingly sued seeking relief from

Michigan's in-person petitioning requirements and filing deadline. SawariMedia had filed its initiative and begun collecting signatures on January 16, 2020. 466 F. Supp.3d at 764. It was, according to the District Court, "well on its way to collecting a sufficient number of signatures to place its initiative on the November 2020 general election ballot," *id*. at 764, when the COVID crisis erupted and the shutdown began.

By April of 2020, in an effort to allow circulators to gather the additional needed signatures, Michigan announced that "[p]ersons may engage in expressive activities protected by the First Amendment." *See* Michigan Executive Order 2020-42 FAQs, https://www.michigan.gov/coronavirus/0,9753,7-406- 98178_98455-525278--,00.html. On May 7, 2020 Michigan included this constitutional rights exception in an emergency order. SawariMedia thus had three more weeks to collect signatures under the protection of this formal exception and meet the State's May 27, 2020 deadline.

Notwithstanding the fact that SawariMedia's circulators had several weeks to collect signatures before the State's stay-at-home orders took effect, and that SawariMedia's circulators had several weeks to continue collecting following Michigan's May 7, 2020 adoption of a constitutional rights exception, the District Court concluded that they were still severely burdened, just as the plaintiffs were

in Esshaki. "[T]he Plaintiffs faced a daunting signature requirement with a firm deadline in the midst of the COVID-19 pandemic." *Id*. at 770.

This Court rejected Michigan's attempt to stay the District Court's decision. *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020). It relied on *Esshaki v. Whitmer*, 813 Fed. Appx. 170 (6th Cir. 2020), to support this result. That case made clear that the combined effects of COVID, Michigan's stay-at-home orders and its in-person signature requirements placed a severe burden on First Amendment rights. Notably, once again, neither the District Court nor the Sixth Circuit in *SawariMedia* required "exclusion or virtual exclusion" from the ballot. Furthermore, Michigan's adoption of a constitutional rights exception changed nothing. There is no valid basis for distinguishing *Esshaki* and *SawariMedia* from this case.

## CONCLUSION

Appellants respectfully request that this appeal be expedited.

Respectfully submitted,

*/s/ Mark R.Brown*

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## CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Plaintiffs-Appellants certify that they have prepared this document in 14-point font and that excluding the Caption, Signature Blocks and Certificates, the document includes 5198 words.

s/*Mark R. Brown*
Mark R. Brown

## CERTIFICATE OF SERVICE

I certify that this Motion and Attachments were filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding. Further, I certify that this Motion and Attachments were electronically delivered to Benjamin Flowers, Solicitor General, Office of Ohio Attorney General Dave Yost, benjamin.flowers@ohioago.gov, Counsel of Record for Appellants, this 7th day of June 2021.

s/*Mark R. Brown*
Mark R. Brown

# ATTACHMENT 1

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

**Chad Thompson, William Schmitt, and Don Keeney,**

**Plaintiffs,**

**v.**

**Case No. 20-2129**

**Judge Sargus**

**Richard "Mike" DeWine, in his official capacity as Governor of Ohio,**

**Stephanie McCloud, in her official capacity as Director of Ohio Department of Health,**[1]

**and**

**Frank LaRose, in his official capacity as Ohio Secretary of State,**

**Defendants.**

# PLAINTIFFS' NOTICE OF APPEAL

Plaintiffs, Chad Thompson, William Schmitt and Don Keeney, hereby appeal to the United States Court of Appeals for the Sixth Circuit the Final Judgment, R.79, and supporting Opinion and Order, R.78, entered on June 3, 2021 by the United States District Court for the Southern District of Ohio in favor of the named Defendants, Richard "Mike" DeWine, Stephanie McCloud, and Frank LaRose, in their official capacities.

[1] Ms. McCloud replaced Dr. Acton as the Director of Ohio Department of Health and is automatically substituted for Dr. Acton under Federal Rule of Civil Procedure 25(d).

Respectfully submitted,

*/s/ Mark R. Brown*

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# ATTACHMENT 2

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

**CHAD THOMPSON, *et al.*,**

**Plaintiffs,**

**v.**

**Case No. 2:20-cv-2129**
**JUDGE EDMUND A. SARGUS, JR.**
**Magistrate Judge Chelsey M. Vascura**

**GOVERNOR OF OHIO MICHAEL DEWINE, *et al.*,**

**Defendants.**

**OPINION AND ORDER**

Plaintiffs initiated this action in April of 2020 challenging Ohio's requirements for placing initiatives on the November 2020 general election ballot in light of the COVID-19 pandemic and Ohio's stay-at-home orders. In May of 2020, this Court granted in part Plaintiffs' motion for a preliminary injunction. The Sixth Circuit Court of Appeals stayed the preliminary injunction pending an appeal and eventually reversed the grant of a preliminary injunction in September of 2020. (ECF No. 58.) Plaintiffs petitioned the Supreme Court for a writ of certiorari, which the Supreme Court denied.

