IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-3514

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,

Plaintiffs - Appellants,

v.

RICHARD MICHAEL DEWINE, in his official capacity as the Governor of Ohio;

STEPHANIE B. MCCLOUD, in her official capacity as Director of Ohio Department of Health;

FRANK LAROSE, in his official capacity as Ohio Secretary of State,

Defendants - Appellees

On Appeal from the United States District Court for the Southern District of Ohio

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BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-3514 Case Name: Thompson v. DeWine

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, Chad Thompson, Don Keeney, William Schmitt
Name of Party
makes the following disclosure:

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

No.

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

No.

CERTIFICATE OF SERVICE

I certify that on June 7, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Mark R. Brown

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

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Court indicated in its Order expediting this matter that it "may direct oral argument or submission on the briefs following the conclusion of briefing." Doc. No. 12-2. Plaintiffs-Appellants agree that notwithstanding the importance of this case, submission on the briefs may be proper in light of the time constraints involved.

STATEMENT OF JURISDICTION

The District Court possessed jurisdiction in this 42 U.S.C. § 1983 suit under 28 U.S.C. § 1331 and entered final judgment on June 3, 2021. *See* Opinion and Order, R. 78; Judgment, R. 79. Plaintiffs-Appellants filed their Notice of Appeal on June 4, 2021. *See* Notice of Appeal, R. 80. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred by ignoring *Anderson-Burdick*'s requirement that Courts consider all the facts and circumstances, including natural catastrophes, when addressing the constitutionality of a State's ballot access laws.

2. Whether the District Court improperly focused on Ohio's emergency orders as they exist today without considering how those past orders and corresponding events burdened Plaintiffs-Appellants' First Amendment rights to access both the November 3, 2020 ballot and the upcoming November 2, 2021 ballot.

3. Whether the District Court erroneously distinguished and disregarded this Court's holdings in *Esshaki v. Whitmer*, 813 Fed. Appx. 170 6th Cir. 2020), and *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020).

4. Whether the District Court erroneously adopted and applied a "total or virtual exclusion" litmus test under *Anderson-Burdick* in order to determine whether burdens are severe.

5. Whether the District Court erroneously concluded that Ohio's strict enforcement of its in-person petitioning requirements, as applied in combination with Ohio's emergency COVID-19 restrictions, did not place a severe burden on Plaintiffs-Appellants First Amendment rights.

6. Whether the District Court erred in concluding that Ohio's strict enforcement of its in-person petitioning requirements during COVID-19 satisfied any standard of review under *Anderson-Burdick*, whether strict, intermediate, flexible or rational basis.

STATEMENT OF THE CASE

Plaintiffs-Appellants Chad Thompson, William Schmitt and Don Keeney are Ohio residents who attempted to circulate ballot initiatives in cities throughout Ohio for the November 3, 2020 general election. Verified Complaint, R. 1, PageID # 2. They have circulated initiatives in prior elections in Ohio, *see Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), and continue to circulate initiatives today in an effort to have them placed on local election ballots for the November 2, 2021 election. *See* Chad Thompson Declaration, R.71-1 at PageID # 871-73.

They commenced this action on April 27, 2020 to challenge the constitutionality of Ohio's strict enforcement of its in-person petitioning requirements during the COVID-19 pandemic. Unlike many states that have adopted reasonable modifications enabling citizens to comply with their petitioning

procedures, *see* Brief of Direct Democracy Scholars, The Initiative and Referendum Institute, and Citizens in Charge as Amici Curiae Supporting Petitioners, *Thompson v. DeWine*, No. 20-1072 (U.S.), March 8, 2021, at 15, R.71-2 at PageID # 896 (hereinafter "Scholars' Brief"), Ohio during the 2020 election and today demands strict compliance with its in-person petitioning requirements, which require that Plaintiffs-Appellants obtain "wet" signatures signed by hand, as well as its filing deadlines. Ohio demands such compliance notwithstanding the unprecedented upheaval and drastic restrictions on daily life and activities caused by the COVID-19 pandemic and the ensuing executive orders issued by Ohio's Governor, Defendant-Appellee DeWine.

As a result, Ohio blocked Plaintiffs-Appellants from placing their initiatives on dozens of local ballots in 2020 and continues to impede their efforts to place these initiatives on the November 2, 2021 ballot.

On February 27, 2020—before the COVID-19 pandemic had reached Ohio—Plaintiffs properly filed their proposed initiatives with several Ohio cities. Stipulated Facts, R.35, at Page ID # 469. (Ohio law prohibits signature collection for a local initiative until it is filed with local officials. *See* O.R.C. § 731.32.) Just two weeks later, on March 14, 2020, Governor DeWine declared a state of emergency, *see* Ex. Order 2020-01D, Declaring State of Emergency,[1] and on

[1] https://coronavirus.ohio.gov/static/publicorders/Executive-Order-2020-01D.pdf.

March 22, 2020 ordered Ohioans to stay home except to engage in certain specific "Essential Activities." *See* Director's Stay at Home Order, March 22, 2020.[2] Petition circulation was not included as an Essential Activity.

Governor DeWine's stated motivation, we now know, was protecting the life and well-being of all Ohioans. "[A]t that time we were guided only by the question, How many people will die if we don't do this?" Mike DeWine, *Don't Roll Your Eyes at Ohio's Vaccine Lottery*, N.Y. TIMES, May 26, 2021.[3] He recognized in March of 2020 that exposure to COVID-19 risked death.

DeWine's initial orders banned, with limited exceptions, all gatherings of 50 or more persons, which are the primary events that initiative circulators rely on to gather signatures. Stipulated Facts, R.35, at Page ID # 472. Subsequent orders issued in the days and weeks that followed included criminal penalties and directed all Ohioans to "stay at home or at their place of residence," to maintain at least a six-foot social distance between themselves and others, and to avoid altogether gatherings of ten or more people. *See* Ian Cross, *Gov. DeWine Clarifies Enforcement, Reporting of Stay-at-home Order Violations*, News5Cleveland.com,

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[2] https://coronavirus.ohio.gov/static/publicorders/DirectorsOrderStayAtHome.pdf.

[3] https://www.nytimes.com/2021/05/26/opinion/ohio-vaccine-lottery-mike-dewine.html?action=click&module=Opinion&pgtype=.

Mar. 23, 2020;[4] Laura Mazade, *What Does the Stay-at-home Order Mean for Ohio?*, Cincinnati Enquirer, Mar. 22, 2020.[5] None of these orders exempted circulators.

Well-intentioned and necessary as they may have been, the Governor's restrictions, combined with the risks posed by COVID-19 and Ohio's strict enforcement of its in-person petitioning requirements, stopped Ohio's initiative procedure in its tracks. Although it was not known at the time of the District Court's preliminary injunction hearing in this case or the interlocutory appellate proceedings that followed in this Court, these factors made it practically impossible for citizens to place initiatives on general election ballots throughout Ohio. Plaintiffs-Appellants, in particular, would succeed in placing only 4 of the 73 municipal initiatives they intended on the November 3, 2020 general election ballot. And those few exceptions occurred exclusively in small villages where the signature requirements were correspondingly low. *See* Declaration of Chad Thompson, R.71-1. *See generally* Kyle Jaeger, *Four More Ohio Cities Will Vote On Marijuana Decriminalization This November*, Marijuana Moment, Aug. 13, 2020.[6]

[4] https://tinyurl.com/yxgym fga.

[5] https://tinyurl.com/yyb6vfjt.

[6] https://tinyurl.com/yysg9rxv.

