

**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**

APPELLANTS' PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING EN BANC

Appellants respectfully request Rehearing En Banc. A copy of the Panel's opinion (hereinafter "slip op.") is attached.

Rule 35 Statement

Pursuant to Federal Rule of Appellate Procedure 35, Appellants respectfully state that the Panel decision conflicts with decisions of the Supreme Court, *Norman v. Reed*, 502 U.S. 279 (1992); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Gorsuch, J., statement); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), and this Court. *See Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007) (en banc); *Graveline v. Benson*, 992 F.3d 524, 533 (6th Cir. 2021). Further, this proceeding involves a question of exceptional importance and the Panel's resolution of that question conflicts with an authoritative decision of the Ninth Circuit. *See Brach v. Newsom*, __ F.4th __, 2021 WL 3124310 (9th Cir., July 23, 2021).

Introduction

On June 4, 2021 Appellants noticed their appeal from the final judgment in favor of Appellees. The Panel in this case (Sutton, CJ., McKeague & Nalbandian,

JJ.)¹ expedited briefing at Appellants' request and rendered a decision on July 28, 2021, finding the case moot. *Thompson v. DeWine*, No. 21-3514, slip op., at 2 (6th Cir., July 28, 2021) (Attached). This finding was contrary to the District Court's conclusion that the case was not moot. *See Thompson v. DeWine*, R.78, at PageID # 962-63. Rather than vacate, as is the "established practice," the Panel affirmed. Slip op. at 8.

In support of its mootness decision, the Panel stated that the 2020 "election has come and gone," *id.* at 6, "the situation today differs markedly from a year ago," *id.*, and "because of advancements in COVID-19 vaccinations and treatment since this case began, the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle." *Id.* "If any case is 'based on a unique factual situation,' this one is." *Id.* (citation omitted). "And so '[t]here is not a reasonable expectation' that plaintiffs 'will face the same burdens' that they did in 2020," *id.* (citation omitted), and the capable of repetition yet evading review exception does not apply. *Id.*

In its decision, the Panel ignored COVID-19's resurgence and the diminishing eradivative effects of vaccinations. On July 13, 2021, the National Institutes of Health reported that emerging COVID-19 variants, including the Delta

¹ The Panel in two preliminary published opinions stayed the preliminary injunction, *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020), and then reversed it. *Thompson v. DeWine*, 976 F.3d 610 (6th Cir. 2020).

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 commissioner of the FDA. 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

Appellees themselves two weeks ago admitted that COVID-19 remains a severe problem in Ohio: "'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 Ohio's

² <https://covid19.nih.gov/news-and-stories/viral-variants>.

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>.

Department of Health. *Delta variant on a trajectory to become the dominant strain in Ohio*, 10WBNS, July 14, 2021.⁵

"As the highly contagious Delta variant ... fuels outbreaks in the United States, the director of the [CDC] warned on [July 16] 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, 2021.⁶ "[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," said Dr. Rochelle Walensky, director of the CDC. Lauren Leatherby & Amy Schoenfeld Walker, *Unvaccinated States Feel Brunt of Delta-Led Covid Uptick*, N.Y. Times, July 17, 2021.⁷

Because of Ohio's low 46% vaccination rate, *see Track Coronavirus Cases in Places Important to You*, N.Y. Times, July 31, 2021,⁸ Ohio remains particularly susceptible. Ohio's COVID-19 rate has increased 166% over the last two weeks.

⁵ <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>.

⁶ <https://www.nytimes.com/live/2021/07/16/world/covid-variant-vaccine-updates>.

⁷ <https://www.nytimes.com/interactive/2021/07/17/us/delta-variant-us-growth.html?action=click&module=Top%20Stories&pgtype=Homepage>.

⁸ <https://www.nytimes.com/interactive/2021/us/covid-cases-deaths-tracker.html>.

See Track Coronavirus Cases in Places Important to You, N.Y. Times, July 31, 2021, *supra*.