Defendants now move to dismiss under Rule 12(b)(1) and (6). (ECF No. 68.) Plaintiffs move for judgment on the pleadings under Rule 12(c). (ECF No. 71.) Defendants contend that this case is moot because Plaintiffs only sought relief related to the November 2020 election. Plaintiffs disagree, arguing that this case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. Plaintiffs contend that they are suffering the same injury in the 2021 election cycle as they suffered in 2020. They argue that enforcement of Ohio's ballot-initiative requirements, combined with the ongoing COVID-19 pandemic and Ohio's public

health orders violates the First Amendment as applied to them. They now seek declaratory and injunctive relief for the duration of the pandemic.

Whatever the merits of Plaintiffs' claims, a fair reading of the Sixth Circuit's opinions in this case leaves no room for these allegations. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss.

## I. Background

The background of this case is set out at length in this Court's preliminary injunction order and the Sixth Circuit's opinions that came after. *Thompson v. DeWine*, 461 F. Supp. 3d 712 (S.D. Ohio), *stayed*, 959 F.3d 804 (6th Cir. 2020), *rev'd*, 976 F.3d 610 (6th Cir. 2020). But the key facts bear repeating, as do subsequent developments since the November 2020 general election.

Plaintiffs are three registered Ohio voters who "regularly circulate petitions to have initiatives placed on local election ballots throughout Ohio and in adjacent States." (Compl. ¶ 4, ECF No. 1; Stip. Facts ¶ 1, ECF No. 35.) In 2020, Plaintiffs sought to place initiatives to decriminalize marijuana possession on the November 3, 2020 general election ballot in cities and villages throughout Ohio. (Stip. Facts ¶¶ 3–4.) To place an initiative on a municipal ballot, Ohio law requires a petition to be submitted to the Ohio Secretary of State with the signatures of at least ten percent of the number of electors who voted for governor in the municipality's previous general election. Ohio Rev. Code § 731.28. The signatures must be original, affixed in ink, and witnessed by the petition's circulator. *Id.* § 3501.38. The collected signatures must be submitted to the Ohio Secretary of State at least 110 days before the election. *Id.* § 731.28.

In early March of 2020, less than two weeks after Plaintiffs filed several proposed initiatives to begin collecting signatures, Governor DeWine declared a state of emergency in Ohio due to the outbreak of COVID-19. (Stip. Facts ¶¶ 4, 18.) Over the next few days, the Ohio

Department of Health issued several emergency public health orders to limit the spread of COVID-19. (*Id.* ¶¶ 19–29.) On March 22, 2020, the Ohio Department of Health issued the "Director's Order that All Persons Stay at Home Unless Engaged in Essential Work Activity." (*Id.* ¶ 30.)

A month later, in April 2020, Plaintiffs filed this action against Governor DeWine, then-Director of the Ohio Department of Health Dr. Amy Acton, and Ohio Secretary of State Frank LaRose in their official capacities. (Compl. ¶¶ 1–12.) Plaintiffs alleged that they were "prevented from collecting the needed supporting signatures of Ohio voters required by Ohio law to place their initiatives on . . . local November 3, 2020 election ballots by the COVID-19 pandemic" and Governor DeWine and then-Director Acton's emergency public health orders. (*Id.* ¶ 10.) Plaintiffs moved for a preliminary injunction, requesting that the Court either (1) direct "Defendants to immediately place Plaintiffs' marijuana decriminalization initiatives on local November 3, 2020 election ballots without the need for supporting signatures from Ohio voters," or alternatively (2) modify Ohio's in-person signature requirements, extend the deadlines for submitting signatures, require Defendants to develop procedures for gathering electronic signatures, and reduce the number of needed voter signatures. (Compl. ¶ 79.)

This Court granted Plaintiffs' request for injunctive relief in part in May of 2020. The Court enjoined enforcement of the ink signature and witness requirements for the November 2020 general election as to Plaintiffs and also enjoined enforcement of the deadline in Ohio Revised Code § 731.28 for the November 2020 general election as to Plaintiffs.[1] *Thompson*, 461 F. Supp. 3d at 739. This Court did not enjoin the State from enforcing its signature quantity requirement.

[1] The Court also granted injunctive relief in favor of two Intervenor-Plaintiffs who sought to place proposed constitutional amendments on the ballot in the November 2020 general election. Those Intervenor-Plaintiffs have withdrawn from this litigation.

*Id.* A week later, the Sixth Circuit granted Defendants' motion for a stay pending appeal. *Thompson*, 959 F.3d at 813.