Plaintiffs-Appellants are experienced initiative proponents with a demonstrated record of success in Ohio. *See, e.g., Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019). But for Ohio's strict enforcement of its in-person signature collection requirements during a world-wide pandemic, they would have succeeded in placing their initiatives on many more of the 73 municipal ballots they targeted. Ohio's unbending insistence upon strict compliance with those requirements, combined with the restrictions imposed by Governor DeWine's executive orders and the public health threat posed by the COVID-19 pandemic made that impossible.

In contrast to their limited success in four small villages, Plaintiffs were forced to forego altogether their efforts in larger cities like Akron (which they also targeted, *see* Stipulation, R.35, at PageID # 469). "Historically, to obtain the necessary number of signatures and gain support for the ballot initiatives, canvassers often approach bystanders at large-scale or community events—e.g., parades—or have a dialogue with citizens on public streets." Scholars' Brief at 13, R.71-2, at PageID # 894. The "[p]ublic health orders in Ohio … during the pandemic, however, prohibit[ed] most large and public gatherings, direct[ed] a six-foot social distance between individuals from different households, and instruct[ed] residents to stay home. These measures—well-intentioned, important,

and necessary—nonetheless severely restrict[ed] initiative proponents' ability to satisfy ballot qualification rules." *Id*.

In any municipality larger than a small village, gathering signatures door-to-door simply cannot succeed. Public gatherings are the primary collection grounds. Volunteers or paid circulators are needed. Scholars' Brief at 11-12, R.71-2, at PageID # 892-93. Due to the Governor's emergency orders restricting gatherings and requiring social distancing, however, there were no festivals, fairs, or parades during the 2020 election cycle, and no meaningful way for Plaintiffs-Appellants to qualify their initiatives in the vast majority of cities in Ohio. *See generally* Stipulated Facts, R. 35, Page ID # 469–470. As stated by a nationally renowned collection of experts, "the pandemic and resulting health-related measures (which will certainly continue for months, if not years) has made the initiative and referendum process severely burdensome." Scholars' Brief at 13, R.71-2, at PageID # 894. "Prohibitions on large gatherings, and fears associated with such gatherings, have removed the most historically important forum for the exercise of direct democracy. Moreover, the pandemic has reduced the number of available paid and volunteer signature gatherers who may have at-home obligations (e.g., childcare) or who worry about exposure to coronavirus." *Id*. at 14, R.71-2, at PageID # 895.

Many of the facts and much of the evidence now in the record was unavailable during last year's various preliminary proceedings. No one knew what

impact Ohio's strict enforcement of its in-person collection requirements would have, nor how many initiatives would be excluded as a result. Today we do. This new evidence is critical to this case and reflects not only studied and practiced perceptions of the crisis, but also Defendants-Appellees' appreciation of how terrible the crisis was when the Complaint was filed.

Governor DeWine can hardly claim now that he expected in-person signature collection to go on as usual. He understood, like all Ohioans, that doing so would pose a grave danger to the public health and could lead to death, not only for circulators but also for the voters who signed and others through community spread.

Still, on April 30, 2020, in response to this litigation, Defendants modified their shutdown order to explicitly except "petition or referendum circulators." Ohio Dep't of Health, Dir.'s Stay Safe Ohio Order Re: Dir.'s Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order, Apr. 30, 2020.[7] This is further proof that prior to April 30, 2020 circulators were required to stay home just like everyone else.

As explained further below, the District Court on May 19, 2020 properly recognized Plaintiffs' dilemma and preliminarily enjoined Ohio's in-person signature requirement as well as its July 16 deadline. A motions panel of this Court

[7] https://tinyurl.com/y7s6cre2.

stayed the injunction, however, and Plaintiffs were thus forced to deal with COVID-19 as best they could in hopes that the Defendants' representations were correct about COVID-19's dissipating and Ohio's opening up. *See Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020) ("What's more, Ohio is beginning to lift their stay-at-home restrictions.").

Unfortunately, Defendants' optimistic predictions proved wrong. COVID-19 did not quit and Ohio did not open up. Just three days after this Court stayed the District Court's preliminary injunction, on May 29, 2020 Ohio extended its emergency bans on gatherings and distancing requirements until July 1, 2020. *See* Ohio Department of Health Director's Order Re: Director's Updated and Revised Order for Business Guidance and Social Distancing, May 29, 2020.[8] Like the many emergency orders before it, this May 29, 2020 extension allowed some businesses to remain open or re-open in limited fashions (including requiring social distancing), continued to absolutely prohibit "[a]ll public and private gatherings of greater than 10 people occurring outside a single household and connected property … except for the limited purposes permitted by Orders of the Director of Health," and required physical distancing in all gatherings that were allowed. Further, the May 29, 2020 order reiterated that all "indoor family entertainment

[8] https://coronavirus.ohio.gov/static/publicorders/revised-business-guidance-sd.pdf.

businesses and venues" were to remain closed until at least July 1, 2020, a date that was later extended indefinitely.

These "entertainment venues" included "auditoriums, stadiums, [and] arenas" – venues where signature collection is common, efficient and productive. Closing these venues meant there would be no sporting events, concerts, rallies, or celebrations that make mass signature collection possible. On top of those closings, Ohio's emergency orders, including its May 29, 2020 orders, expressly prohibited "parades, fairs, [and] festivals." Coupled with the other gathering bans, the May 29, 2020 order necessarily spelled the end to meaningful in-person signature collection in Ohio before the November election. Far from lifting its restrictions, Ohio extended them throughout the summer of 2020 and into the fall.

On June 30, 2020, for example, Ohio extended the terms of the prohibitions found in its various emergency orders until July 7, 2020. *See* Director's Order to Extend the Expiration Date of Various Orders.[9] Then, on July 7, 2020 Ohio extended these emergency restrictions indefinitely; they were left in force "until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies the Order." Director's Second

[9] https://coronavirus.ohio.gov/static/publicorders/Extend-ExpirationDate-Various-Orders.pdf.

Order to Extend the Expiration Date of Various Orders, July 7, 2020.[10] Also on July 7, 2020, the Governor announced new masking requirements for Ohioans. *See* Ohio Department of Health, Covid-19 Update: School Guidelines, Public Health Advisory System, July 2, 2020.[11]

By July 7, 2020, the COVID crisis in Ohio and nationwide had exploded. According to the New York Times, on July 7, 2020 COVID-19 "[c]ase numbers are surging throughout much of the United States, including in several states that were among the first to reopen." *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, July 7, 2020.[12] Included among the "states [that] have had recent growth in newly reported cases over the last 14 days," the Times reported on July 7, 2020, was Ohio. *Id*. In Ohio in July 2020 "[t]here have been at least 57,956 cases of coronavirus," and "[a]s of Tuesday morning [July 7, 2020], at least 2,927 people had died." *Ohio Coronavirus Map and Case Count*, N.Y. Times, July 7, 2020.[13] These are the circumstances under which Plaintiffs-Appellants were

[10] https://coronavirus.ohio.gov/static/publicorders/Second-Order-ExtendExp-Date-Various-Orders.pdf.

[11] https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/newsreleases-news-you-can-use/school-guidelines-public-health-advisorysystem.

[12] https://www.nytimes.com/interactive/2020/us/coronavirus-uscases.html?action=click&module=Top%20Stories&pgtype=Homepage.

[13] https://www.nytimes.com/interactive/2020/us/ohio-coronaviruscases.html.

required to comply with Ohio's in-person petitioning requirements during the 2020 election cycle.

