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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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Defendants-Appellees' Brief is most notable for what it lacks. Defendants-Appellees fail to address the fact that no statewide citizen initiatives qualified for Ohio's 2020 ballot. They fail to acknowledge that that the number of successful statewide initiatives nationwide was reduced by half, even after including those in States that accommodated circulators. They fail to explain how natural disasters like hurricanes can require accommodation but world-wide pandemics that kill exponentially more people do not.

They essentially concede that the motions panel in this case may have misunderstood a critical fact in Michigan, rendering both the panels' interlocutory orders in *Esshaki* v. *Whitmer*, 813 Fed. Appx. 170 (6th Cir. 2020), and *SawariMedia, LLC* v. *Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020),[1] in conflict with the panel's logic here, but then claim those panels were simply wrong. *See* Brief for Defendants-Appellees at 47 ("it calls for reconsidering *SawariMedia* and *Esshaki*, not *Thompson*"). And as for the requirement that all factual allegations, including Plantiffs' claims that it was impossible to collect signatures in-person, must be taken as true under Rule 12(b) of the Federal Rules, Defendants assert without

[1] The Sixth Circuit panel's decision denying a stay was vacated on December 9, 2020. *See SawariMedia LLC v. Whitmer*, No. 20-1594 (6th Cir., Dec. 9, 2020). *SawariMedia* remains relevant, however, because before it was vacated by either the District Court or this Court the panel in this case distinguished it.

authority that this "technicality" can be ignored. *See* Brief for Defendants-Appellees at 51.

In regard to what they do say, several of Defendants-Appellees's arguments are mistaken or incorrect, as explained below.

I. The COVID-19 Crisis Continues in Ohio and Across the United States.

Defendants-Appellees attempt a pastel-painted picture of the last year's events. No mention is made of the number of deaths in Ohio nor the burdens endured by Ohioans for 17 months. Instead, Defendants-Appellees once again incorrectly claim, as they did last year, that it was never that bad and everything in Ohio is now "back to normal." *Id.* at 28.

The claims are as false now as they were in May of 2020. People are still dying and COVID-19 is still spreading. On July 13, 2021, the National Institutes of Health reported that emerging COVID-19 variants, including the Delta variety, "spread[] more easily." National Institutes of Health, *Viral Variants: Cause for Concern, Time for Action*, July 13, 2021.[2] Vaccines, meanwhile, "are less effective." *Id*. "With vaccination rates still not at the threshold needed to stop the spread of Covid-19, most Americans who are unprotected will likely contract the rapidly spreading Delta variant," according to Dr. Scott Gottlieb, former

[2] https://covid19.nih.gov/news-and-stories/viral-variants.

commissioner of the Food and Drug Administration. Madeline Holcombe, *People unvaccinated against Covid-19 risk the most serious virus of their lives, one expert says*, CNN, July 19, 2021.[3] "Cases are going up, hospitalizations are going up, death rates are ticking up," the Surgeon General said on July 19, 2021. Madeline Holcombe, *Don't be fooled into letting your guard down against Covid, US Surgeon General says*, CNN, July 20, 2021.[4] "Expectations that the US would find itself returning to a pre-pandemic normalcy this summer are quickly giving way to the realities of a prolonged fight against Covid-19, as a rise in infections has now been recorded in all 50 states." Travis Caldwell, *Covid-19 risk for some unvaccinated people is higher than it's ever been, expert says*, CNN, July 17, 2021.[5]

"'Based on the trends we're seeing, it's clear that the delta variant is on the rise in Ohio,' said [Dr. Bruce] Vanderhoff [from the Ohio Department of Health], adding the variant is on its way to becoming a dominant virus strain in the state."

[3] https://www.cnn.com/2021/07/19/health/us-coronavirus-monday/index.html.

[4] https://www.cnn.com/2021/07/20/health/us-coronavirus-tuesday/index.html.

[5] https://www.cnn.com/2021/07/17/health/us-coronavirus-saturday/index.html.