In September of 2020, the Sixth Circuit reversed this Court's grant of a preliminary injunction. *Thompson*, 976 F.3d at 620. The court held that Plaintiffs were not likely to succeed on the merits of their First Amendment challenge and that all preliminary injunction factors weighed in favor of Ohio. *Id.* at 615–19. Plaintiffs therefore did not obtain relief for the November 2020 general election.

The November 2020 general election came and went. The COVID-19 pandemic remained. In early 2021, Plaintiffs petitioned the United States Supreme Court for a writ of certiorari for interlocutory review of the Sixth Circuit's decision reversing this Court's grant of a preliminary injunction. The Supreme Court denied Plaintiffs' petition in April 2021. *Thompson*, No. 20-1072, 2021 WL 1520804, at *1 (U.S. Apr. 19, 2021). Following the denial of certiorari, Defendants moved to dismiss, arguing that the case is moot and that Defendants are now immune from any retrospective relief under the Eleventh Amendment. (Defs.' Mot. Dismiss, ECF No. 68.)

Plaintiffs move for judgment on the pleadings. They ask the Court to declare strict enforcement of Ohio's ballot-initiative requirements unconstitutional for the duration of the pandemic and to grant a permanent injunction: (1) prohibiting enforcement of Ohio's in-person wet signature and witness requirements; (2) prohibiting enforcement of Ohio's July submission deadline; and (3) prohibiting enforcement of Ohio's signature quantity requirements. (Pls.' Mot. J. on Pleadings and Resp. in Opp'n at 1, ECF No. 71, hereinafter, "Pls.' Resp.")

## II. Standard of Review

First up, a matter of procedure. Plaintiffs argue that Defendants' 12(b) motion is improper; Defendants argue that Plaintiffs' (12)(c) motion is improper. Defendants ask the Court to dismiss

Plaintiffs' 12(c) motion on procedural grounds, while Plaintiffs ask the Court to construe Defendants' 12(b) motion as a motion under Rule 12(c) or Rule 56 to efficiently resolve this case given the time-sensitive nature of Plaintiffs' claims.

The difference between a Rule 12(b) motion and a Rule 12(c) motion "stems from when in the course of proceedings they can be raised." *Reed Elsevier, Inc. v. TheLaw.net Corp.*, 269 F. Supp. 2d 942, 947 (S.D. Ohio 2003). Motions under 12(b) must be brought before a defendant files an answer to the complaint—except for motions under 12(b)(1), which can be brought at any stage of the litigation. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506; Fed. R. Civ. P. 12(b). Motions under 12(c) can be brought only "[a]fter the pleadings are closed[.]" Fed. R. Civ. P. 12(c). Pleadings are only "closed" within the meaning of Rule 12(c) if an answer has been filed and no counterclaims or crossclaims are still at issue. *Williams v. United States*, 754 F. Supp. 2d 942, 945 (W.D. Tenn. 2010) (citing Fed. R. Civ. P. 7(a) and Wright & Miller, 5C Fed. Prac. & Proc. § 1367 (3d ed.)).

In this case, no answer has been filed. So the pleadings have not "closed" for purposes of Rule 12(c). *See id.* That means Plaintiffs' motion is not technically proper. [2] In any event, all procedural roads lead to the same destination in this case. Plaintiffs argue that, because the time for filing an answer has passed, all factual allegations in the Complaint are deemed admitted. But, in reviewing Defendants' motion to dismiss, the Court must accept all the Complaint's factual allegations as true anyway. *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010) (citing *Ashcroft*

[2] Because a "plaintiff cannot move under Rule 12(c) until after an answer has been filed, the proper course for the plaintiff in a case in which the defendant fails to answer is to move for a default judgment under Rule 55 rather than seek a judgment on the pleadings." Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1367 (3d ed.); *see also, e.g.*, *Poliquin v. Heckler*, 597 F. Supp. 1004, 1006 (D. Me. 1984) (holding the same); *Stands Over Bull v. Bureau of Indian Affs.*, 442 F. Supp. 360, 367 (D. Mont. 1977) (citation omitted) ("When a defendant has failed to file an answer, a motion for judgment on the pleadings is not the correct procedural remedy.").

*v. Iqbal*, 556 U.S. 662 (2009)). And even if Defendants' motion to dismiss was untimely, Courts can review motions raising Rule 12(b)(6) defenses under Rule 12(c) using an identical standard of review. *See Gillespie v. City of Battle Creek*, 100 F. Supp. 3d 623, 628 (W.D. Mich. 2015); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008). With those distinctions noted, the Court moves on to the standard of review.