Once the election was over and winter came, things only got worse. On November 19, 2020, Governor DeWine's Department of Health went so far as to enact a statewide curfew, *see* Director's Stay at Home Tonight Order, Nov. 19, 2021,[14] a curfew that was repeatedly extended, *see*, *e.g.*, Director's Stay at Home Tonight Order, Jan. 27, 2021,[15] and left in place until it was rescinded on February 11, 2021.

As for Ohio's ban on gatherings of more than 10 people, it constantly remained in place and was extended on March 2, 2021, *see* Director's Order: First Amended Revised Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio, with Exceptions,[16] until April 5, 2021. At the same time they rescinded this order on April 5, 2021, *see* Director's Order Rescinding Various Orders, April 5,

[14] https://coronavirus.ohio.gov/static/publicorders/health-order-encouraging-ohioans-to-stay-home.pdf.

[15] https://coronavirus.ohio.gov/static/publicorders/fourth-amended-stay-safe-tonight-order.pdf.

[16] https://coronavirus.ohio.gov/static/publicorders/first-amended-revised-order-for-mass-gatherings.pdf.

2021,[17] Defendants-Appellees imposed another ban on gatherings of more than 10 people and continued to require social distancing. *Id*.

In sum, COVID-19 continued throughout the spring and summer of 2020. It continued to prevent meaningful signature collection during the fall of 2020 and winter of 2021. Little relief from COVID-19 and the various governments' regulations of it has come as late as April 9, 2021, as demonstrated by the Supreme Court's action in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (ordering emergency relief because of COVID-19 and government's restrictions); *see also South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Gorsuch, J.) ("As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could.").

Ohio is still as of this writing subject to emergency orders of various kinds. Ohio has certainly not returned to normal. Even the most optimistic experts worry today that COVID-19 will continue and even resurge in various community "hot spots" across the United States. Many fear that it will return in full bloom as a "new winter surge" across the United States and kill tens of thousands more. *See* Rob Stein, *The Future Of The Pandemic In The U.S.: Experts Look Ahead*, NPR,

[17] https://coronavirus.ohio.gov/static/publicorders/directors-order-rescinding-various-orders.pdf.

March 24, 2021;[18] Hannah Beech & Livia Albeck-Ripka, *As Delta Variant Surges, Outbreaks Return in Many Parts of the World*, N.Y. Times, June 30, 2021[19] ("The nightmare is returning.").

No one knows what COVID-19 holds for the future. The present, however, has happened; Ohio remained in the grip of COVID-19 and its citizens remained under severe restrictions upon their daily activities during the 2020 election cycle and beyond. Ohio's 2021 election cycle continues to suffer. Signatures that could have been collected in March, April, May, June and July of 2020 and used to support initiatives during the November 2, 2021 election were lost to the pandemic and the Governor's orders.

The underlying contagiousness and severity of the COVID-19 virus remains a threat and will continue to impose a severe burden on future signature gathering efforts for the November 2, 2021 election. Plaintiffs continue in their quest to place their initiatives on the ballots of the 70-plus municipalities initially targeted. Meanwhile, the deadline for signatures in that upcoming election, like that for the November 2020 general election, is mid-July 2021. Plaintiffs-Appellants continue to experience irreparable harm and, like the plaintiffs in *Tandon* are desperately in

[18] https://www.npr.org/sections/health-shots/2021/03/24/976146368/the-future-of-the-pandemic-in-the-u-s-experts-look-ahead.

[19] https://www.nytimes.com/2021/06/30/world/asia/virus-delta-variant-global.html?action=click&module=Top%20Stories&pgtype=Homepage.

need of relief. *See Tandon*, 141 S. Ct. at 1297 (recognizing that in the face of COVID the plaintiffs "are irreparably harmed by the loss of free exercise rights 'for even minimal periods of time'".)

A. Preliminary Proceedings in The District Court

On April 27, 2020, Plaintiffs filed this action requesting a preliminary injunction against strict enforcement of Ohio's in-person petitioning requirements and deadlines. Verified Complaint, R.1. On May 19, 2020, the District Court applied the First Amendment's *Anderson-Burdick* framework and the Sixth Circuit's decision 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, the pandemic, and Defendants' emergency stay-at-home orders "severely burden [Plaintiffs'] 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 a leading election law expert, the District 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).[20] The District Court

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

accordingly entered limited relief, enjoining Ohio's in-person signature requirement and its early deadline. *Thompson*, 461 F.Supp.3d at 739. Professor Hasen again lauded the District Court's approach, stating that it "did a good job of trying to put the plaintiffs in the position they would have been in if there had been no pandemic." Hasen, *supra*. "[F]ollowing the Sixth Circuit precedent in the *Esshaki* case," Hasen observed, "the district court gave state officials maximum flexibility to cure the constitutional defects created by the confluence of the coronavirus and state law." *Id*.

B. Interlocutory Appellate Proceedings

Defendants took an emergency interlocutory appeal and 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 not only incorrectly applied a litmus test – "virtual or total exclusion" – to decide whether burdens are severe under the *Anderson-Burdick* framework, *id.* at 808, it also erroneously "[d]ismiss[ed] the realities of how the pandemic had essentially ended successful petitioning activity" in Ohio. Hasen, *supra*.

The panel's opinion misread both the *Anderson-Burdick* test and the facts in *Esshaki*. The panel concluded that because "Michigan's stay-at-home orders remained in place through the deadline for petition submission," *Thompson*, 959 F.3d at 809, the circulators in Michigan were precluded from collecting signatures

thereafter and were left "with only the signatures that they had gathered to that point [when the orders went into effect]." *Id*. This misstatement of fact proved critical to the motions panel's rationale for distinguishing not only *Esshaki*, but also *SawariMedia, LLC* v. *Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020).

The record in *Esshaki* contradicts the panel's description of the circumstances in Michigan and why they were purportedly different from those in Ohio. A co-plaintiff (Hawkins) of Esshaki's in that Michigan case had collected 3000 signatures before Michigan's first Stay-at-Home Order was announced, and then collected an additional 1283 signatures after that Order (without any formal exception for constitutionally protected activities) was announced. *Esshaki v. Whitmer*, 461 F. Supp.3d 646, 648 (E.D. Mich. 2020).[21] Circulators in Michigan, including one of Esshaki's co-plaintiffs (Hawkins), thus were not prevented from collecting signatures after Michigan's Stay-at-Home orders took effect. Hawkins did and was not arrested or punished for doing so. Michigan's orders made it harder, just as Ohio's did, but they did not prohibit it as the motions panel in this case incorrectly concluded.

The motions panel also erred when it concluded that "sterilizing writing instruments between signatures" was an effective measure to prevent the

[21] This fact was reported by the District Court in *Esshaki* on May 20, 2020, two weeks after the Sixth Circuit panel in *Essahki* agreed the burden was severe.

transmission of COVID-19. *Thompson*, 959 F.3d at 810. In May of 2020 this may have been a reasonable assumption. But we know today that it is incorrect. While surfaces can convey COVID-19, and wiping them down is always wise (even when there is no pandemic), COVID-19 is spread through aerosol. Standing anywhere near an infected person, even outside, while discussing the merits of a ballot initiative, was and remains the primary threat for transmitting COVID.

It was not until July of 2020 that the CDC recognized this and governments across the country began requiring masks inside and out. *See* Centers for Disease Control and Prevention, Press Release, *CDC calls on Americans to wear masks to prevent COVID-19 spread*, July 14, 2020.[22] Even then social distancing was still required, since masks are not perfect prophylactics.