"President Joe Biden said Friday [July 30] the US will, 'in all probability,' see more guidelines and restrictions amid rising coronavirus cases and the spread of the highly contagious Delta variant." Donald Judd, *Biden says US will 'in all probability' see more guidelines and restrictions amid rising Covid cases*, CNN, July 30, 2021).¹ Experts warned on July 30, 2021 that "the emergence of vaccine-resistant strains may come too rapidly for current vaccine developments to alleviate the health, economic and social consequences of the pandemic." Simon A. Rella, et al., *Rates of SARS-CoV-2 transmission and vaccination impact the fate of vaccine-resistant strains*, Scientific Reports 11, 15729 (2021).⁹ "[P]olicymakers and individuals should consider maintaining non-pharmaceutical interventions and transmission-reducing behaviors throughout the entire vaccination period," they said. *Id.*

The Panel also ignored Ohio's failure to rescind or repeal all of its emergency restrictions. Some still remain today, a reality Ohio admitted. *See* Brief of Defendants-Appellees at 9. Contrary to the panel's conclusion that COVID-19 restrictions are a thing of the past that will never recur, *see, e.g.*, slip op. at 7 ("This speculation does not get the job done"), as late as June 1, 2021 Ohio's emergency

⁹ <https://doi.org/10.1038/s41598-021-95025-3>.

orders made clear that social distancing was still required and that gatherings of more than ten people were still prohibited. Not only was there a likelihood of recurrence, Ohio's restrictions were recurring and burdening Appellants' efforts to collect signatures as late as June for the 2021 election.

On July 16, 2021 the Ohio Department of Health announced that "[i]f 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 unvaccinated individuals, maintain groups of no more than 10 people, separated from other groups by at least 6 feet." Ohio Department of Health, Responsible Restart Ohio: Residential Camps, July 16, 2021.¹² This recent directive (which applies to everyone, not just campers) further stated 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.* Appellees have thus not to this day disavowed the possibility that they will put restrictions back in place.

The Panel also refused to consider Appellants' attempt to distinguish a recent panel decision handed down after the District Court's final judgment. Plaintiffs argued in their principal Brief, *see* Appellants' Brief at 39-42 & n.31, that unlike in

¹² <https://coronavirus.ohio.gov/static/responsible/Residential-Camps.pdf>.

Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548 (6th Cir. 2021), here Ohio's COVID-19 restrictions "hampered their ability to gather signatures for the 2020 election but also carried over to the 2021 election." *Thompson*, slip op., at 7. "Even if that's true," the Panel responded, "this is the first time plaintiffs are saying so." *Id.* Meanwhile, it fully embraced Appellees' argument that *Hargett* is indistinguishable *see, e.g.*, Appellees' Brief, at 27 ("The COVID-19 pandemic was 'a once-in-a-century crisis'" (quoting *Hargett*)), and ruled the case moot.

The Panel committed three errors that warrant *en banc* review. First, this case could not have been rendered moot by an election, *see, e.g.*, *Norman*, 502 U.S. 279; *Graveline*, 992 F.3d 524, the repeal of COVID-19 orders, or the alleged dissipation of the COVID-19 crisis. *See Tandon*, 141 S. Ct. 1294; *South Bay*, 141 S. Ct. 716, 720 (Gorsuch, J., statement); *Cuomo*, 141 S. Ct. 63. *See also Brach*, 2021 WL 3124310 (9th Cir., July 23, 2021).

Second, affirming the District Court's judgment was improper. The Supreme Court and this Court *en banc* have made it clear that the "established practice" upon a finding of mootness on appeal that is not caused by the losing party below is to vacate or reverse the lower court decision, not affirm it. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007) (*en banc*).

Third, the Panel's refusal to consider part of Appellants' attempt to distinguish *Hargett*, 2 F.4th 548, a case that was decided after final judgment and was repeatedly relied upon by Appellees (and the panel) to support mootness, was manifestly unfair. Arguments challenging subject matter jurisdiction cannot be waived. Using waiver to preclude a response to a new argument supporting mootness based on a case handed down after the judgment being appealed is improper.

Reasons for Granting *En Banc* Review

I. The Panel's Conclusion Contradicts Supreme Court Precedent and Conflicts With a Published Decision of the Ninth Circuit.