Delta variant on a trajectory to become the dominant strain in Ohio, 10WBNS, July 14, 2021.[6]

"As the highly contagious Delta variant of the coronavirus fuels outbreaks in the United States, the director of the [CDC] warned on Friday that 'this is becoming a pandemic of the unvaccinated.'" *As the Delta variant fuels rising U.S. cases, the C.D.C. director warns of a 'pandemic of the unvaccinated,'* N.Y. Times, July 16, 2021.[7] "'[I]f you are not vaccinated, you remain susceptible, especially from the transmissible Delta variant, and are particularly at risk for severe illness and death,' Dr. Rochelle P. Walensky, director of the [CDC], said at a recent news conference." Lauren Leatherby & Amy Schoenfeld Walker, *Unvaccinated States Feel Brunt of Delta-Led Covid Uptick*, N.Y. Times, July 17, 2021.[8]

Because Ohio's 46% vaccination rate, *see Track Coronavirus Cases in Places Important to You*, N.Y. Times, July 20, 2021,[9] "trails the national average,"

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[6] https://www.10tv.com/article/news/health/coronavirus/ohio-health-leaders-answer-questions-surrounding-delta-variant-of-covid-19-in-the-state/530-c0ab5a4e-afc4-4ef7-a7d7-bb2246fd5d25.

[7] https://www.nytimes.com/live/2021/07/16/world/covid-variant-vaccine-updates.

[8] https://www.nytimes.com/interactive/2021/07/17/us/delta-variant-us-growth.html?action=click&module=Top%20Stories&pgtype=Homepage.

[9] https://www.nytimes.com/interactive/2021/us/covid-cases-deaths-tracker.html.

Zachary Wolf, *Say goodbye to your carefree Covid summer*, CNN, July 17, 2021,[10] Ohio remains particularly at risk. "Cases are rising, to varying degrees, in all 50 states, an abrupt switch from just weeks ago." *Id*. Ohio's COVID-19 increase over the last two weeks has been particularly problematic at 98%. *See Track Coronavirus Cases in Places Important to You,* N.Y. Times, July 20, 2021, *supra*. Not only has Ohio's rate doubled in two weeks, eight people each day, on average, have died in Ohio because of COVID-19 over the one. *Id*.

II. Ohio Continues to Restrict People's Movements, Gatherings and Actions Because of COVID-19.

Defendants-Appellees assert that as of June 2, 2021 "most" emergency orders have been repealed or rescinded. *See* Brief of Defendants-Appellees at 9. Exactly what this means is left unclear, as Defendants-Appellees fail to explain which emergency orders remain in place. But Defendants-Appellees do not deny that some emergency COVID-19 restrictions remain.

Figuring out which, unfortunately, can be problematic given the number of restrictions that have been put in place and the fluidity of their development. *See South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021), (Gorsuch, J.) ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put

[10] https://www.cnn.com/2021/07/17/politics/what-matters-covid-summer/index.html.

restoration of liberty just around the corner."). Because no formal process governed how Defendants-Appellees created, changed and rescinded their orders, not only could Defendants here quickly "move the goalposts" to suit their needs, the orders put in place often lacked the rigor of ordinary legislation and administrative rules.

Ohio's April 8, 2021 and May 17, 2021 emergency orders banning gatherings and commanding people to continue six-foot distancing present examples. While the May 17, 2021 order expired of its own force, the April 8, 2021 never has. Nor was it rescinded on June 2, 2021, or at any other time. So is the April 8, 2021 emergency order banning gatherings of more than ten and requiring social distancing still in effect? Defendants-Appellees suggest not, but never present a definitive claim.

Perhaps the reason is that Defendants want Ohioans to believe those restrictions are still in place (even if they are not). According to the Ohio Department of Health's July 16, 2021 order announcing "universal recommended best practices for COVID-19 prevention," Ohio Department of Health, Responsible Restart Ohio: Residential Camps, July 16, 2021,[11] "[i]If you are not fully vaccinated … [i]n addition to wearing a mask as outlined above, maintain at least 6 feet of distancing from others when possible ... [a]void gathering in groups with other unvaccinated individuals when possible … [and] [i]f you gather with other

[11] https://coronavirus.ohio.gov/static/responsible/Residential-Camps.pdf.

unvaccinated individuals, maintain groups of no more than 10 people, separated from other groups by at least 6 feet." The July 16, 2021 order further states that "[r]egardless of vaccination status, you may be asked to wear a mask in a healthcare setting … and [i]f you are fully vaccinated, you may be asked to wear a mask in certain situations …." *Id*. These instructions clearly extend to everyone and are not limited to camps.

Regardless of whether the April 8 order remains in effect, Ohioans are still being instructed by Ohio's Department of Health to keep their distance, avoid gatherings, and wear masks. At least that is what more than half of the population (the unvaccinated majority) in Ohio is being told to do. Contrary to Defendants-Appellees' claim, things are not "back to normal," or even close to it.