On the day the motions panel stayed the District Court's preliminary injunction, Plaintiffs petitioned for rehearing en banc and moved the en banc Court to vacate the stay. *See* Petition for Rehearing En Banc and Motion to Vacate Stay, Doc. No. 45-1 (No. 20-3526, 6th Cir.). On May 30, 2021, following an intervening Supreme Court decision that cast doubt on the clarity of Ohio's First Amendment exception to its stay-at-home orders, which the panel had also relied upon, *see South Bay United Pentecostal Church v. Gavin*, 140 S. Ct. 1613 (2020), Plaintiffs moved the motions panel to reconsider its stay. *See* Plaintiffs' Emergency Motion

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

for Reconsideration, Doc. No. 57-1 (No. 20-3526, 6th Cir.). Both the May 26, 2020 petition and May 30, 2020 motion were denied on June 16, 2020. *See* Order, Doc. No. 65-1 (No. 20-3526, 6th Cir.).

On June 16, 2020, Plaintiffs requested that the Supreme Court vacate the stay. *See* Emergency Application to Lift Stay, No. 19A1054 (U.S., June 16, 2020). The Court immediately called for a response, which Defendants filed on June 22, 2020, followed by Plaintiffs' reply that same day. On June 25, 2020, the Supreme Court denied relief. *Thompson v. DeWine*, 2020 WL 3456705 (U.S., June 25, 2020).

Because of this Court's intervening decision in *SawariMedia, LLC* v. *Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020), and the worsening COVID crisis, on July 8, 2020 (one week before the deadline for signature submission) Plaintiffs filed an emergency motion with the motions panel once again asking that it lift the stay. *See* Plaintiffs' Emergency Motion to Partially Lift Stay, Doc. No. 67, *Thompson v. DeWine*, No. 20-3526 (6th Cir., July 8, 2020). On July 13, 2020 the motions panel denied the request while acknowledging that Plaintiffs' claim for relief was "arguable." *See Thompson v. DeWine*, No. 20-3526, slip op. (6th Cir., July 13, 2020) (unpublished).

On September 16, 2020, the same panel that stayed the District Court's preliminary injunction reversed it. *Thompson v. DeWine*, 976 F.3d 610 (6th Cir.

2020). It saw "no reason to depart from [its] previous holding that Ohio's ballot-access restrictions impose, at most, only an intermediate burden on [Plaintiffs'] First Amendment rights, even during COVID-19." *Id*. at 616.

Plaintiffs on February 2, 2021, with the assistance of the Northwestern University Supreme Court Clinic and with the support of several direct democracy experts as amici curiae, filed an interlocutory petition for writ of certiorari with the Supreme Court of the United States. *See* Petition for Writ of Certiorari, *Thompson v. DeWine*, No. 20-1072 (U.S., Feb. 2, 2021). Defendants responded on March 11, 2021, after having asked for and receiving an extension from the Supreme Court. On April 19, 2021, the Supreme Court denied interlocutory review. *See Thompson v. DeWine*, No. 20-1072 (U.S., April 19, 2021).

C. Return to District Court

Following the Supreme Court's denial of certiorari, Plaintiffs on April 21, 2021 moved for a status conference in the District Court. *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. 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.

In support of their cross-Rule 12 motion for final judgment and in response to Defendants' Rule 12(b)(6) motion to dismiss, Plaintiffs presented to the District Court several newly developed facts and arguments, including that Ohio did not open up as predicted following the May 26, 2020 stay; COVID exploded following the May 26, 2020 stay and even accelerated beyond that following the motions panel's September 16, 2020 reversal; no statewide citizen-initiatives qualified for the 2020 ballot and only four local citizen-initiatives out of Plaintiffs' anticipated 73 qualified.

The data on failed initiatives is particularly critical. No statewide citizen initiatives in Ohio qualified for the November 2020 general election ballot.[23] At first blush this might be surprising for Ohio elections, since at least two citizen-initiatives (those presented by the Intervenors in this case) were making concerted attempts, and Ohio has averaged approximately two citizen initiated ballots each election since the advent of popular democracy in 1912. *See* T. DONOVAN, ET AL., STATE AND LOCAL POLITICS, INSTITUTIONS AND REFORM 119 (Figure 4.4) (4th ed. 2015). But unlike in many states that relaxed their initiative requirements, Ohio's

[23] *See* NCSL National Conference of State Legislatures, Statewide Ballot Measures Database (Nov. 12, 2020), https://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx.

refusal to make any modification to its in-person petitioning requirements simply caused the inevitable. Without alterations to Ohio's in-person petitioning requirements during this crisis, initiatives in Ohio did not have a realistic chance.

This decrease in citizen initiatives was not limited to Ohio. Even after including data from those states that adopted reasonable modifications by reducing signature thresholds and allowing remote collection, the overall number of statewide initiatives nationwide still fell by 50% in 2020 (as compared to 2018). *See* Amanda Zoch, *2020 Ballot Measures: A Preview*, National Conference of State Legislatures, Aug. 18, 2020.[24] This evidence makes clear that for popular democracy to remain viable (as the framers of Ohio's Constitution hoped it would, *see* JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE 66 (2020) ("Direct democracy has been around since the country's birth"), "States, like Ohio, should tailor their ballot qualifying requirements to the current public health and real world realities …." Scholars' Brief at 15, R.71-2, at PageID # 897.

The evidence in this case demonstrates that popular measures have utterly failed to make Ohio's ballot during the pandemic. Strict enforcement of Ohio's in-person petitioning requirements during the COVID-19 pandemic have caused, and

[24] https://www.ncsl.org/research/elections-and-campaigns/2020-ballot-measures-a-preview-magazine2020.aspx.

will continue to cause, the total or virtual exclusion of initiatives from Ohio's ballots in November 2021 and each future election cycle until the pandemic is over. This is not only a loss for those who favor Ohio's constitutionally created right to make use of the initiative, it is a loss for all Ohioans.

To this day Ohio continues to limit public gathering and require social distancing. Ohio's June 1, 2021 order, trumpeted by Defendants, does not change that. S*ee* Ohio Department of Health, Director's Order Rescinding Various Orders, June 1, 2021.[25] Ohio's social distancing requirement and ban on public gatherings remain in the Ohio Department of Health's previous April 8, 2021 and May 17, 2021 orders. Both orders continue to require that Ohioans "must" avoid public "gathering[s]" and "must" practice "six feet" of "social distancing." *See* Director's Order, Re: Director's Amended Order for Social Distancing, Facial Coverings and Non-Congregating, April 8, 2021;[26] Director's Second Amended Order for Social Distancing, Facial Coverings and Non-Congregating, May 17, 2021.[27] The orders also continue to restrict seating capacities for inside gatherings to 25%. *Id*.

[25] https://coronavirus.ohio.gov/static/publicorders/directors-order-rescinding-various-orders-06-02-21.pdf.

[26] https://coronavirus.ohio.gov/static/publicorders/amended-directors-order-for-social-distancing-21.pdf.

[27] https://coronavirus.ohio.gov/static/publicorders/rev-2nd-final-amended-do-soc-dist-remove-face-cover-21.pdf.

While Governor DeWine and the Department of Health have altered the details of their COVID-19 orders and restrictions numerous times this past year, the substance of Ohio's (justifiable) COVID-19 response had not changed from March of 2020 until the end of May 2021. Ohio still prohibited gatherings and required social distancing in an effort to minimize the risk of transmission. As a result, Ohioans were not and are not now free to congregate, sign petitions, or engage in the same daily activities as they were before the COVID-19 pandemic erupted in early 2020.