The Panel's decision in this case relies heavily on an interlocutory decision that does not reflect the law of this Circuit, *Hargett*, 2 F.4th 548, and an unpublished Ninth Circuit decision, *Common Sense Party v. Padilla*, 834 F. App'x 335, 336 (9th Cir. 2021), handed down before the Supreme Court's rulings in *Tandon* and *South Bay*. The Panel, meanwhile, ignored a published decision of the Ninth Circuit that contradicts its conclusion, *Brach*, 2021 WL 3124310, as well as the Supreme Court's rulings in *Tandon*, *South Bay*, and *Cuomo*.

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); *Norman v. Reed*, 502 U.S. 279 (1992) (same). 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).

The Supreme Court established in *Cuomo*, 141 S. Ct. at 68, *Tandon* 141 S. Ct. at 1297, and *South Bay*, 141 S. Ct. at 720, that the capable of repetition exception applies with full force to laws challenged and restriction put in place during the COVID-19 crisis. Thus, in *Cuomo*, 141 S. Ct. at 68, the majority agreed that under circumstances like those presented here, with the New York Governor frequently changing COVID restrictions as the pandemic waxed and waned, the case was not rendered moot: “It is clear that this matter is not moot.” (Citing *Wisconsin Right to Life, Inc.*, 551 U.S. 449; *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)) (emphasis added). 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.” (Citation omitted). Instead, “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.*

That a State's COVID restrictions prove temporary, are issued with promises of future rescission, and even are rescinded, is not enough to moot a case. As Justice Gorsuch said in *South Bay*, 141 S. Ct. at 720 (Gorsuch, J.), after all, "[g]overnment actors have been moving the goalposts on pandemic-related sacrifices for months." Nor can the speculative claim that the crisis has passed or retreated justify dismissal. New York and California made similar claims in *Tandon* and *Cuomo*, but the Supreme Court found live challenges nonetheless. Far from it being speculative as to whether COVID-19 will continue, as the panel ruled here, slip op. at 7, true conjecture (as implicitly recognized by the Supreme Court and proven true by recent developments) is predicting its eradication.

The Supreme Court relied upon both the voluntary cessation doctrine and the capable of repetition yet evading review exception. Either alone was sufficient. And while Free Exercise claims were involved in those three cases, the Court's opinions do not indicate that this is the limit of their reach. The Supreme Court made clear in *Warth v. Seldin*, 422 U.S. 490, 500 (1975), that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"

The Ninth Circuit's recent published opinion in *Brach*, 2021 WL 3124310, make this clear. There, in a case in which Judge Siler participated, the Ninth Circuit reversed summary judgment in favor of the State and against private-school parents who challenged California's emergency restrictions on the private education of their children. The plaintiffs argued that the restrictions violated Substantive Due Process, among other constitutional prohibitions, by interfering with parental rights. The case did not include a Free Exercise claim.

Before reversing on the merits, the Ninth Circuit concluded that the case was not mooted by the repeal of the challenged orders and alleged retreat of the pandemic. "We conclude that, despite recent changes to the State's Covid-related regulations, this case is not moot." *Id.* at *1. It relied on the Supreme Court's decisions in *Cuomo* and *South Bay*. It concluded that the Supreme Court "declined to treat the matter as moot, citing cases involving the voluntary cessation doctrine, and the rule governing disputes that are capable of repetition but evading review." *Id.* at *7 (citations omitted). "[T]he same two doctrines invoked in [*Cuomo*] also apply here and confirm that this case is not moot." *Id.* "[U]nder both the voluntary cessation doctrine and the rule concerning disputes that are 'capable of repetition, yet evading review,' neither the public-school nor private-school Plaintiffs' claims are moot." *Id.* at *10.

The Supreme Court's and the Ninth Circuit's decisions cannot be reconciled with the Panel's conclusion here. Even if an election, the quintessential capable of repetition yet evading review situation, were not involved here, the case would not be moot.

II. The Panel's Affirming the Judgment Below Contradicts Decisions of the Supreme Court and this Court.

When an appellate case becomes moot “[t]he established practice ... in the federal system ... is to reverse or vacate the judgment below and remand with a direction to dismiss.” *Munsingwear*, 340 U.S. at 39. Not only is this the established practice, the Court has made clear that it is virtually mandatory. Only where mootness is caused by the losing party, which is plainly not the case here, will the judgment be allowed to stand. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *Camreta v. Greene*, 563 U.S. 692, 713 (2011). Because Appellants did not conduct the 2020 election, cause the pandemic, invent the vaccine, or repeal Ohio's emergency restrictions, they are plainly not responsible for any mootness in this case.