III. Plaintiffs Were and Remain Severely Burdened With No Realistic Options.

Even if Ohio were to have lifted all of its restrictions, and even if COVID-19 were to miraculously disappear, nothing can change the fact that Plaintiffs-Appellants have been severely burdened by Ohio's strict enforcement of its in-person petitioning requirements for the past fifteen-plus months – a critical point that Defendants-Appellees fail to address. The undisputed facts demonstrate that Plaintiffs-Appellants' collection efforts were thwarted in 69 out of the 73 municipalities they had targeted for the November 3, 2020 election, and no statewide initiatives qualified.

Given these undisputed facts, Plaintiffs-Appellants need not belabor the obvious: COVID-19 has imposed an incalculable burden on American business, American government, America's economy and the daily life of every American citizen. It has also severely burdened Plaintiffs' First Amendment rights under these extraordinary circumstances. Defendants' rosy pronouncements to the contrary, like their prior predictions, cannot be reconciled with the reality.

Defendants-Appellees claim that Plaintiffs-Appellants "failed to adapt" to the pandemic and experienced "reluctance or lack of creativity." Brief for Defendants-Appellees at 18. "During the pandemic," they argue, "people across this country have come up with many 'contactless' ways to go about their business and interact with the public. Thompson could have done the same." Brief for Defendants at 38.

This is nonsense. The laws challenged here prohibit creativity. They prohibit adaptation. They prohibit the "contactless ways" businesses, lawyers, courts, schools, governments, and voters, to name a few, were permitted to interact. Throughout the pandemic Ohio has continued to insist that Plaintiffs-Appellants obtain their signatures by hand and in person. There is no remote option. Mail cannot be used. Remote collection over the Internet is not an option. Yet Defendants-Appellees contend that the burden of complying with Ohio's laws under these extraordinary circumstances is solely attributable to "the decisions of

private parties." Brief for Defendants-Appellees at 36. They are not. Ohio's strict enforcement of its in-person petitioning requirements is the very definition of state action under 42. U.S.C. § 1983.

If Defendants-Appellees are correct, why did Ohio, like the "vast majority of states allow[] voters to cast a ballot by mail" in the 2020 election? Note, *Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 Ford. Urban L.J. 967, 991-92 (2021). Why was Ohio among the "19 states [that] postponed their primaries"? *Id*. Were voters not creative enough to come up with contactless ways to vote on their own? The question answers itself: voters are not free to develop their own contactless voting methods. Voting procedures are prescribed by the government and only the government has authority to modify them. The same goes for circulating petitions in order to place initiatives and candidates on ballots.

IV. The Case is Not Moot.

Defendants-Appellees finally conclude, after hedging in prior filings with this Court and the Supreme Court, that the case is moot. The capable of repetition yet evading review doctrine does not apply. They are mistaken. Indeed, this case would not be moot even if there were no such exception. The reason is that, as the District Court concluded, the injury inflicted on Plaintiffs-Appellants is not only

capable of recurring, it is recurring. Opinion and Order, R.78 at PageID# 962. COVID-19 has not quit, Ohio still requires in-person signature collection, Ohio still has emergency COVID-19 restrictions, and Plaintiffs-Appellants are still attempting to collect signatures to qualify their initiatives in some of the same municipalities that were targeted in March, April and May of 2020.

Plaintiffs-Appellants are therefore suffering a continuing and cumulative injury caused by Ohio's strict enforcement of its in-person petitioning requirements during the ongoing pandemic. The conditions, in-person collection requirements and emergency orders in place in March, April, May, June, July, etcetera of 2020 prevented Plaintiffs-Appellants from gathering signatures not only for use in the November 3, 2020 election, but also the November 2, 2021 election. The constitutionality of these restrictions in combination with Ohio's laws and emergency orders therefore remains a live matter. Defendants-Appellees do not address, much less refute, any of this.

Defendants-Appellees are also wrong about whether the capable of repetition yet evading review exception applies. Contrary to their claim, *Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6141, slip op. (6th Cir., June 22, 2021),[12] does not support their position.

[12] As of this writing West pagination has not yet been published for this case.

First, the lone individual plaintiff in that case was no longer otherwise qualified to vote absentee in Tennessee after the election, and therefore irrespective of mootness did not have standing to challenge Tennessee's ban on first-time absentee voters. *Id*. at 10. In contrast, Plaintiffs-Appellants have continuing standing to challenge Ohio's restrictions on signature collection and continue to attempt to collect signatures in Ohio in order to place their initiatives on ballots.

