In The Supreme Court of the United States

No. 19A1054

CHAD THOMPSON; WILLIAM T. SCHMITT; DON KEENEY,
Plaintiffs - Appellees - Applicants

v.

RICHARD MICHAEL DEWINE,
in his capacity as the Governor of Ohio;
AMY ACTON, in her official capacity as Director of Ohio Department of Health; **FRANK LAROSE**, in his official capacity as Ohio Secretary of State,
Defendants - Appellants - Respondents

OHIOANS FOR SECURE AND FAIR ELECTIONS; DARLENE L. ENGLISH; LAURA A. GOLD; ISABEL C. ROBERTSON; EBONY SPEAKES-HALL; PAUL MOKE; ANDRE WASHINGTON; SCOTT A. CAMPBELL; SUSAN ZEIGLER; HASAN KWAME JEFFRIES,
Proposed Intervenors - Appellees

OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL; JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,
Proposed Intervenors - Appellees

Application to the Honorable Sonia Sotomayor
Associate Justice of the United States
Circuit Justice for the Sixth Circuit

APPLICANTS' REPLY

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A. The Crisis Continues.

According to the New York Times, "[m]ore than 2,253,100 people in the United States have been infected with the coronavirus and at least 119,500 have died." *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, June 20, 2020.[1] "There have been at least 44,262 cases of coronavirus in Ohio, according to a New York Times database. As of Saturday afternoon [June 20, 2020], at least 2,697 people had died." *Ohio Coronavirus Map and Case Count*, N.Y Times, June 20, 2020.[2] The New York Times data reports that Ohio saw more COVID-19 cases on June 18, 2020 (700 cases) and June 19, 2020 (609 cases) than it had seen since May 29, 2020, when it reported 651 cases. *Id.* (interactive chart). As Governor DeWine warned when he began relaxing Ohio's emergency orders, Ohio remains at a "dangerous risk." *See* Randy Ludlow, *Coronavirus in Ohio: Gov. Mike DeWine warns virus remains 'a dangerous risk' even as state reopens*, Columbus Dispatch, May 12, 2020.[3]

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[1] https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?auth=link-dismiss-google1tap.

[2] https://www.nytimes.com/interactive/2020/us/ohio-coronavirus-cases.html.

[3] https://www.dispatch.com/news/20200512/coronavirus-in-ohio-gov-mike-dewine-warns-virus-remains-rsquoa-dangerous-riskrsquo-even-as-state-reopens.

B. Ohio Has Not Re-Opened.

Disregarding these realities in both its argument to the Sixth Circuit and here, Ohio continues to insist that all is well; it has "re-opened." Respondents erroneously represent to this Court, for example, that "[n]early all [emergency orders] have been eased or eliminated as the State 'reopens.'" Respondents' Opposition to Emergency Application to Vacate the Sixth Circuit's Stay (hereinafter "Response"), at 6. This false claim unfortunately convinced the Sixth Circuit: "Ohio is beginning to lift their stay-at-home restrictions. On May 20, the Ohio Department of Health rescinded its stay-at-home order." *Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020). The May 20, 2020 Order referenced, however, did no such thing.

The May 20, 2020 Order, brief as it is, stated without elaboration only that a single prior requirement that people "stay at home or at their place of residence" was lifted. *See* Director's Order that Rescinds and Modifies Portions of the Stay Safe Ohio Order, May 20, 2020.[4] Whether this was just another litigation tactic like the April 30, 2020 Order is unclear, but one thing is plain: the May 20, 2020 order did not mention Ohio's many prohibitions on "gatherings" or requirements that people maintain safe six foot distances. These restrictions were included in several prior orders and are the crux of the signature circulation problem. They remained in place even after the May 20 order, and are still the law in Ohio to this day.

Indeed, on May 29, 2020 -- three days after the Sixth Circuit stayed the District Court's preliminary injunction and the litigation in this case seemed to be

[4] https://coronavirus.ohio.gov/static/publicorders/Stay-Safe-Partial-Rescission.pdf.

at an end -- 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.[5]

Like the many emergency orders before it, the new May 29, 2020 order allows some businesses to remain open or re-open in limited fashions (including requiring social distancing),[6] continues 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 requires physical distancing in all gatherings that are allowed. The only "gathering" exceptions are for (1) weddings (with limitations) and funerals, (2) "religious facilities, entities and groups and religious gatherings," (3) "First Amendment protected speech," (4) since its April 30, 2020 order was released "petition or referendum circulators," and (5) "activity by the Media."