This Court in *Stewart*, 473 F.3d 692, sitting *en banc*, made clear that this Circuit follows this precedent: “[w]hen a civil case becomes moot pending appellate adjudication, ‘the established practice ... in the federal system ... is to

reverse or vacate the judgment below and remand with a direction to dismiss.” (Citations omitted). Consequently, the panel here plainly erred by affirming the merits-based judgment below.

Not only must the judgment below be vacated, the Panel's two published, preliminary opinions must also be vacated. *See Thompson*, 959 F.3d 804 (staying preliminary injunction); *Thompson*, 976 F.3d 610 (reversing preliminary injunction). According to the Court in *Camreta*, 563 U.S. at 713, any "preliminary adjudication," *id.* at 714 n.11, that threatens "spawning any legal consequences," *id.* at 713 (citation omitted), must be vacated. "[T]he usual *Munsingwear* order" requires that the Court vacate "the part of the decision that mootness prevents us from reviewing but that has prospective effects on [the losing party]." *Id.* at 714 n.11.

This Court in *United States v. City of Detroit*, 401 F.3d 448 (6th Cir. 2005), implicitly acknowledged this requirement. There, after losing an *en banc* decision remanding the case to the District Court, having the District Court once again rule against it, appealing again to the Sixth Circuit, and then seeing the successful City abandon its case, the Department of Justice argued that the panel should not only vacate the most recent decision below, but also the prior *en banc* decision.

The Court readily vacated the immediate decision below, but because of "the circumstances of this case," *id.* at 451, concluded that it could not vacate the District Court's first decision nor that of the *en banc* Court: "We are precluded ... from reviewing our prior *en banc* decision, and consequently the district court's original decision, not as a result of mootness but as a result of the law-of-the-case doctrine and the rules of our Circuit." *Id.* The Court thus recognized that had it not been an *en banc* decision, vacatur would have been proper for these prior decisions, too.

With prior and preliminary decisions, the crucial question is whether they "would have precedential effect beyond the preliminary decision on the stay ..." *Democratic Executive Committee of Florida v. National Republican Senatorial Committee*, 950 F.3d 790, 795 n.2 (11th Cir. 2020) (emphasis original). If so, "then vacatur may be warranted if the case were to become moot." *Id.* Only if it is clear that the interlocutory decisions have no effect and will not "spawn[] any legal consequences," *Camreta*, 563 U.S. at 713, will the "normal rule" of vacatur not apply. *See Hassoun v. Searls*, 976 F.3d 121, 134 (2d Cir. 2020) (refusing to vacate a preliminary stay because it is not binding nor have precedential effect). Otherwise "the usual *Munsingwear* order" requires that the Court vacate "the part

of the decision that mootness prevents [the Court] from reviewing but that has prospective effects on [the losing party]." *Camreta*, 563 U.S. at 714 n.11.¹³

Here, the Panel's two published, preliminary decisions have spawned legal consequences for Appellants and others. They threaten more. The District Court below relied on the preliminary opinions to dismiss Appellants' claims on the merits. This Court in *Hawkins v. DeWine*, 968 F.3d 603, 606 (6th Cir. 2020), relied on the panel's published stay opinion to rule that Ohio's COVID restrictions did not severely burden minor-parties and their candidates. It likewise used that same opinion in *Thompson* to deny relief to minor candidates in Michigan. *See Kishore v. Whitmer*, 972 F.3d 745, 749 (6th Cir. 2020). Several district courts in the Sixth Circuit have relied on the preliminary opinions to reject claims made by candidates and circulators, *see, e.g., Duncan v. LaRose*, 2020 WL 6600627, *2 (S.D. Ohio 2020), as have district courts outside this Circuit. *See, e.g., Blankenship v. Newsom*, 477 F. Supp.3d 1098, 1106 (N.D. Cal. 2020).

The Panel's published preliminary opinions must be vacated if the panel's mootness determination is allowed to stand.