Second, the challenge in Tennessee focused only on COVID-19's impact on a long-standing statutory voting restriction. *Id*. at 3. There was no claim that emergency COVID-19 restrictions played any part in causing the complained-of injury, nor was there any indication that any relevant emergency restrictions even remained in place. Here, in contrast, Plaintiffs-Appellants' challenge is based not only on COVID-19, but also the existence of emergency restrictions on movement, association and gathering. Those emergency restrictions existed for over 15 months and exist in one form or another to this day. Defendants-Appellees today are still directing Ohioans in their official publications to avoid gatherings of more than ten people, keep six foot distances, and wear masks.

Third, the voting in that case was a discrete, finite event tied to a single election. Signature collection for local initiatives in Ohio, in contrast, is fluid. Ohio law does not require that supporting signatures for local elections be collected in a limited period of time for a particular election cycle. Consequently,

the signatures that Plaintiffs-Appellants were prevented from collecting in March, April and May of 2020 due to Ohio's emergency restrictions could have been used to place Plaintiffs-Appellants' initiatives on either the November 3, 2020 ballot or the November 2, 2021 ballot (or any future ballot in Ohio). Those restrictions, and Ohio's strict enforcement of its in-person petitioning requirements in March, April, May, June, July, August, September, and October before the November 3, 2020 election therefore continue to injure Plaintiffs-Appellants and interfere with their ability to place initiatives on the November 2, 2021 ballot. Because Plaintiffs-Appellants continue to suffer that injury, their claims cannot be moot.

Fourth, emergency restrictions kept in place after the November 3, 2020 election, just like their counterparts in January, February, March, April and May of 2021, have joined with Ohio's in-person signature collection requirement and the COVID-19 crisis to continue to burden Plaintiffs-Appellants' ability to place their initiatives on the November 2, 2021 ballot. The many initiatives that were filed with municipalities but not submitted for the November 3, 2020 election, *see* Stipulation, R. 35, at PageID # 469, could also be submitted to support placement of those same initiatives on the November 2, 2021 election ballot. Plaintiffs-Appellants' current efforts to place them on ballots has therefore been burdened.

Finally, Defendants-Appellees incorrectly assert that *Hargett* "establishes" that the circumstances giving rise to Plaintiffs-Appellants' claims "cannot be

reasonably expected to repeat in a materially similar way," Brief of Defendants-Appellees at 30, but fail to acknowledge that *Hargett* was an interlocutory decision. Such decisions, as Defendants-Appellees are aware, are not controlling precedent. But even if *Hargett* were controlling here – and it is not – the foregoing distinctions render it inapposite. The rationale in that case simply does not apply here.[13]

Defendants-Appellees' position also contradicts not only well-settled Supreme Court and Sixth Circuit precedent, but also recent COVID-19 orders issued by the Supreme Court. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Gorsuch, J.). Defendants-Appellees' attempt to distinguish these recent COVID-19 cases because they arose under the Free Exercise Clause is unavailing. Article III presents a constitutional question separate and apart from the merits of the case. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. 490, 500 (1975),

[13] In the event that the Court concludes this matter is moot, the accepted practice is that the entire case must be dismissed; this includes all prior proceedings and rulings in the case, including not only the District Court's preliminary and final decisions but also this Court's prior stay and reversal of the District Court's preliminary injunction. *See United States v. Taylor*, 8 F.3d 1074, 1077 (6th Cir. 1993) ("Where an order appealed from is unreviewable because of mootness, the appropriate thing for us to do, curiously enough, is to vacate the order. We shall do so here.") (citations omitted); *Trump v. Citizens for Responsibility and Ethics in Washington*, 141 S. Ct. 1262 (2021). *See also United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *Slatery v. Adams & Boyle, PC*, 141 S. Ct. 1262 (2021).

"standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal …." *See also Cottrell v. Alcon Laboratories*, 874 F.3d 154, 162 (3d Cir. 2017) ("we separate our standing inquiry from any assessment of the merits of the plaintiff's claim"). Consequently, that different clauses of the First Amendment give rise to different controversies does not change the Article III analysis. The Supreme Court's analysis of mootness in the face of the COVID-19 crisis and the changing COVID-19 emergency restrictions in *Tandon* and *South Bay Pentecostal* pertains equally to all First Amendment challenges.

Defendants-Appellees' claim that the capable of repetition yet evading review exception does not apply because Plaintiffs-Appellants did not act "diligently" here is factually incorrect. Brief for Defendants-Appellees at 22. No claim is made that Plaintiffs-Appellants did not timely file this action and pursue it fast enough in the District Court, nor can Defendants-Appellees point to any delay by Plaintiffs-Appellants leading up to the panel's stay. It was only after the stay was granted and the Supreme Court refused to intervene, Defendants-Appellees assert, that Plaintiffs-Appellants' "diligence waned." Brief for Defendants-Appellees at 26.