Rule 12(b)(1) challenges the Court's subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). There are two types of subject-matter jurisdiction challenges: facial attacks and factual attacks. *United States v. Richie*, 15 F.3d 592, 598 (6th Cir. 1994). When a motion "attacks the factual basis for jurisdiction," as Defendants' motion does here, "the district court has broad discretion over what evidence to consider and may look outside the pleadings to determine whether subject-matter jurisdiction exists." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015). The plaintiff has the burden of proving subject-matter jurisdiction when jurisdiction is challenged under Rule 12(b)(1). *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 677–78 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Furthermore, "[a]lthough for purposes of a motion to dismiss [a court] must take all the factual allegations in the complaint as true, [it][is] not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 677–79 (quoting *Twombly*, 550 U.S. at 55) (internal quotations omitted).

"If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). However, "[i]n ruling on a motion to dismiss, the Court may consider the complaint as well as (1) documents referenced in the pleadings and central to plaintiff's claims, (2) matters of which a court may properly take notice, [and] (3) public documents[.]" *Overall v. Ascension*, 23 F. Supp. 3d 816, 824 (E.D. Mich. 2014) (citing *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997)). In deciding these motions, the Court will look to the pleadings, the stipulated facts in the record, and facts of which the Court will take judicial notice.[3]

## III. Analysis

The Court first takes up Defendants' Motion to Dismiss. (Defs.' Mot., ECF No. 68.) The Court must first address Defendants' 12(b)(1) motion because the Court has no power to consider a Rule 12(b)(6) motion if it lacks subject-matter jurisdiction. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

### A. Plaintiffs' claims are capable of repetition, yet evading review.

Defendants assert that the Court lacks subject-matter jurisdiction because Plaintiffs' claims were rendered moot once the November 3, 2020 election occurred. (Defs.' Mot. at 6.) Plaintiffs disagree. Plaintiffs assert that their claims meet the "capable of repetition, yet evading review" exception to mootness. (Pls. Resp. at 22.)

The judicial power under Article III of the U.S. Constitution only extends to "Cases" and "Controversies". U.S. Const. Art. III, § 2. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v.*

[3] Plaintiffs urge the court to take judicial notice of subsequently adopted emergency orders as public records. (Pls.' Resp. at 6–7.)

*Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). If a case becomes "moot at any point during the proceedings" it falls outside the jurisdiction of a federal court. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537, 200 L. Ed. 2d 792 (2018) (internal quotations and citation omitted).

The Supreme Court has recognized an exception to the mootness doctrine in cases that are "capable of repetition, yet evading review." *Murphy*, 455 U.S. at 482. In the absence of a class action, this exception applies in situations when: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Id. (*citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). This exception applies "only in exceptional situations[.]" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted).

The first prong—whether the action is too short in duration to be fully litigated prior to expiration—is "easily satisfied" in challenges to election laws brought during the election cycle. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). In *Blackwell*, "less than eleven months elapsed between the filing of the lawsuit and the occurrence of the election[.]" *Id.* In this case, less than seven months elapsed between the filing of the lawsuit in April 2020 and the November 3, 2020 general election.

Mootness in this case therefore turns on the second prong—whether there is a "reasonable expectation that" Plaintiffs will "be subjected to the same action again." *Murphy*, 455 U.S. at 482 (citation omitted). To satisfy the second prong, "there must be a 'reasonable expectation' or a 'demonstrated possibility' that the same controversy will recur involving the same complaining

party." *Kundrat v. Halloran*, 206 F. Supp. 2d 864, 869 (E.D. Mich. 2002) (citing *Murphy*, 455 U.S. at 482).

Defendants argue this case is moot and that it is not "capable of repetition, yet evading review." They contend that "Plaintiffs have not shown that another pandemic with the severity of COVID-19 is likely to occur again, or that the COVID-19 pandemic will revert back to the conditions as they existed in the spring of 2020, or that Ohio would issue public health orders that would prevent them from obtaining signatures." (Defs.' Reply in Support at 13.) Defendants argue that, because this is an as-applied challenge to Ohio's ballot-initiative requirements during the COVID-19 pandemic, it is "uniquely *incapable* of repetition." (*Id.* at 14 (emphasis in original).) Defendants point out that the Ohio Department of Health rescinded the restrictive orders that Plaintiffs alleged in the Complaint made it impossible for them to collect signatures. (Defs.' Mot. at 8.) They argue that the operative order from the Ohio Department of Health is much less restrictive. (*Id.* at 8.) On May 17, 2021, the Ohio Department of Health issued an order stating that "the vast majority of health orders—except some orders for safety in congregate living and health settings and some technical matters—will be rescinded on June 2, 2021[.]"[4]

Plaintiffs submit that they are actively attempting to qualify initiatives for local ballots for the November 2021 election subject to the same ballot-initiative laws Plaintiffs originally challenged. (Pls.' Resp. at 26–27.) And, crucially, the COVID-19 pandemic remains ongoing. (*Id.*) They argue that there "is not only a likelihood of recurrence, there is a recurrence here." (*Id.* at 27.)