¹³ In their first and only opportunity to respond to Appellees' mootness argument and their claim that "[t]he Court should affirm the District Court's judgment," Appellees' Brief at 62, Appellants replied that upon a finding of mootness the judgment below and all preliminary opinions had to be vacated under *Munsingwear*. Appellants' Brief at 13 n.13 (citations omitted). Appellants on July 30, 2021 moved the panel to reverse or vacate the decision below along with the panel's two prior interlocutory decisions.

III. The Panel's Refusal To Consider Plaintiffs' Argument is Manifest Error.

Appellants argued in their principal Brief, *see* Appellants' Brief at 39-42 & n.31, that unlike in *Hargett*, 2 F.4th 548, here Ohio's COVID-19 restrictions "hampered their ability to gather signatures for the 2020 election but also carried over to the 2021 election." *Thompson*, slip op., at 7. "Even if that's true," the Panel responded, "this is the first time plaintiffs are saying so." *Id.* The panel would therefore not allow Appellants to distinguish a case that had not existed when the District Court entered its final judgment and that Appellees relied upon in passim throughout their Brief. *See, e.g.,* Appellees' Brief, at 27 ("The COVID-19 pandemic was 'a once-in-a-century crisis.'" (Quoting *Hargett*)).

The Panel's refusal to consider this argument pushes the boundaries of Due Process. The Federal Rules of Civil Procedure, for example, ensure responsive opportunities throughout proceedings as a matter of Due Process; responses are not limited to initial pleadings. "This opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to original pleadings" *Nelson v. Adams USA*, 529 U.S. 460, 466 (2000). Were Appellees to have raised a new case like *Hargett* in subsequent pleadings before the District Court, Plaintiffs would have been afforded a full opportunity to respond. Here, in the Sixth Circuit, they were not.

The Panel justified its refusal by citing *Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007), a case that cannot carry that weight. The challengers in *Connerly* sought to keep an initiative off the ballot but then on appeal claimed the initiative itself was illegal. This was a "very different challenge" the Court ruled. *Id.* at 592.

Here, in contrast, Appellants' challenge never changed. All that changed was the election cycle, something that regularly happens in election cases and something that rarely results in mootness. Indeed, fleeting elections are the *raison d'être* for the capable of repetition yet evading review exception. If the panel is correct, then the capable of repetition exception simply does not exist for election challenges. Neither does Federal Rule of Civil Procedure 54(c), which states that relief should be granted according to what "each party is entitled, even if the party has not demanded that relief in its pleadings."

Further, because mootness concerns subject matter jurisdiction, arguments for and against cannot be casually waived. "[S]ubject-matter jurisdiction may be raised at any time, by any party or even *sua sponte* by the court itself." *Franzel v. Kerr Manufacturing Co.*, 959 F.2d 628, 630 (6th Cir. 1992). Appellants are unaware of any authority that supports the Panel's conclusion that while arguments against jurisdiction can never be waived, those supporting Article III jurisdiction can.

The most that Appellants can find is a Tenth Circuit rule stating that the Court will not "consider theories that might support subject-matter jurisdiction when raised for the first time in a reply brief." *United States v. Rainey*, 794 Fed. Appx. 728, 732 (10th Cir. 2019). Because here Appellants' argument was raised both in their principal Brief, *see* Plaintiffs-Appellants' Brief at 39-42 & n.31, and their Reply Brief, *see* Reply Brief at 11-12, that rule would not apply even if this case came from Oklahoma.

Conclusion

Appellants respectfully request Rehearing En Banc.

Respectfully submitted,

/s/ Mark R. Brown

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I certify that this Petition 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

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

No. 21-3514

THOMPSON, et al.,

Plaintiffs - Appellants,

v.

DEWINE, et al.,

Defendants - Appellees

ATTACHMENT

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0170p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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.

No. 21-3514

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:20-cv-02129—Edmund A. Sargus, Jr., District Judge.