Defendants-Appellees conveniently ignore a number of relevant filings by Plaintiffs-Appellants that prove them wrong. For example, on the day the motions panel stayed the District Court's preliminary injunction Plaintiffs-Appellants

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, Plaintiffs also moved the motions panel to reconsider its stay. *See* Plaintiffs' Emergency Motion 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.).

Next, 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). On June 25, 2020, the Supreme Court denied relief. *Thompson v. DeWine*, 2020 WL 3456705 (U.S., June 25, 2020).

Contrary to Defendants-Appellees' contention, Plaintiffs' diligence did not "wane" after this date. To the contrary, on July 8, 2020 Plaintiffs-Appellants 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. *See Thompson v. DeWine*, No. 20-3526, slip op. (6th Cir., July 13, 2020) (unpublished). Thus, Plaintiffs-Appellants sought emergency relief from the stay three times between May 26, 2020 and July 13, 2020. Only after the July 16, 2020 filing deadline passed, when any further request for emergency relief

would be futile, did Plaintiffs-Appellants relent in their efforts to obtain it. Defendants-Appellees' assertion that they failed to exercise diligence therefore does not comport with the facts.[14]

In the event, this Court did in fact expedite consideration of the case and rendered its decision on September 16, 2020. In doing so, it noted that "relief is still available, in theory, until Ohio prints its first round of ballots." *Thompson v. DeWine*, 976 F.3d 610, 614 n.1 (6th Cir. 2020). Consequently, not only had Plaintiffs-Appellants taken several emergency steps to obtain timely relief before the election in the District Court, in this Court, and in the Supreme Court, this Court in fact disposed of Defendants' interlocutory appeal in an expedited and timely manner before the election. Defendants therefore can have no legitimate complaint about Plaintiffs' actions and this Court's resolution of their interlocutory appeal before the election.

Defendants-Appellees' complaint thus hinges, as it must, on what happened after this Court's September 16, 2020 decision, as they eventually make clear. Plaintiffs-Appellants, they claim, "could have sought emergency relief from the Supreme Court after this Court's decision last September." Brief for Defendants-

[14] If there is any question about Plaintiffs' effort to win timely emergency relief before the November 3, 2020 election from this Court, it is answered by Defendants' own tactics. Plaintiffs' conscientious emergency efforts so concerned Defendants that they (unsuccessfully) requested that the Court prohibit Plaintiffs from filing additional motions seeking emergency relief.

Appellees at 27. They "could have filed a certiorari petition shortly after the Court's decision (and then still before the election)." *Id.*

Neither contention is credible. Plaintiffs had already unsuccessfully applied to the Supreme Court to vacate the stay once. Overseas ballots in Ohio were due to be printed in two days, moreover, *see* 2020 Ohio Elections Calendar, with the rest due on October 6, 2020. *Id*. Plaintiffs-Appellants' prior failed attempt, coupled with *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*) (cautioning against late ballot changes), and Ohio's deadlines for printing ballots rendered virtually impossible any chance of winning emergency relief from the Supreme Court. The application would have been futile. Obtaining timely certiorari and immediate relief before the election and before ballots were printed was even more unlikely.

The District Court, meanwhile, did not retrieve jurisdiction from this Court until the mandate issued on October 8, 2020. *See* Sixth Circuit Doc. No. 107. By that date, however, Ohio's ballots had been printed. No emergency relief entered by the District Court could thus place Plaintiffs-Appellants' initiatives on Ohio's 2020 ballots.

What about certiorari after the election? This was the path Plaintiffs-Appellants pursued. Did it take too long as Defendants-Appellees' claim? No, it did not, but the more relevant question is whether it matters. For purposes of the capable of repetition yet evading review doctrine it does not. There was absolutely

nothing Plaintiffs-Appellants could have done after the election to win access to the 2020 general election ballot. The time that counts for the capable of repetition yet evading review doctrine is that which passes before an election, not after. The question is whether time before an election is too short in duration for a challenger to win relief or otherwise fully litigate its claim. Notably, Defendants-Appellees cite no authority for their novel claim that post-election time and effort is relevant to the capable of repetition yet evading review calculus.