Plaintiffs have shown a "'demonstrated possibility' that the same controversy will recur" involving them. *Kundrat*, 206 F. Supp. 2d at 869 (citing *Murphy*, 455 U.S. at 482). Plaintiffs

[4] Ohio Dep't of Health, Director's Second Amended Order for Social Distancing, Facial Coverings and Non-Congregating (May 17, 2021).

allege in the Complaint that "Ohio law, taken together with the COVID-19 outbreak and Defendants' orders, directly cause injury-in-fact to Plaintiffs" and that Plaintiffs' injuries are "fairly traceable to the Ohio laws requiring in person signature collection for candidates, the COVID-19 pandemic, and the Defendants' orders described in this action." (Compl. ¶¶ 60–61.) While the "Defendants' orders described" in the Complaint have changed, the Ohio laws requiring in-person signature collection remain in place. And the COVID-19 pandemic is ongoing.[5]

One year ago, society was optimistic that the worst of the pandemic passed and that emergency public health restrictions would lessen. In this case, the Court of Appeals observed on May 26, 2020, "What's more, Ohio is beginning to lift their stay-at-home restrictions." *Thompson*, 959 F.3d at 810. Instead, the pandemic worsened. In November 2020 amid an acceleration of COVID-19 cases in the State, the Ohio Department of Health imposed a new stay-at-home order.[6] This time does seem different. But the previous year illustrates the difficulty in predicting the high and low tides of a once-in-a-century pandemic. So long as a global pandemic is present, there is a "demonstrated possibility" that Plaintiffs will be again subject to public health orders of the type they challenge in the Complaint.

Defendants contend that even "if pandemic conditions worsen again and the Plaintiffs' claims are capable of repetition, they will still fail as a matter of law." (Defs.' Mot. at 9.) However, that Plaintiffs' claims may fail as a matter of law does not also mean that those claims are moot. Plaintiffs are collecting signatures for the 2021 election; the same state laws challenged during the 2020 election cycle remain in place; the spread of COVID-19 remains a global pandemic.

[5] Ohio Dep't of Health, COVID-19 Dashboard (accessed May 28, 2021), https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards.

[6] Ohio Dep't of Health, Director's Twenty-One Day Order that All Persons Stay at Home During Specified Hours Unless Engaged in Work or Essential Activity (Nov. 19, 2020).

Plaintiffs' claims therefore fall within the "capable of repetition, yet evading review" exception to mootness.

**B. Plaintiffs' claims fail as a matter of law under Rule 12(b)(6).**

Next, Defendants move for dismissal under Rule 12(b)(6). (Defs.' Mot. at 10.) They argue that the Eleventh Amendment bars Plaintiffs' claims for declaratory relief related to the 2020 election because such relief is retrospective. (*Id.*) Defendants' Eleventh Amendment argument is of a piece with their argument that Plaintiffs' claims for injunctive relief are moot, which the Court addressed above. Plaintiffs respond that the Eleventh Amendment does not bar Plaintiffs' claims for declaratory relief because, although the Complaint was originally designed to obtain relief for the November 3, 2020 election, prospective relief is still available for the 2021 election cycle. (Pls.' Resp. at 28.)

Defendants are entitled to dismissal of Plaintiffs' claims, but for another reason: based on the Sixth Circuit's opinions in this case, Plaintiffs' claims cannot succeed as a matter of law. In the Complaint, Plaintiffs alleged that enforcement of Ohio's ballot-initiative requirements for the 2020 election in conjunction with the COVID-19 pandemic and Ohio's stay-at-home orders violate their First and Fourteenth Amendment rights. (Compl. ¶¶ 64–78.) Plaintiffs requested declaratory relief and preliminary and permanent injunctive relief against Defendants. (*Id.* ¶ 79.)

This Court granted in part Plaintiffs' motion for a preliminary injunction on May 19, 2020. *Thompson*, 461 F. Supp. 3d at 717. One week later, the Sixth Circuit granted Defendants' motion to stay pending appeal, holding that all four preliminary injunction factors favored Defendants. *Thompson*, 959 F.3d at 812. In September of 2020, the Sixth Circuit reversed the grant of a preliminary injunction, indicating that its analysis of the four preliminary injunction factors remained unchanged from its order granting a stay. *Thompson*, 976 F.3d at 615.