Decided and Filed: July 28, 2021

Before: SUTTON, Chief Judge; McKEAGUE, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellants. Benjamin M. Flowers, ZACHERY P. KELLER, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

OPINION

PER CURIAM. This is the third time we have seen this case. Plaintiffs are three Ohioans who, during the 2020 election, tried to get initiatives to decriminalize marijuana on local

ballots. To do so, they had to comply with Ohio's ballot-access laws. Those laws impose various requirements on an initiative's proponents, including submitting a petition with a minimum number of ink signatures witnessed by the petition's circulator.

Plaintiffs say the laws, as applied during the COVID-19 pandemic, made it too difficult for them to get any of their initiatives on 2020 ballots. So they sued for declaratory and injunctive relief. But plaintiffs tied their requests for relief exclusively to the November 2020 election. That election has come and gone—and with it the prospect that plaintiffs can get any of the relief they asked for. This case is thus moot. We **AFFIRM** the district court's dismissal of plaintiffs' complaint.

I.

We need not restate the facts at length. *See Thompson v. DeWine*, 461 F. Supp. 3d 712 (S.D. Ohio), *stayed*, 959 F.3d 804 (6th Cir.) (*Thompson I*), *rev'd*, 976 F.3d 610 (6th Cir. 2020) (*Thompson II*). The short of it is this: Plaintiffs are three Ohio voters. They regularly circulate petitions to get initiatives on local and statewide ballots. For the 2020 election cycle, plaintiffs hoped to place initiatives on municipal ballots to decriminalize marijuana.

Before an initiative finds its way onto a local ballot, its proponents must circulate a petition. Ohio Rev. Code Ann. § 731.28. The petition must get signatures from at least ten percent of the number of electors who voted for governor in the municipality's previous election. *Id.* And those signatures must be original and in ink, and the petition's circulator must witness them. *Id.* § 3501.38. Once a petition has enough qualifying signatures, the circulator must submit it to the Secretary of State at least 110 days before the election. *Id.* § 731.28.

Soon after plaintiffs filed proposed initiatives for November 2020 ballots, Ohio declared a state of emergency because of COVID-19 and ordered Ohioans to stay at home. As a result, plaintiffs found it harder than usual to gather signatures for their initiative petitions. So they sued Governor Mike DeWine and other state officials for declaratory and injunctive relief. They allege that, because the pandemic and emergency orders made signature gathering difficult, "Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election violate" the First and Fourteenth Amendments. (R. 1, Compl. at 16–17, PID 16–17.)

And they asked the district court to “immediately place” their initiatives “on local November 3, 2020 election ballots without the need for supporting signatures.” (*Id.* at 18, PID 18.) If that failed, they also asked the court to reduce the number of signatures they needed to qualify for the ballot, extend the deadline for submitting petitions, and order the state to develop a way for voters to sign petitions electronically.

The district court enjoined the ink and witness requirements, extended the deadline for submitting petitions, and ordered the state to accept electronic signatures. *Thompson*, 461 F. Supp. 3d at 739–40. We stayed that injunction, *Thompson I*, 959 F.3d at 804, and then reversed it, *Thompson II*, 976 F.3d at 614. After plaintiffs unsuccessfully sought review in the Supreme Court, defendants moved to dismiss plaintiffs’ complaint, claiming it was moot and barred by the Eleventh Amendment. The district court, relying on our opinions in *Thompson I* and *II*, dismissed the case on its merits after holding that it was not moot. Plaintiffs appeal, and we review the decision de novo. *See, e.g., Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

II.

Under Article III of the Federal Constitution, we can only decide “Cases” or “Controversies.” U.S. Const. art. III, § 2. So we adjudicate “only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). Thus, “[i]f ‘the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,’ then the case is moot and the court has no jurisdiction.” *Id.* (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)).

A.

This case is moot. Plaintiffs request two types of relief, injunctive and declaratory. But unlike many election cases, plaintiffs do not challenge Ohio’s ballot-access laws standing alone. *See Common Sense Party v. Padilla*, 834 F. App’x 335, 336 (9th Cir. 2021) (COVID-related challenge to a ballot-access law was moot because plaintiff did not challenge “the constitutionality of the provision itself or its constitutionality as applied to [plaintiff] outside this context”); *cf. Storer v. Brown*, 415 U.S. 724, 727 (1974).