The length of time taken to file Plaintiffs-Appellants' interlocutory petition for certiorari is irrelevant. The Supreme Court, moreover, was experiencing its own COVID-19 problems necessitating extensions in deadlines, briefing procedures and oral arguments, and Plaintiffs-Appellants fully complied with these new requirements without seeking extensions or accommodations. Defendants-Appellees, for their part, did not; they sought an extension of time from the Supreme Court in order to respond to Plaintiffs-Appellants' timely petition.

V. Plaintiffs Are Not Required to Amend Their Complaint In Order to Win Relief.

The capable of repetition yet evading review exception is designed to deal with past elections. Using it, the Supreme Court and this Court have regularly ruled that courts can rule on the legality of rules and requirements imposed in the context of past elections without the need for the challenges to be re-pleaded or complaints to be amended. Plaintiffs therefore need not amend their Complaint in order to

continue their challenge to Ohio's restrictions. Defendants-Appellees' claim to the contrary is incorrect.

Even if the capable of repetition yet evading review exception did not exist, Defendants-Appellees would still be wrong. Rule 54(c) of the Federal Rules of Civil Procedure "'makes clear that a judgment should give the relief to which a party is entitled, *regardless of whether it is legal or equitable or both*.' Fed. R. Civ. P. 54(c) advisory committee's note to 1937 adoption. Thus, Rule 54(c) allows courts to give a deserving party a type of relief which their pleadings did not demand." *Abrams v. Nucor Steel Marion*, 694 Fed. Appx. 974, 983-84 (6th Cir. 2017) (citation omitted and emphasis original); *see also Chicago United Industries v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006) **(**"Rule 54(c) of the civil rules entitles a prevailing plaintiff to the relief proper to his claim even if he did not request that relief, because the circumstances bearing on the feasibility of particular forms of relief often change between the initiation of the suit and the rendition of the final judgment.") (citation omitted).

Consequently, because the COVID-19 crisis still exists, Defendants-Appellees continue to demand wet, witnessed signatures, Defendants-Appellees have imposed emergency orders restricting Plaintiffs-Appellants' ability to comply from March 2020 until the present, and because the combination of these events, laws and orders has and continues to place severe burdens on Plaintiffs-Appellants'

First Amendment rights, Plaintiffs-Appellants should be awarded the relief they are entitled.

VI. Defendants-Appellees Misapply *Anderson-Burdick* By Urging the Court to Adopt Improper 'Litmus Test' Analyses.

Defendants-Appellees' discussion of the merits attempts nothing less than a rewrite of Supreme Court precedent governing constitutional review of election laws. According to Defendants-Appellees, a burden qualifies as 'severe' for purposes of the *Anderson-Burdick* analysis "only if it makes exercising the First Amendment right 'virtually impossible.'" Brief of Defendants-Appellees at 36 (quoting *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment)). That is an obvious misstatement of the law. It is incorrect for several reasons.

As an initial matter, the concurring opinion in *Crawford* on which Defendants-Appellees purport to rely does not support their position. Defendants-Appellees pluck two words from that opinion – 'virtually impossible' – quote them out of context and assert that they establish a categorical test for determining whether a burden is severe. They do not. And not even Justice Scalia, the author of the concurring opinion, suggested that they do. On the contrary, in the sentence immediately preceding those two words, Justice Scalia explained that "[b]urdens are severe if they go beyond the merely inconvenient." *Crawford*, 553 U.S. at 205. By Justice Scalia's own definition, therefore, burdens may be severe if they fall in

the range that exceeds "merely inconvenient" and encompasses "virtually impossible." *See id.*

But Justice Scalia does not conclude that a burden is severe *only* if it amounts to a virtual impossibility, which is why Defendants-Appellees must confine themselves to quoting only two words of his opinion, out of context, in an effort to support their claim that he does. Furthermore, even if Justice Scalia had reached such a conclusion, the majority opinion in *Crawford*, which is controlling, expressly rejects it. As the majority explained, Supreme Court precedent does not "identify any litmus test for measuring the severity of a burden that a state law imposes." *Crawford*, 553 U.S. at 191.

Defendants-Appellees similarly misrepresent this Court's precedent. They assert that "a severe burden is one that 'totally denie[s]' the right at stake," Brief of Defendants-Appellees at 36 (quoting *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020)), but once again the two words on which they purport to rely are quoted out of context. *Mays* does not hold that a burden is severe *only* if it totally denies a plaintiff's right, as Defendants-Appellees contend.