D. Intervening Precedent Presented to the District Court

Not long after the motions panel issued its stay in this case, a different panel of this Court rendered a diametrically opposed decision, building on *Esshaki* and finding that Michigan's restrictions on initiative circulators were unconstitutionally severe as applied during the COVID-19 pandemic. *See SawariMedia, LLC*, 963 F.3d at 597. Like Ohio, Michigan shut-down the State on March 23, 2020 and then later included a formal exception for constitutionally protected activity. *See SawariMedia, LLC v. Whitmer*, 466 F. Supp.3d 758, 771 (E.D. Mich. 2020).[28] Circulators in Michigan, moreover, had time to collect signatures before those

[28] The *SawariMedia* district court decision was vacated by joint request of the parties on October 19, 2020. *SawariMedia LLC v. Whitmer*, 2020 WL 6580461, at *1 (E.D. Mich. 2020). That decision did not affect the Sixth Circuit's decision in *SawariMedia*, which is still published and remains as persuasive and controlling as the panel's interlocutory decisions in this case.

orders were adopted. *Id*. at 764. Michigan's stay-at-home orders took effect and lasted "from March 23, 2020, through May 7, 2020" without any formal exception for First Amendment activities, *id*. at 770, thereby prohibiting collection for eight weeks.

On May 7, 2020, three weeks before the May 27, 2020 deadline, Michigan adopted formal "Constitutional Exemption Language" making clear that Michigan's stay-at-home orders did not "abridge protections guaranteed by the state or federal constitution *under these emergency circumstances.*" *Id*. at 771. Still, because the District Court concluded that "it is far from clear that that language [in the exception] permitted citizens to gather petition signatures," *id.*, the exception "which was present only in the orders covering the last twenty days of the signature-collection period – did not meaningfully lessen the burden on Plaintiffs' First Amendment rights in the same manner or to the same extent as the exemptions in *Thompson*." *Id*.

Though it went to great lengths to distinguish the motions panel's stay in *Thompson*, the District Court's opinion in *SawariMedia* reveals that Michigan's experience with the COVID-19 crisis, its emergency stay-at-home orders, its exception for constitutionally protected activities, the timeframes for collecting signatures supporting signatures, and the relevant opportunities to collect those signatures, were not meaningfully different from those in Ohio. Circulators in both

States had time before the crisis to collect signatures. Circulators in both States arguably (at great risk and uncertain as they were about legalities) had time after COVID-19 struck and the stay-at-home orders were announced to collect more signatures. Initiative circulators in both States were physically and legally prohibited from collecting signatures for several weeks following the States' adoption of their initial stay-at-home orders – circulators in Michigan lost approximately eight weeks and circulators in Ohio lost five. *See* Verified Complaint, R.1, Page ID # 14.

Given the similarities between Michigan and Ohio, Plaintiffs argued to the District Court that there is no factual basis for the conclusion that Michigan's response to COVID-19 imposed a severe burden but Ohio's did not. The *Thompson* motions panel was incorrect about Michigan circulators' total inability to collect signatures after the announcement of the shut-down orders. *See Esshaki*, 461 F. Supp.3d at 648. This new evidence, Plaintiffs argued, amply supported their request for injunctive relief from Ohio's strict enforcement of its in-person petitioning requirements.

The District Court disagreed and rendered final judgment in favor of Defendants-Appellees on June 3, 2021. *See* Opinion and Order, R.78. It first concluded that Defendants-Appellees' belated Rule 12(b) motion was procedurally proper, and that it would accept Plaintiffs' pleadings as true in rendering its

decision. *See* Opinion and Order, R.78 at PageID# 957. Both parties introduced facts outside the pleadings in their Rule 12 motions, and the District Court also ruled that it could consider these facts in resolving the case under Rule 12(b) 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 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.

Id.

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 were still persuasive and supported dismissal. *Id*. at PageID # 965. The District Court 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.

Id. at PageID # 966 (citations omitted).

Applying the motions 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*. *Id*. The burden placed upon them under the panel's conclusion, the District Court explained, could therefore not be severe. *Id*.

In drawing this conclusion, the District Court dismissed the recently uncovered facts and precedents Plaintiffs-Appellants presented, including the fact that "[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 PageID # 968, and 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*. at 968-69, following the panel's May 26, 2020 stay of the District Court's preliminary injunction.

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. Borrowing language from the motion panel's decision, the District Court stated that "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).

Plaintiffs timely noticed their appeal on June 4, 2021.

SUMMARY OF ARGUMENT

The District Court erred in five ways. First, it improperly ignored *Anderson-Burdick*'s requirement that Courts consider all the facts and circumstances when addressing the constitutionality of a State's ballot access laws. These facts and circumstances include natural disasters as well as terrorist attacks, things that are not caused by government.

Second, the District Court improperly focused on Ohio's emergency orders as they exist today as opposed to last year before the November 3, 2020 election. Contrary to the rationale for the capable of repetition yet evading review exception, as well as the fact that last year's restrictions have impeded Plaintiffs' ability to collect signatures needed to place initiatives on this year's ballot, the District Court concluded that because the crisis is improving Plaintiffs face an "even steeper [hill] now." *Id*. at PageID # 970. Even if the crisis is improving, constitutional violations that occurred before this improvement demand a remedy. Not only does the capable of repetition yet evading review exception require that past constitutional violations be redressed, Plaintiffs continue to suffer present injuries caused by Ohio's actions and inactions last year.

Third, the District Court erroneously accepted as effectively controlling the motions panel's interlocutory conclusion that *Esshaki v. Whitmer*, 813 F. Appx. 170 6th Cir. 2020), and *SawariMedia, LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020), are distinguishable. *See* Opinion and Order, R.78, at PageID# 970. They are not. Either they were wrong or the motions panel was wrong in this case. They cannot both be correct.

Fourth, the District Court erroneously accepted the motions panel's conclusion that total or virtual exclusion is necessary under *Anderson-Burdick* for restrictions to be considered severe and subjected to strict scrutiny. Neither the

Supreme Court nor this Circuit had before the motions panel's decision ruled that total or virtual exclusion is necessary as opposed to sufficient. On the contrary, the Supreme Court has repeatedly rejected application of such litmus tests, including in *Anderson* itself. *See Anderson*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Last, the District Court erred in concluding that Ohio's strict enforcement of its in-person petitioning requirements during COVID-19 satisfied any standard of review under *Anderson-Burdick*, whether strict, intermediate, flexible or rational basis. Ohio's objective once COVID-19 hit, Governor DeWine now admits, was saving as many lives as possible. Continuing to demand that people closely interact with others in-person in order to exercise their constitutional rights when remote alternatives are readily available is not related to saving lives in any way. Forcing circulators to risk serious illness and death makes no sense and serves no legitimate end.

STANDARD OF REVIEW

A grant or denial of preliminary relief is not a final decision on the merits, has no res judicata effect, and does not constitute the law of the case. *See Technical Publishing Co. v. Lebhar–Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir.1984); *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1079 (9th Cir. 2020).

The Supreme Court in *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), explained why this is so:

> 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, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

(Emphasis added).

The Sixth Circuit has made clear that just as the findings of fact and conclusions of law rendered to support a preliminary injunction are not binding, findings of fact and conclusions of law rendered to deny a preliminary injunction are not binding either. "Rulings that simply deny extraordinary relief for want of a clear and strong showing on the merits, or that are avowedly preliminary or tentative, do not trigger law of the case consequences." *Wilcox v. United States*, 888 F.2d 1111, 1113 (6th Cir. 1989) (citations omitted).