Instead, plaintiffs tie all their requested relief to the November 2020 election, COVID-19, and Ohio’s stay-at-home orders. *See Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) (case was moot when plaintiff’s injury and motion for a preliminary injunction were “inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis”). Plaintiffs’ complaint was one to “declare unconstitutional, enjoin and/or modify” Ohio’s ballot-access laws so that their initiatives could be included “on Ohio’s November 3, 2020 general election ballot.” (R. 1, Compl. at 1, PID 1.) Why? Because “the current public health emergency caused by COVID-19 and defendant DeWine’s and defendant Acton’s emergency orders effectively shutting down the State” made it hard for them to gather signatures. (*Id.*) So they asked the court to “immediately place” their initiatives “on local November 3, 2020 election ballots.” (*Id.* at 18, PID 18.) And in case they didn’t get that relief, plaintiffs also asked the court to enjoin enforcement of Ohio’s ballot-access laws and to unilaterally modify them—but again, only “for Ohio’s November 3, 2020 general election,” and only because COVID-19 and Ohio’s stay-at-home orders made signature gathering too difficult. (*Id.* at 14, PID 14, 18–19, PID 18–19.)

Without a time machine, we cannot go back and place plaintiffs’ initiatives on the 2020 ballot. So plaintiffs’ first request for injunctive relief is moot. *See Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) (“The 2014 election has come and gone, so we cannot devise a remedy that will put the Green Party on the ballot for that election cycle.”). And plaintiffs’ alternative requests for an injunction, which they tied *specifically* to the 2020 election, also became moot when the election passed. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th at 560; *Operation King’s Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007); *Padilla*, 834 F. App’x at 336 (noting in a COVID-19 election case that “the occurrence of an election moots relief sought with respect to that election cycle”).

Plaintiffs’ request for declaratory relief is likewise moot. To determine whether a request for declaratory relief is moot, we ask “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Preiser v.*

Newkirk, 422 U.S. 395, 402 (1975) (emphasis altered) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

No such controversy exists for plaintiffs’ declaratory relief claim. Like their demands for injunctive relief, plaintiffs tie their declaratory relief request specifically to the 2020 election. They ask the court to declare that Ohio’s ballot-access laws—as applied to “measures proposed for local November 3, 2020 elections in Ohio”—violate the Constitution “in light of the current public health emergency caused by the COVID-19 pandemic and the executive orders requiring that Ohio citizens stay at home and shelter in place.” (R. 1, Compl. at 19, PID 19.) But those orders are no longer in place, and the election is over. (See *Rescinded Public Health Orders*, OHIO DEP’T OF HEALTH, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/public-health-orders/public-health-orders-rescinded> (last accessed July 23, 2021, 9:45 AM)). So no “substantial controversy” of “immediacy and reality” exists. See *Preiser*, 422 U.S. at 402; see also 28 U.S.C. § 2201 (requiring “a case of actual controversy” before a court can issue declaratory relief).

Plaintiffs sought specific relief. They challenged Ohio’s ballot-access laws as applied to the unique circumstances existing during the 2020 election. But because of intervening events—the passing of the election and the rescission of Ohio’s stay-at-home orders and emergency declaration—we cannot give plaintiffs what they ask for. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (noting that a case is moot when the court cannot “grant any effectual relief”); *Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 564 (6th Cir. 2020). Thus, “in view of the limited nature of the relief sought, we think the case is moot because the . . . election is over.” *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969).

B.

The capable-of-repetition-yet-evading-review exception to mootness does not apply here. See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Plaintiffs point out that they are trying to get initiatives on the ballot for local 2021 elections. And because COVID-19 persists, the threat that Ohio will again implement stay-at-home orders keeps this case alive.

The capable-of-repetition exception features regularly in election disputes. *See In re 2016 Primary Election*, 836 F.3d 584, 588 (6th Cir. 2016). To be capable of repetition but evading review, a dispute must satisfy a two-pronged test. First, the challenged action must be too short in duration for the parties to fully litigate it before it becomes moot. And second, there must be “a reasonable expectation that the same complaining party will be subject to the same action again.” *Wis. Right to Life*, 551 U.S. at 462 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). We can assume the first prong is met here, as it commonly is in election cases. *See Lawrence*, 430 F.3d at 371.