Instead, *Mays* merely recognizes that strict scrutiny applies in such cases. *See Mays*, 951 F.3d at 786. That is an uncontroversial statement of a well-settled rule of law. But nothing in *Mays* suggests that the Court intended to establish a categorical test for identifying a severe burden under the *Anderson-Burdick*

analysis, which, again, is why Defendants-Appellees must confine themselves to quoting just two words from that opinion out of context. Furthermore, if *Mays* did purport to establish such a test, it would contravene not only *Crawford* but also the Supreme Court's foundational ballot access precedents, including *Anderson* itself. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) ("Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions.") (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Defendants-Appellees' position thus rests on a category error. They point to cases in which courts found the total denial of a right to be a *sufficient* condition to support the finding of a severe burden, and erroneously assert that it constitutes a *necessary* condition. That is not merely bad logic, but an attempt to rewrite decades of Supreme Court precedent that expressly rejects Defendants-Appellees' position. *See Crawford*, 553 U.S. at 191; *Anderson*, 460 U.S. at 789; *Storer*, 415 U.S. at 730.

Defendants-Appellees' assertion that Plaintiffs-Appellants must "overrule all that precedent" to prevail in this matter thus bears no relation to reality. Brief of Defendants-Appellees at 48. None of this Court's decisions cited by Defendants-Appellees concludes that a burden is "severe" under *Anderson-Burdick* "*only* if it excludes or virtually excludes initiatives from the ballot," as Defendants-Appellees

falsely assert, *id.* (emphasis added) – not *Graveline v. Benson*, 992 F.3d 524, 543 (6th Cir. 2021), not *Kishore v. Whitmore*, 972 F.3d 745, 751 (6th Cir. 2020), not *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019), and not *Libertarian Party of Kentucky v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). Like every other case that Defendants-Appellees cite, these decisions merely recognize that total or virtual exclusion is sufficient – not necessary – to establish a severe burden, which, once again, explains why Defendants-Appellees are unable to quote any language from these opinions that establishes the categorical rule they attempt to fashion here. That language does not exist.

In the end, as Plaintiffs-Appellants have explained, even if this Court were to accept Defendants-Appellees' invitation to upend decades of Supreme Court precedent rejecting the application of categorical rules (or "litmus tests") in the ballot access context, Plaintiffs-Appellants would still prevail because the undisputed facts show that initiatives were excluded or virtually excluded from Ohio's general election ballots in 2020. Zero statewide initiatives qualified in 2020. That is total exclusion. And only four of Plaintiffs-Appellants' 74 anticipated local initiatives qualified, and all four were in small villages with very low signature requirements. No initiatives qualified in any larger municipality. That is virtual exclusion. Thus, Plaintiffs-Appellants satisfy the 'exclusion or virtual exclusion' litmus test that Defendants-Appellees improperly urge the Court to

adopt here. Ohio's strict enforcement of its in-person petitioning requirements has severely burdened Plaintiffs-Appellants' First Amendment rights.

Pressing ahead, Defendants-Appellees urge the Court to adopt yet another categorical rule: "private decisions cannot be considered in assessing the burdens that *the State* imposed." Brief of Defendants-Appellees at 51 (citing *Morgan v. White*, 964 F.3d 649, 652 (7th Cir. 2020)). The Court should decline this invitation for the same reasons: the single case that Defendants-Appellees cite does not adopt their supposed rule (notably, Defendants-Appellees fail to quote any language from *Morgan*), and even if it did, application of such a rule here would violate Supreme Court precedent.

Contrary to Defendants-Appellees' contention, the Supreme Court has emphasized time and again that the *Anderson-Burdick* analysis requires "a consideration of the facts and circumstances behind the law," *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (citation omitted), and "derives much from the particular facts involved." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 n.13 (1986) (citations omitted). So has this Court. *E.g.*, *Graveline*, 992 F.3d at 536 (observing that Sixth Circuit's *Anderson-Burdick* cases require consideration of "evidence of the *real impact* the restriction has on the process.") (citation omitted)). Defendants-Appellees' assertion that the Court can conduct that analysis properly in this case, while disregarding the very facts from which it arises –

including citizens' reluctance to sign petitions by hand during a worldwide pandemic – is not only unsupported, but contrary to decades of Sixth Circuit and Supreme Court precedent.

Whether Ohio has a legitimate interest in insisting upon strict compliance with its in-person petitioning requirements during the pandemic is relevant to this Court's analysis of the constitutionality of those requirements. Whether Ohio's demand for "wet" ink signatures during the pandemic is sufficiently tailored to meet its interests is also relevant. Defendants-Appellees' assertion that this Court should analyze this case as if it arose from a pandemic-free vacuum is simply wrong.