This same logic applies to interlocutory reversals of preliminary injunctions. *See Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 n.3 (9th Cir. 1985), *rev'd on other grounds*, 475 U.S. 608 (1986). The same is true of refusals to grant interlocutory stays, *see Wilcox*, 888 F.2d at 1114 ("Refusal to stay a preliminary injunction pending appeal does not establish the law of the case"), as well as grants of those stays. *See East Bay Sanctuary Covenant v. Garland*, 993

F.3d 640, 660 (9th Cir. 2021) ("[I]n deciding whether the court should stay the grant or denial of a preliminary injunction pending appeal, the motions panel is predicting the likelihood of success of the appeal."). Neither the *Thompson* motions panel's stay nor its interlocutory reversal are therefore binding now.[29]

Denials of interlocutory certiorari are not binding precedent either: they do not reflect approval of the appealed decision's result nor do they bar another attempt at certiorari following final judgment, which is preferred. *See Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari).

[29] *Daunt v. Benson*, 999 F.3d 299 (6th Cir. 2021), is not to the contrary. There the Sixth Circuit applied the law-of-the-case doctrine to a prior interlocutory decision affirming a District Court's denial of a preliminary injunction where the plaintiffs had gone to the Sixth Circuit on an interlocutory basis and invited an early and final resolution of the case. Unlike the present case, in *Daunt* the "[p]laintiffs themselves … asked the district court to consolidate their motion for a preliminary injunction with a full trial on the merits," *id*. at 306, "argued in their motion for a preliminary injunction before the district court that 'there are only legal questions at issue' in this case," *id*. at 309, "conced[ed] that there was nothing that further factual development would contribute to the resolution of the case," *id*., admitted that no "further factual development could lead to a different outcome," *id*., took the interlocutory appeal themselves, and presented the Sixth Circuit with "a fully developed record" during their initial appeal. *Id*. at 308. The Sixth Circuit accordingly ruled that its prior rejection of the plaintiffs' appeal "has the hallmarks of a preliminary-injunction ruling that should be afforded law-of-the-case status: we issued a 'fully considered legal decision' as to the constitutionality of the Commission's eligibility criteria based on 'a decision making process that included full briefing and argument without unusual time constraints.'" *Id*. at 309.

Accordingly, a de novo standard of review applies to the District Court's Rule 12(b) dismissal of this case. *See Mertik v. Blalock*, 983 F.2d 1353, 1356 (6th Cir. 1993). The complaint is construed in the light most favorable to the Plaintiffs, all factual allegations are accepted as true, and the Court determines de novo whether Plaintiffs can prove no set of plausible facts in support of their claims. *See Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995).

ARGUMENT

I. The Case is Not Moot.

A. The Capable of Repetition Yet Evading Review Exception Applies.

The District Court was correct to conclude that the case is not moot. *See* Opinion and Order, R. 78, at PageID # 959-63. The Supreme Court and this Court have repeatedly recognized that elections are too short in duration to allow the litigation of constitutional challenges to election laws and procedures. The Supreme Court therefore has carved out a "capable of repetition, yet evading review" exception to mootness for just such cases, and both the Supreme Court and this Court have long applied that precedent. *See, e.g.*, *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Norman v. Reed*, 502 U.S. 279 (1992); *Meyer v. Grant*, 486 U.S. 414 (1988); *Graveline v. Benson*, 992 F.3d 524, 533 (6th Cir. 2021); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006).

The capable of repetition exception "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 735 (2008). The fact that the challenge is directed at an election that has passed is of no moment, since this is always the case when the exception is invoked. *See, e.g.*, *Davis*, 554 U.S. 724 (resolving a dispute from the 2006 election two years later); *Anderson*, 460 U.S. at 784 & n.3 (resolving a dispute from the 1980 election in 1983).

The exception applies equally to facial and as-applied challenges. *See Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 463 (2007) ("We have recognized that the "'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks."). It is for this reason that identical recurrences are not needed to support the exception. *Id.*; *see also Graveline*, 992 F.3d at 533 (rejecting application of strict "same plaintiff" requirement to support exception).

So long as there is a reasonable expectation that a similar controversy will recur, an election challenge is not mooted by an intervening election. *See Dunn v. Blumstein,* 405 U.S. 330, 333 n. 2 (1972). This premise has been applied equally to

initiatives as well as elections of candidates. *See ACLU of Nevada v. Lomax*, 471 F.3d 1010 (9th Cir. 2006).

The Supreme Court recently made clear that the capable of repetition exception applies with special force to COVID-19 restrictions. The reason is simple; they are emergency executive orders that come and go. One is frequently replaced by another. Using these fleeting changes to justify mootness would mean that the constitutional impacts of COVID-19 restrictions would be immune from judicial scrutiny.

Thus, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam), the Court agreed that under circumstances like those presented here, with the New York Governor frequently changing COVID-19 restrictions, the case was not rendered moot: "It is clear that this matter is not moot." (Citations omitted). The Court reiterated in *Tandon*, 141 S. Ct. at 1297, that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." Instead, "so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id*. *See also South Bay Pentecostal Church*, 141 S. Ct. at 720 (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.").

This Court, like the Supreme Court, has routinely applied the capable of repetition exception in election cases. The Sixth Circuit in *Blackwell*, 462 F.3d at 584, observed that that the too-short-in-duration requirement "is easily satisfied" in election challenges. "Legal disputes involving election laws almost always take more time to resolve than the election cycle permits." *Id*. (citations omitted). "In the present case, less than eleven months elapsed between the filing of the lawsuit and the occurrence of the election, and future challenges will face the same problem." *Id*. By way of comparison, only seven months elapsed in the present case.

In terms of the likely-to-recur prong, this Court found in *Blackwell*, 462 F.3d at 584-85, that it "is likely that the LPO will once again seek to place candidates on the general election ballot in 2008." "As a result, the party again will face the requirements that its candidates" were then challenging. *Id*. at 585. "Considering the 'somewhat relaxed' repetition standard employed in election cases, this issue easily satisfies the 'capable of repetition, yet evading review' exception and is not moot." *Id*. (citations omitted). *See also Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 394 (6th Cir. 2016).

Plaintiffs-Appellants continue to actively attempt to qualify their initiatives for local ballots. *See* Declaration of Chad Thompson, R.71-1, at PageID # 871. The Ohio laws being challenged requiring in-person collection, an early deadline, and unadjusted numbers, remain the same. COVID-19 has not presented a temporary emergency; it remains a full-blown crisis in the second year of its indefinite duration. *See South Bay Pentecostal Church*, 141 S. Ct. at 720 (Gorsuch, J.) ("As this crisis enters its second year … it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could.").

There is not only a likelihood of recurrence, there is recurrence here. And even if the problem were not presently recurring, it will occur again in the future as made clear by Senators Menendez and Collins. *See* Bob Menendez & Susan Collins, *There Will Be Another Pandemic — Are We Prepared For It*?, N.Y. TIMES, June 14, 2021[30] ("it's not a matter of if but when another pandemic or public health emergency will strike").

Contrary to Defendants' assertions below, Plaintiffs do not seek to have their initiatives retroactively placed on the November 3, 2020 election ballot. Instead, they ask that the Court use the capable of repetition yet evading review exception to decide whether Ohio's restrictions on the November 3, 2020 election were constitutional. This constitutional conclusion will then inform future elections,

[30] https://www.nytimes.com/2021/06/14/opinion/collins-menendez-covid-commission.html?action=click&module=Opinion&pgtype=Homepage.

which the Supreme Court in *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), made clear was the objective of the exception.