But plaintiffs falter on the second prong. To be sure, we relax our inquiry at this step for election cases. *See Memphis A. Philip Randolph Inst.*, 2 F.4th at 560. So plaintiffs need not show that the same controversy will recur “down to the last detail.” *Wis. Right to Life*, 551 U.S. at 463. In other words, “[t]o be capable of repetition, ‘the chain of potential events does not have to be air-tight or even probable.’” *Memphis A. Philip Randolph Inst.*, 2 F.4th at 560 (quoting *Barry v. Lyon*, 834 F.3d 706, 716 (6th Cir. 2016)). Still, “a mere physical or theoretical possibility” that the events prompting the suit will come back is not enough. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). So a case “is not capable of repetition if it is based on a unique factual situation.” *Memphis A. Philip Randolph Inst.*, 2 F.4th at 560; *see also Libertarian Party of Ohio*, 462 F.3d at 584.

If any case is “based on a unique factual situation,” this one is. *See Memphis A. Philip Randolph Inst.*, 2 F.4th at 560. As pled, plaintiffs’ claims “are inextricably tied to the COVID-19 pandemic.” *Id.* A once-in-a-lifetime global pandemic prompted unprecedented stay-at-home orders right as election machinery was gearing up. The pandemic dissuaded the public from going outdoors, interacting with strangers, and gathering in groups—the situations plaintiffs say they rely on to solicit signatures. But the situation today differs markedly from a year ago. “Fortunately, because of advancements in COVID-19 vaccinations and treatment since this case began, the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle.” *Id.* And so “[t]here is not a reasonable expectation” that plaintiffs “will face the same burdens” that they did in 2020. *Id.*

Plaintiffs insist that “[t]here is not only a likelihood of recurrence, there is recurrence here.” (Appellant Br. at 38.) They say COVID-19 remains a “full blown crisis” hampering their efforts to gather signatures for 2021 initiatives. (*Id.*) But we recently rejected a similar argument in another election case, citing advancements in the COVID-19 vaccine and treatment. *See Memphis A. Randolph Institute*, 2 F.4th at 560–61; *see also People Not Politicians Or. v. Fagan*, No. 6:20-cv-01053-MC, 2021 WL 2386118, at *3 (D. Or. June 10, 2021).

Plaintiffs also insist that Ohio’s COVID restrictions not only hampered their ability to gather signatures for the 2020 election but also carried over to the 2021 election. Plaintiffs claim that they could have used “[s]ignatures collected between March and July of 2020 . . . to qualify initiatives for the November 2, 2021 ballot.” (Appellant Br. at 40.) Even if that’s true, this is the first time plaintiffs are saying so. *See Operation King’s Dream*, 501 F.3d at 592 (“Because the Plaintiffs present this argument for the first time on appeal, we decline to address it.”). All along, plaintiffs have claimed Ohio violated their constitutional rights as it relates to the November 2020 election and the emergency surrounding it. “Plaintiffs’ decision on appeal to alter the relief sought and transform the cause of action further underscores that their appeal is moot.” *Id.*

Finally, plaintiffs fall back on their fear that a future pandemic could wreak similar havoc on elections. This speculation does not get the job done. *See Speer v. City of Oregon*, 847 F.2d 310, 311–12 n.3 (6th Cir. 1988) (“Plaintiff cannot avoid mootness by engaging in speculation that at some point in the future she may move and then return and seek to run for City Council and again be subjected to the residency requirement.”); *People Not Politicians*, 2021 WL 2386118, at *3 (rejecting a COVID election challenge as moot in part because plaintiffs’ argument “that the circumstances that led to Plaintiffs’ as-applied challenge following the 2020 election cycle ‘could recur’ is highly speculative”). Because of the specific relief sought and the unique harm alleged, this is not a case when “the controversy” prompting the lawsuit “almost invariably will recur with respect to some future” ballot initiatives. *See Lawrence*, 430 F.3d at 372; *see also Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013).

III.

Ohioans had to make sacrifices as the state responded to COVID-19. We appreciate the difficulties the virus posed to plaintiffs' efforts to gather signatures for their initiatives. But the event for which plaintiffs sought relief has passed. So their claims are now moot. We affirm the district court's dismissal of their complaint.