Further, the May 29, 2020 order reiterated that all "indoor family entertainment businesses and venues" are to remain closed until at least July 1, 2020. This is important, because "entertainment venues" includes "auditoriums,

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

[6] Even for those businesses that have now been allowed to re-open, and even for those persons allowed under the gatherings exceptions to venture out, they must continue to practice social distancing under the terms of the May 29, 2020 order. "Social Distancing," according to the May 29, 2020 order, "includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds … or using hand santizer, covering coughs or sneezes …, regularly cleaning high-touch surfaces, and not shaking hands."

stadiums, [and] arenas," where signature collection is common, efficient and productive. Closing these places means there are 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 prohibit inside and outside "parades, fairs, [and] festivals." This prohibition, coupled with the other gathering bans, necessarily spells the end to meaningful in-person signature collection in Ohio. It is simply impossible to collect thousands of signatures over a limited length of time without doing so at big events. Door-to-door solicitation is helpful, but collecting thousands upon thousands of signatures in a matter of a few weeks requires a high encounter rate, one that can only be achieved where there are lots of people. Lots of people gathered together in Ohio is illegal and dangerous.

In sum, for at least five weeks in Ohio circulators risked arrest and prosecution for violating any one of Ohio's many emergency orders. Beginning on April 30, 2020, Ohio allowed circulators to collect signatures, but continued to impose distancing requirements on everyone and prohibit gatherings of ten or more people, including "parades, fairs, and festivals." All arenas, auditoriums, and stadiums remained closed and will remain closed until at least July 1, 2020. There can be no denying that the audience once available to circulators simply no longer exists in Ohio, and will not exist for some time to come.

In spite of all this and "without evidence," Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative in a Pandemic*, 2020 U. CHIC. L. REV.

ONLINE 1, 10 (May 27, 2020) (cited with permission),[7] the motions Panel below "[d]ismiss[ed] the realities of how the pandemic had essentially ended successful petitioning activity" in Ohio. *Id.* at 9. "[W]e cannot hold private citizens' decisions to stay home for their own safety against the State," the Panel said. *Thompson v. DeWine*, 959 F.3d at 810. "Requiring Plaintiffs to secure hundreds of thousands of signatures in support of their initiative is a burden. That said, Ohio requires the same from Plaintiffs now as it does during non-pandemic times. So the burden here is not severe." *Id.* at 811.

Even if half of the circulation time previously allowed by Ohio was lost to the pandemic, the Panel surmised, "the five-week period from Ohio's rescinding of its order until the deadline" affords them more than enough time. *Id.* at 810. Further,

> There's no reason that Plaintiffs can't advertise their initiatives within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them and bring the petitions to the electors' homes to sign. Or Plaintiffs could bring their petitions to the public by speaking with electors and witnessing the signatures from a safe distance, and sterilizing writing instruments between signatures.

Id.[8] The Panel's armchair quarterbacking may be quaint, but it is hardly realistic. It reflects a clearly erroneous understanding of how massive signature collection efforts work, and how difficult it is to gather signatures even in ordinary times. It

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[7] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608472.

[8] It is not at all obvious how circulators could accomplish this latter technique suggested (without evidence) by the Sixth Circuit. Most cities in Ohio prohibit placing obstructions, such as card tables, on sidewalks and streets. *See*, *e.g.*, Columbus (Ohio) City Code, § 902.02. Collecting signatures thus cannot proceed like a check-out line at a grocery store, where papers can be left on tables with sanitized pens for willing voters who queue up in six foot intervals waiting to sign.

can hardly be squared with Governor DeWine's own public life-and-death warnings, both before and after Ohio's gradual re-opening began. *See* Ludlow, *supra*,; *DeWine warns 'risk is up' as Ohio continues reopening process: 'This is a high-risk operation*', 10tv.com, May 8, 2020.[9]

Albert Schweitzer once said that "All true living is face to face." That wisdom is now ancient history in Ohio and across the United States. Courts remain closed, schools are closed, businesses are closed, sports stadia are empty, baseball is on hold, parades, festivals, fairs and other gatherings of more than ten people are illegal. People must remain six feet apart. True living as Albert Schweitzer experienced it will not return for some time. Neither will face-to-face signature collection. The Sixth Circuit's factual finding to the contrary is clearly erroneous.

II. The District Court Did Not Order Any Affirmative Relief for Applicants.

Respondents make much of the District Court's orders setting aside the deadline for the state-wide initiatives and directing Defendants to consider allowing remotely collected signatures for state-wide initiatives. *See* Response at 1, 29-32. They conveniently fail to mention, however, that none of this affirmative relief applied to Applicants. None of it applied to Ohio's distinct local initiative process, which is distinct and is all Applicants challenged. The only relief afforded Applicants was a negative injunction prohibiting enforcement of the July 16, 2020

[9] https://www.10tv.com/article/dewine-warns-risk-ohio-continues-reopening-process-high-risk-operation-2020-may.

deadline and Ohio's in-person signature requirement. Solutions beyond that were left completely to the State.