In *Anderson*, for example, where the Supreme Court judged the validity of Ohio's ballot access laws as applied to the 1980 election notwithstanding that the election was over, the Court cited *Storer* to support its single-sentence rejection of mootness: "Even though the 1980 election is over, the case is not moot." *Anderson*, 460 U.S. at 784 n.3 (citing *Storer*, 415 U.S. at 737 n.8). The question was not whether Ohio's law was valid in 1983, but rather whether it was valid in 1980 when John Anderson was running for President. *See also Norman v. Reed*, 502 U.S. 279, 288 (1992). The same must be true here. Under the capable of repetition exception, the question is whether Ohio's restrictions before the November 3, 2020 election were constitutional.

B. Ohio's Restrictions from March 2020 to the Present Burden Plaintiffs' Ability to Access the November 2, 2021 Ballot.

Even if no capable of repetition yet evading exception existed, Plaintiffs' case would still not be moot. This is because Ohio's unconstitutional restrictions in March, April, May, June and July of 2020 continue to burden Plaintiffs' ability to access the November 2, 2021 ballot. These unconstitutional past restrictions in 2020 burdened Plaintiffs' ability to gather signatures supporting initiatives that could be placed on the November 2, 2021 ballot as well as the now past November 3, 2020 ballot.

While signatures can only be collected after filing initiatives with local officials under Ohio, there is no closing date in Ohio by which those signatures must be used. Signatures collected between March and July of 2020 could have thus been used to qualify initiatives for the November 2, 2021 ballot. Likewise, Ohio's many (and even more draconian) restrictions from August 2020 through May 2021, in addition to the restrictions that existed from March to July of 2020, have burdened Plaintiffs' First Amendment right to access the November 2, 2021 ballot. Even if the capable of repetition yet evading review exception did not exist, this case and the challenges to all of these restrictions therefore would remain alive in this Court.

Because the initial Complaint was designed to win this relief in preliminary and permanent fashion in time for the November 3, 2020 general election, that election date was included in Plaintiffs' demand for relief. This does not mean, however, that relief relating to other elections is now foreclosed. On the contrary, as Rule 54(c) of the Federal Rules of Civil Procedure expressly states, a "final judgment should grant the relief to which either party is entitled, even if the party has not demanded that relief in its pleadings." *See Frank v. Walker*, 819 F.3d 384, 388 (7th Cir. 2016); *Pension Ben. Guar. Corp. v. East Dayton Tool and Die*, 14 F. 3d 1122, 1127 (6th Cir. 1994); *Morrow v. South*, 540 F. Supp. 1104, 1111 (S.D. Ohio 1982). Should Plaintiffs-Appellants prevail here, they are entitled to

prospective relief as necessary, including a declaratory judgment, stating that their initiatives were unconstitutionally kept off the ballot, their rights are presently being burdened, and prohibiting similar conduct in the future.

The District Court erroneously failed to acknowledge what the capable of repetition exception and the continuing harm being inflicted on Plaintiffs required it to do. The District Court stated that because Ohio has now rescinded and relaxed some of its COVID-19 orders, Plaintiffs-Appellants have an even tougher case. This is not true. The question is not simply whether Ohio's present COVID-19 restrictions are valid. It is whether the restrictions in place from March 2020 until today have unconstitutionally burdened Plaintiffs' First Amendment rights. The continuing cumulative nature of the burden on Plaintiffs' ability to access the November 2, 2021 ballot require that this question be addressed.[31] It is not moot.[32]

[31] This Court's recent decision holding that a challenge to Tennessee's ban on first-time absentee voters was moot does not alter this conclusion. *See Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6141, slip op. (6th Cir., June 22, 2021). First, unlike Plaintiffs-Appellants here, the plaintiff in that case lacked standing because he was no longer qualified to vote absentee in Tennessee. *See id.* at 10. Second, the plaintiff in that case challenged a long-standing statutory provision as applied during the COVID-19 pandemic, but did not challenge emergency orders that remain in effect, as Plaintiffs-Appellants do here. Third, whereas that plaintiff asserted a discrete injury to his voting rights arising from a specific election, Ohio's enforcement of its emergency orders in 2020 and at present continue to injure Plaintiffs-Appellants' efforts to place their initiatives on the 2021 general election ballot. These critical distinctions render the rationale of *Memphis A. Philip Randolph Inst.* inapposite here.

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

This case stands in stark contrast to the case as it existed when the preliminary proceedings were litigated. The record now includes undisputed facts that establish Plaintiffs' entitlement to relief, even under the improper "exclusion or virtual exclusion" litmus test that the motions panel adopted.

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, and Plaintiffs 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-19 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 is not an effective means of preventing transmission of the virus between petition circulators and signers. Far more important than avoiding contaminated surfaces is

[32] The emergence of vaccines does not change this. They were not available before 2021 and therefore do not factor into the constitutional analysis relevant to the November 3, 2020 election. Nor were they available for most of the time Plaintiffs would have been collecting signatures for the November 2, 2021 election. Further, Ohioans' vaccination rate remains less than 50%.

avoiding infected people, whose mere presence and breathing spreads the disease – even when they exhibit no symptoms. The activity of gathering signatures in person, from large numbers of strangers day after day, thus poses unacceptable risks to the health and well-being not only of circulators and signers, but all citizens through community spread.

Third, contrary to Defendants' representation to the motions panel in May of 2020, Ohio never "opened up" before the November 3, 2020 election. Instead, Ohio shut down even further than it had been, requiring masks and imposing curfews from November 19, 2021 to February 11, 2021. *See* Ben Axelrod, *Ohio lifts COVID-19 curfew effective Thursday; ends last call restrictions*, WKYC, Feb. 11, 2021.[33] Nor has Ohio yet fully "opened up." Ohio's emergency restrictions still state that people "must" refrain from gathering or congregating in groups of more than ten people in the absence of a stated exception, and social distancing is still required.

Fourth, COVID is not only deadly, but continues to spread and kill at an alarming rate. As of July 3, 2021, 603,018 Americans have died from COVID. *See* Centers for Disease Control and Prevention, Covid-19, July 3, 2021.[34] That figure

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

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

includes 20,344 Ohioans. *See* Ohio Department of Health, COVID-19 Dashboard, July 3, 2021.[35] And those numbers keep rising, with no clear end in sight. New COVID variants only increase the risks. *See* Beech & Albeck-Ripka, *supra.* According to the Centers for Disease Control and Prevention, as of July 3, 2021 there have been 33,530,880 COVID-19 cases in the United States, with the number increasing at a steady rate. Centers for Disease Control, *supra*.

Fifth, Defendants have now admitted for purposes of their Rule 12(b)(6) motion that collecting signatures at the start of the COVID 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. This Rule 12 admission was unavailable on May 26, 2020 when the panel concluded that Ohio's "First Amendment protected speech" exception allowed circulation during the first weeks of the COVID crisis. Nor did the panel on September 16, 2020 address whether these allegations are sufficient to state a claim under Rule 12(b) standards.

Taken together, the foregoing facts demonstrate that Ohio's strict enforcement of its in-person petitioning procedures has resulted 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

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

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 "beginning to lift their stay-at-home restrictions," *Thompson*, 959 F.3d at 810 – not, at least, in any meaningful sense that would have enabled 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 before the November 3, 2020 election. Those same restrictions, along with their more recent iterations, continue to impose severe burdens on Plaintiffs-Appellants' First Amendment rights to place their initiatives on the November 2, 2021 election ballot.

Yet, while Ohio adopted reasonable modifications to certain election laws in response to the COVID pandemic – for example, it postponed its 2020 primary election and extended the use of absentee ballots – Ohio continued to demand strict compliance with its in-person petitioning procedures. *See id.* at 807. As it stands, 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. 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." *Blackwell*, 462 F.3d at 586 (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-19 pandemic.