Plaintiffs now request declaratory relief and a permanent injunction "(1) prohibiting enforcement of Ohio's in-person supporting signature requirements for candidates for office during the ongoing COVID crisis, (2) extend[ing] the deadline for submitting supporting signatures to city auditors, village clerks and local election boards of elections in order to qualify popular measures for local election ballots during the ongoing COVID crisis, and (3) enjoining the required number of signatures required in order to place initiatives on local election ballots during the ongoing COVID crisis." (Pls. Resp. at 43.) Further, Plaintiffs urge the Court "to order Defendants to develop with Plaintiffs a timely, efficient and realistic procedure for gathering supporting signatures from voters and submitting them to local officials." (*Id.*) A fair reading of the Sixth Circuit's opinion forecloses such relief. *See Thompson*, 976 F.3d at 620.

**1. The Sixth Circuit's September 16, 2020 opinion guides the analysis here.**

As an initial matter, the parties dispute whether the Sixth Circuit's opinion reversing the grant of a preliminary injunction is the "law of the case." (Defs.' Reply in Support and Resp. in Opp'n at 18; Pls.' Reply in Support at 11.)

The law-of-the-case doctrine "provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Daunt v. Benson*, ---F.3d----, 2021 WL 2154769, at *5 (6th Cir. May 27, 2021) (citing *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006) (internal quotations omitted)). "Put another way, '[t]he law-of-the-case doctrine precludes reconsideration of issues decided at an earlier stage of the case.'" *Id.* (citing *Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017)).

Whether a panel's ruling on a preliminary injunction becomes "the law of the case is tricky[.]" *Howe v. City of Akron*, 801 F.3d 718, 739 (6th Cir. 2015). As a general matter, "decisions on preliminary injunctions do not constitute law of the case and 'parties are free to

litigate the merits.'" *William G. Wilcox, D.O., P.C. Employees' Defined Ben. Pension Tr. v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (citations omitted). However, when the "appellate panel considering the preliminary injunction has issued '[a] fully considered appellate ruling on an issue of law,' then that opinion becomes the law of the case." *Howe*, 801 F.3d at 740 (citing Wright & Miller, Fed. Prac. and Proc.: Jurisdiction and Related Matters §4478.5 (4th ed. 2015)).

Here, the Court need not determine whether the Sixth Circuit's opinion reversing the grant of a preliminary injunction is the law of the case. Even assuming that "the Sixth Circuit's rulings in the preliminary-injunction context are not binding on this Court's current task under Rule 12, the Court finds the rulings are persuasive[.]" *Daunt v. Benson*, No. 1:19-CV-614 (LEAD), 2020 WL 8184334, at *11 (W.D. Mich. July 6, 2020), *aff'd*, No. 20-1734, 2021 WL 2154769 (6th Cir. May 27, 2021). The Sixth Circuit's opinion will therefore guide this Court's analysis.

**2. Plaintiffs' First Amendment claims fail as a matter of law under the *Anderson-Burdick* framework.**

A plaintiff seeking a permanent injunction must show actual success on the merits. *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n. 12 (1987). Courts review "First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework." *Thompson*, 976 F.3d at 615 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Under this framework, "the level of scrutiny" to apply to "state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* (citing *Burdick*, 504 U.S. at 434). When state law imposes a severe burden, a court evaluates the law under strict scrutiny. *Id.* When the law imposes "reasonable, nondiscriminatory restrictions," a court applies rational-basis review to the state law. *Id.* (citing *Burdick*, 504 U.S. at 434). When the challenged law imposes an intermediate burden, a court weighs the burden against "the precise interests put forward by the

State as justifications for the burden imposed by its rule." *Id.* (citing *Anderson*, 460 U.S. at 789); *Kishore v. Whitmer*, 972 F.3d 745, 748–49 (6th Cir. 2020). In doing so, a court must "consider 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 616 (quoting *Burdick*, 504 U.S. at 434).

The Sixth Circuit—in both its opinion granting a stay and its opinion reversing this Court—concluded that "Ohio's ballot-access restrictions impose, at most, only an intermediate burden on plaintiffs' First Amendment rights, even during COVID-19." *Thompson*, 976 F.3d at 616; *Thompson*, 959 F.3d at 811. The Court will adhere to the Sixth Circuit's reasoning. In weighing the burdens Ohio's ballot-initiative laws impose on Plaintiffs during the COVID-19 pandemic against Ohio justifications for those laws, Ohio's justifications come out on top. *Id.* at 616–19.