The facts and circumstances of this case demonstrate that the burden on Plaintiff-Appellants' First Amendment rights is severe. As anyone living in the real world for the past year knows, collecting signatures in person during the Covid-19 pandemic has been practically impossible. Accordingly, for the reasons stated in Plaintiff-Appellants' opening brief, Ohio's strict enforcement of its in-person petitioning requirements cannot withstand scrutiny under the *Anderson-Burdick* analysis.

VII. The Preliminary Proceedings in this Court Are Not Binding Case Law.

Defendants assert that this case is governed by the panel's preliminary decisions. They are wrong. The Supreme Court and this Court have made clear that

absent extraordinary circumstances, interlocutory appellate decisions do not represent the law of the case and do set binding precedent.

Daunt v. Benson, 999 F.3d 299 (6th Cir. 2021), proves the point. 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. It did so, however, because of the extraordinary circumstances presented. 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. This Court 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.

Contrary to the situation in *Daunt v. Benson*, here Plaintiffs-Appellants did not seek to consolidate preliminary proceedings with a trial on the merits. They did not, moreover, take an emergency appeal (and thus invite interlocutory resolution) to this Court. Defendants did. In doing so, moreover, Defendants argued to the motions panel that time was of the essence and won a stay within seven days. There was no fully developed factual record "without unusual time constraints."

Further, in contrast to *Daunt*, facts are critical to Plaintiffs-Appellants' challenge here. More importantly, as Plaintiffs-Appellants explain in their principal Brief, these are facts that were not available last year. These are facts that could not have been considered in the preliminary proceedings in this Court.

Defendants-Appellees point to *Hawkins v. DeWine*, 968 F.3d 603 (6th Cir. 2020), as the relevant controlling authority. *See* Brief for Defendants-Appellees at 44. The problem, however, is that the Court in *Hawkins* never once mentions a "virtual or total exclusion" test. Far from supporting the panel's position and Defendants-Appellees argument here, *Hawkins* undermines it. *Hawkins* stands for the correct proposition that there is no "virtual or total exclusion" test under *Anderson-Burdick*.

Further, *Anderson-Burdick* in *Hawkins* was applied to the unique allegations and laws presented in that case. The result achieved there can only be controlling for matters addressing those same unique laws, which included the deadlines and numbers of signatures required of independent presidential candidates and minor political parties. These deadlines and signature requirements are quite different from those applied to initiatives.

Even more important is that the *Hawkins* Court did not have before it evidence like that presented here. In particular, there was no evidence in *Hawkins* that minor candidates and parties did not reach the ballot. Here, there is evidence showing that no statewide initiatives qualified while only four of 73 local initiatives did. Nationally, moreover, initiatives were reduced by 50%. Unlike in *Hawkins*, there is proof here that application of Ohio's laws and emergency orders during the COVID-19 crisis severely burdened initiatives.

Hawkins is therefore inapposite. The deadlines and numbers of signatures at issue differed markedly from those presented here. Independent presidential candidates, for example, needed to collect only 5000 signatures statewide, a number far fewer than some cities (like Akron) targeted by Plaintiffs-Appellants. Cumulatively, the number of signatures required in 73 cities is far greater than that. Independent presidential candidates also had until August 17, 2020 to qualify, more than a month later than the July 16, 2020 deadline in the present case.

As for political parties, in contrast to 10% of the prior gubernatorial vote required for local initiatives, minor political parties are required to collect only 1% of the prior vote for Governor. It is understood, moreover, that statewide political party campaigns should have more resources and can be expected to do more in less time. Contrary to Defendants-Appellees' claim, sustaining regulations for statewide candidates and political parties under *Anderson-Burdick* hardly means that different requirements must also be sustained for citizen initiatives. It certainly does not mean that in-person, wet signature requirements are always valid in the face of pandemics like COVID-19.

Hawkins does not speak at all to whether the distinct signature requirements and deadlines for local initiatives, when coupled with the COVID-19 crisis and resulting shut-down orders, imposed something less than severe burdens on circulators of initiatives. Indeed, the absence of initiatives on the 2020 ballot proves the opposite.

Conclusion

The District Court's dismissal of the Complaint should be **REVERSED**.

Respectfully submitted,

/s/ Mark R.Brown

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Plaintiffs-Appellants certify that they have prepared this document in 14-point font and that excluding the Caption, Signature Blocks and Certificates, the document includes 6423 words.

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

CERTIFICATE OF SERVICE

I certify that this Reply 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*
Mark R. Brown

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:

Stipulation, R. 35, at PageID # 469, and

Opinion and Order, R.78 at PageID # 962.