In 2020, many 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, R.71-2 at PageID # 896. Whether voluntarily or by court order, 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), *aff'd*, *Libertarian Party of Il. v. Cadigan*, 2020

WL 5104251 (7th Cir. Aug. 20, 2020); *Green Party of Md. v. Hogan*, No. 1:20-cv-1253 (D. Md. June 19, 2020); *Goldstein v. Sec. of the Commonwealth*, 142 NE 3d 560 (Mass. 2020). 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-19 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-Appellants are entitled to relief, even under the exclusion or virtual exclusion standard that the motions panel adopted in this case.

III. "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-Appellants 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 Blackwell*, 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 *Blackwell* 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-Appellants' rights is severe and warrants relief.

The Sixth Circuit's decisions in related actions arising under the COVID-19 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-19 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 Fed. Appx. at 171 (emphasis added). The 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 the Sixth Circuit 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-19 pandemic 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.

The Sixth Circuit declined 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.

IV. The District Court Erred By Not Applying *Anderson-Burdick* Under All the Facts and Circumstances, Including the Pandemic.

As explained above, *Anderson-Burdick* mandates a "practical assessment of the challenged scheme's justifications and effects." *Storer*, 415 U.S. at 730; *see generally Arizona Green Party*, 838 F.3d at 990. This Court in both *Esshaki*, 813 Fed. Appx. 170, and *SawariMedia*, 963 F.3d 595, performed this task. Both panels included the facts presented, including the natural disaster called COVID-19, in assessing the constitutionality of Michigan's ballot access requirements for candidates and initiatives.

The District Court, in contrast, did not. It erred by not conducting the required "practical assessment." It instead ruled that because Ohio was not responsible for the pandemic, the pandemic was not to be factored into the *Anderson-Burdick* calculus. Opinion and Order, R. 78, at PageID # 969. But as Professor Morley has observed, while "[o]rdinary obstacles such as heavy rain or

snow are insufficient to empower a court" to take action, natural disasters compel federal courts to remedy the injuries they cause to constitutional rights. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 591-92 (2018). The deadly world-wide COVID-19 pandemic, which has killed hundreds of thousand of Americans already, is one such disaster.

In contrast to ordinary weather patterns, natural disasters like hurricanes have constitutional repercussions. "[E]lection emergencies that have a reasonable likelihood of substantially disrupting an impending or ongoing election and denying a significant proportion of the electorate an opportunity to vote would violate due process." *Id*. at 591 (footnote omitted). "To rise to the extreme level of a due process violation, an election emergency must make voting or the conduct of the election unreasonably dangerous or impracticable, rather than merely inconvenient or time-consuming." *Id*. (footnote omitted).

COVID-19 disenfranchised a huge swath of voters in Ohio. Those seeking to make use of Ohio's citizen-initiative mechanism lost their votes.

As the Court recognized in *Florida Democratic Party v. Scott*, 215 F. Supp.3d 1250, 1257 (N.D. Fla. 2016), natural disasters that limit ballot access and voting rights require constitutional accommodation. Applying *Anderson-Burdick*, it concluded that that following Hurricane Matthew's devastating impact on the State

of Florida the First Amendment required that officials extend the deadline for voter registration. *See also Georgia Coalition for the People's Agenda v. Deal*, 214 F. Supp.3d 1344, 1345-46 (S.D. Ga. 2016) (ordering extension of voter registration deadline because of hurricane).

The COVID-19 pandemic is no less devastating and likewise demands judicial action to remedy the constitutional injury arising from Ohio's strict enforcement of its in-person petitioning procedures under such extraordinary circumstances.

V. Ohio's Refusal to Accommodate Circulators and Voters Cannot Pass Lesser Scrutiny.

Defendants-Appellees' strict enforcement of Ohio's in-person petitioning requirements during the height of a world-wide pandemic cannot pass any level of scrutiny. Even assuming that the District Court were correct and Plaintiffs-Appellants experienced only an "intermediate" burden, *see* Opinion and Order, R. 78, at PageID # 966, which is subject to "flexible" balancing, *id*. at PageID # 967, Ohio's strict enforcement of its in-person signature collection requirements during a world-wide health crisis cannot pass that test. Indeed, Ohio's demand is not even rational.

Ohio's stated objective during the COVID pandemic was and remains saving lives. To do so it went so far as to cancel an in-person election on March 17, 2020

and replace it with no-excuse remote voting over one month later. Forcing citizens to engage in the very lethal conduct that Ohio went to such great lengths to avoid and which Defendants-Appellees knew could kill hundreds if not thousands through community spread, all while ignoring a simple and expedient remote accommodation, one that Ohio has already applied to voting, lacks any rational basis.

Scott, 215 F. Supp.3d 1250, illustrates this point. Following Hurricane Matthew, the plaintiffs there challenged Florida's refusal to extend its deadline for voter registration. Applying *Anderson-Burdick*, the Court concluded that Florida's rationale for its decision not to extend the deadline could not pass any level of scrutiny under *Anderson-Burdick*, not even the rational basis test. In terms of any intermediate test between rationality review and strict scrutiny, the Court concluded:

> In no way could Defendants argue that there is some sort of limitation that requires them to burden the constitutional rights of aspiring eligible voters. Many other states, for example, either extended their voting registration deadlines in the wake of Hurricane Matthew or already allow voter registration on Election Day. There is no reason Florida could not do the same.

Id. at 1257.

"[B]ecause Florida cannot put forth a 'legitimate state interest[ ] sufficiently weighty to justify the' burden," the Court continued, Florida's statutory framework

applied in the aftermath of Hurricane Matthew was unconstitutional under the *Anderson–Burdick* test. *Id*. (citation omitted). Indeed, the Court continued, "Florida's statutory framework is unconstitutional even if rational basis review applied (which it does not)." *Id*. "Quite simply, it is wholly irrational in this instance for Florida to refuse to extend the voter registration deadline when the state already allows the Governor to suspend or move the election date due to an unforeseen emergency." *Id*. (citation omitted).

The same is true here. Ohio's Governor was authorized to pass emergency orders during COVID-19 changing every aspect of life in the State, including voting at elections. His refusal to accommodate a single facet of Ohio's experience with COVID-19, that is, the circulation of petitions, in the same way he accommodated voting is "wholly irrational." He could have easily done so, and as demonstrated by experiences in other States and the experience with voting in his own State, Ohio's election machinery would not have suffered in the least. The Governor's insistence on in-person collection appears to suggest animus against popular democracy and those who support it. However, "a bare [governmental] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis original).

CONCLUSION

Plaintiffs-Appellants respectfully request the District Court's final judgment be reversed.

Respectfully submitted,

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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 12,944 words.

s/*Mark R. Brown*
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CERTIFICATE OF SERVICE

I certify that this Brief was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding.

s/*Mark R. Brown*
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiffs-Appellants pursuant to Sixth Circuit Rule 30(g) designate the following filings from the district court's electronic records:

Verified Complaint, R.1, Page ID # 14

Stipulated Facts, R.35, Page ID # 469, 470, 472

Motion, R.65

Order, R.66

Motion to Dismiss, R.68

Declaration of Chad Thompson, R.71-1

Brief of Direct Democracy Scholars, The Initiative and Referendum Institute, and Citizens in Charge as Amici Curiae Supporting Petitioners, *Thompson v. DeWine*, No. 20-1072 (U.S.), March 8, 2021, R.71-2, PageID # 892, 893, 894, 896, 897

Plaintiffs' Reply, R.74

Opinion and Order, R.78, PageID # 957, 962, 965, 966, 967, 968, 969, 970