**a. Burden**

A "severe burden excludes or virtually excludes electors or initiatives from the ballot." *Id.* at 617. Ohio's laws, however, "specifically exempted conduct protected by the First Amendment from its stay-at-home orders"—including gathering signatures for petitions. *Id.* (citing Ohio Dep't of Health, Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order ¶ 4 (April 30, 2020)). That much remained true during and after the election cycle following the panel's decision in September. Ohio Dep't of Health, Director's Twenty-One Day Order that All Persons Stay at Home During Specified Hours Unless Engaged in Work or Essential Activity ¶ 2 (Nov. 19, 2020) ("This Order does not apply to . . . First Amendment protected speech[.]") And even though the conditions as a result of COVID-19 may make it harder for Plaintiffs to obtain signatures, that does not mean "that Plaintiffs are *excluded* from the ballot." *Thompson*, 976 F.3d at 618 (citing *Thompson*, 959 F.3d at 810) (emphasis in original). Therefore, Plaintiffs face an intermediate burden.

**b. Ohio's Justifications**

"The next step in the *Anderson-Burdick* framework is a flexible analysis in which" the Court weighs "the burden of the restriction against the state's interests and chosen means of pursuing them." *Id.* (citing *Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019), *cert. denied*, --- U.S. ----, 140 S.Ct. 2803, 207 L. Ed. 2d 141 (2020)) (internal quotations omitted).

In this case, Ohio has articulated two interests. "The first relates to the ink and attestation requirements: preventing fraud by ensuring the authenticity of signatures." *Id.* The Sixth Circuit concluded that there is "no question this is a legitimate—indeed compelling—interest." *Id.* Second, Ohio posits that its "deadlines allow it to verify signatures in a fair and orderly way, ensuring that interested parties have enough time to appeal an adverse decision in court." *Id.* This interest is also legitimate, as "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

**c. Balancing of Burdens and Justifications**

At the third and final and final step of *Anderson-Burdick*, the Court must "assess whether the State's restrictions are constitutionally valid given the strength of its proffered interests." *Id.* (citing *Schmitt*, 933 F.3d at 641). All "that's required for the State to win at this step is for its legitimate interests to outweigh the burden on Plaintiffs' First Amendment rights." *Id.* at 619.

The Sixth Circuit has "held, in multiple cases, that the interests Ohio pursues through its ballot access laws 'outweigh the intermediate burden those regulations place on Plaintiffs.'" *Id.* (citing *Thompson*, 959 F.3d at 811; *Hawkins v. DeWine*, 968 F.3d 603, 607 (6th Cir. 2020)). Furthermore, "reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with

initiatives that have not demonstrated sufficient grassroots support." *Id.* (citing *Little*, --- U.S. at ----, 140 S. Ct. 2616, 2020 WL 4360897, at *2 (Roberts, C.J., concurring in the grant of a stay)).

**3. Plaintiffs' efforts to distinguish the panel's analysis are unpersuasive.**

The Sixth Circuit issued its decision on this Court's preliminary injunction order in September of 2020. The November 3, 2020 election occurred less than two months later. Since then, the course of the COVID-19 pandemic and Ohio's emergency public health orders have changed. *See supra* Part III.A. Plaintiffs now attempt to distinguish both the facts and the law on which the panel relied.

**a. Facts**

Plaintiffs contend that this case "stands in stark contrast to the case as it existed when the preliminary proceedings were litigated." (Pls.' Resp. at 31.) The Sixth Circuit's September 2020 opinion noted that the "severe burden" standard under *Anderson-Burdick* requires a showing that the combined effect of ballot-access restrictions amounts to an "exclusion or virtual exclusion" from the ballot. *Thompson*, 976 F.3d at 617–18 (citing *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 575 (6th Cir. 2016)). Plaintiffs argue that facts developed after the panel's decision in September 2020 show "exclusion or virtual exclusion" from the 2020 ballot and thus, strict scrutiny should apply under *Anderson-Burdick*. (Pls.' Resp. at 31–32.)

First, Plaintiffs argue that Ohio's strict enforcement of its in-person petitioning requirements in-fact resulted in the exclusion or virtual exclusion of initiatives on the 2020 ballot. (*Id.* at 32.) No statewide initiatives appeared on Ohio's November 2020 general election ballot, and Plaintiffs "succeeded in placing only 4 out of the 73 initiatives they reasonably anticipated placing on local ballots[.]" (*Id.*) Second, they argue that "science has learned that COVID-19 is airborne and primarily transmitted through aerosol[,]" posing unacceptable risk of community

spread to circulators and citizens. (*Id.*) Third, they submit that, contrary to the State's representations to the Sixth Circuit in 2020, the state did not "open up," instead shutting down even further. (*Id.*) Fourth, they point to the fact that COVID-19 has killed over 570,000 Americans and continues to spread. (*Id.* at 33.) Fifth and finally, they claim that Defendants admit that collecting signatures from March 2020 to April 30, 2020 was "both physically impossible and illegal" by virtue of Defendants' failure to file an answer—therefore admitting the Complaint's allegation that collecting signatures was "literally impossible." (*Id.*; Compl. ¶ 52.)

These arguments do not persuade the Court that Plaintiffs are now entitled to a higher level of scrutiny than the Sixth Circuit applied in its September 16, 2020 opinion. The Sixth Circuit already disposed of Plaintiffs argument that "impossibility" is a factual allegation that can be admitted in a pleading. *Thompson*, 976 F.3d at 616 n.5 (6th Cir. 2020) ("we don't think 'impossibility' here is a factual allegation that can be admitted in pleadings."). And even if that were true, the panel noted that "Ohio made it clear by April 30" that it exempted conducted protected by the First Amendment from its stay-at-home orders. *Id.* at 617. Therefore, according to the Sixth Circuit, "Plaintiffs [had] months to gather signatures" after April 30, 2020. *Id.*

Furthermore, the panel cautioned that even if "prospective signatories were deciding to stay home or avoid strangers—thus reducing Plaintiffs' opportunities to interact with them—we don't attribute those decisions to Ohio" because "First Amendment violations require state action." *Id.* (citing *Thompson*, 959 F.3d at 810). There is no telling from the facts Plaintiff cites whether the lack of ballot initiatives on the 2020 general election ballot were the result of Ohio's public health orders or private "prospective signatories [ ] deciding to stay home or avoid strangers" due to the risks of COVID-19. *Id.*

In any event, Plaintiffs now seek prospective relief for the duration of the COVID-19 pandemic, not retrospective relief for the November 2020 election. (Pls.' Resp. at 27.) If "Plaintiffs [ ] faced an uphill battle" under the *Anderson-Burdick* framework in 2020, *Thompson*, 976 F.3d at 617, the hill is even steeper now. Given the advent of the vaccine,[7] the decrease in COVID-19 cases,[8] and the lifting of most public health orders as of June 2,[9] the conditions as they now exist do not appear to be more burdensome than those alleged in the Complaint and established in the stipulated facts prior to this Court's preliminary injunction order in May of 2020. Therefore, subsequent factual developments do not warrant departing from the Sixth Circuit's prior analysis.

**b. Law**

Plaintiffs also contend that there "is no valid basis for distinguishing" *Esshaki v. Whitmer,* 813 F. App'x 170 6th Cir. 2020) and *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020) from this case. In those cases, the Sixth Circuit held that the district court properly applied strict scrutiny under the *Anderson-Burdick* framework in evaluating the plaintiffs' likelihood of success on First Amendment challenges brought in response to Michigan's stay-at-home orders. *Esshaki*, 813 F. App'x at 171 ("The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied[.]"); *SawariMedia, LLC*, 963 F.3d at 597 ("with respect to the burden imposed on Plaintiffs' access to the ballot, the restrictions at issue here are identical to those in *Esshaki*"). Plaintiffs argue that "[n]ot only are *Esshaki* and

[7] As of June 2, over 45% of Ohioans have received at least one dose of a COVID-19 vaccine. Ohio Dep't of Health, COVID-19 Vaccination Dashboard (accessed June 2, 2021), https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/covid-19-vaccine/covid-19-vaccination-dashboard.

[8] Ohio Dep't of Health, COVID-19 Dashboard (accessed on June 2, 2021), https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards.

[9] Ohio Dep't of Health, Director's Second Amended Order for Social Distancing, Facial Coverings and Non-Congregating (May 17, 2021).

*SawariMedia* materially indistinguishable from this case, but also, the severity of the burdens imposed in those cases was less onerous than the burdens imposed on Plaintiffs here." (Pls.' Resp. at 42.) The Sixth Circuit considered the same argument in this case and rejected it. *Thompson*, 976 F.3d at 617 ("But the cases Plaintiffs cite don't support their theory.").

In the end, the Sixth Circuit's analysis is fatal to Plaintiffs' claims. *Id.* at 619. Taking all factual allegations in the Complaint, stipulated facts, and undisputed public record as true, Plaintiffs fail to state a claim under the First and Fourteenth Amendments upon which relief can be granted in light of the Sixth Circuit's decisions. Defendants are therefore entitled to dismissal under Rule 12(b)(6). Plaintiffs' Motion for Judgment on the Pleadings is moot.

## IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss (ECF No. 68) and **DENIES AS MOOT** Plaintiffs' Motion for Judgment on the Pleadings (ECF No. 71). Plaintiffs' claims are **DISMISSED**. The Clerk is **DIRECTED** to close this case.

**IT IS SO ORDERED.**

**6/3/2021**
**DATE**

**s/Edmund A. Sargus, Jr.**
**EDMUND A. SARGUS, JR.**
**UNITED STATES DISTRICT JUDGE**