Respondents also incorrectly claim that "Thompson submitted no evidence at all." Response at 9. Applicant-Thompson submitted a Verified Complaint, which is not only testimonial but was not contested. The parties, moreover, stipulated to all the facts needed to support a negative injunction, which is all Applicants received. Defendants, meanwhile, were repeatedly invited by the Court to submit evidence in rebuttal, but they chose not to. Instead, they stipulated to all the facts that were necessary to support the District Court's negative injunction for Applicants.

III. Applicants Did Not Have Months to Collect Signatures Before COVID-19.

Respondents erroneously assert that Applicants had "months" to collect signatures before COVID-19. Response at 1. This is not true. Ohio law prohibits those circulating local initiatives from doing so before initially filing their proposed ordinances with local officials. *See* Ohio Rev. Code § 731.32. Applicants in the present case, as stipulated by the parties, filed the relevant initiatives with local officials on February 27, 2020. *See* Stipulated Facts, R.35, at PAGEID # 469. That means they could begin collecting signatures that were due by July 16, 2020 no sooner than late in the day on February 27, 2020. COVID-19 and Ohio's emergency orders effectively closed the State no later than March 22, 2020 (and effectively much sooner). Ohio did not purportedly even "allow" circulators to begin collecting again until April 30, 2020 (after this litigation commenced).

Thus, even assuming that circulation was possible beginning on May 1, 2020, Applicants lost at least five weeks of circulation time, had at most three weeks before COVID-19 hit to collect signatures, and in total would have had roughly 18 weeks to collect signatures in the absence of COVID-19. Far from having "months" to circulate at their leisure as Respondents claim, Applicants had only 18 weeks assuming there was no pandemic, lost at least five weeks to Ohio's closure, lost much more than that because of COVID-19, and continue to suffer the effects of COVID-19 moving forward. As Courts and Elections Officials across the country have recognized, collecting thousands of signatures face-to-face is simply not possible under the current circumstances.

IV. Ohio's Claim That Applicants' Activity Was Not Protected By The First Amendment Proves That it Could Not Have Been Exempted By a "First Amendment" Exemption.

Respondents principal argument is that this Court should let the Sixth Circuit's stay stand because the Applicants' circulation does "not implicate the Free Speech Clause *at all*." Response at 2 (emphasis original). Given this claim, they have necessarily admitted that Ohio's "First Amendment protected speech" exception, which proved so "vitally" important to the Sixth Circuit, could not have protected Applicants' circulation efforts before April 30, 2020. Respondents have necessarily conceded that the Sixth Circuit's conclusion is premised on a mistaken reading of Ohio's orders and constitutional law. This, all by itself, justifies setting aside the stay.

That Respondents later attempt to back-track and claim that "Ohio's stay-at-home orders *always* exempted First Amendment activity, including signature gathering," Response at 3 (emphasis original), is simply inexplicable. How could circulation not be protected by the First Amendment at all, as Respondents emphasize to defeat this Court's involvement, yet be protected as First Amendment activity for purposes of Ohio's "First Amendment protected speech" exception? Respondents' argument is duplicitous at best and curious to say the least.

V. Applicants Must Collect Hundreds and Thousands of Signatures in Several Different Cities Across Ohio.

Respondents argue that Applicants bear little burden because they have few signatures to collect. Response at 23-24. This is not true. The cherry-picked villages that Respondents point to are small, but many of the Cities Applicants target are quite large. In Akron, for example, where Applicants filed before February 27, 2020, *see* Stipulated Facts, R.35, at PAGEID # 469, the population approaches 200,000. *Id.* Ohio law, modified by the Akron City Charter, requires that Applicants collect signatures from registered voters totaling no less than 7% of the number of votes cast in Akron during the last gubernatorial election. This translates into several thousand required signatures, just for Akron alone. Respondents even concede that this number likely approaches 10,000 signatures just for this single City. Response at 24. Putting all of the Villages and Cities together that Applicants target, the total number swells to thousands upon thousands in disparate locations across the State.

VI. The Panel's Logic Threatens Signature Collection Efforts Across the Country.

Challenges to States' strict in-person signature collection requirements for candidates and initiatives continue to be filed in Ohio, States within the Sixth Circuit, and across the country. The list of 100+ pending COVID-19 related cases reported by Professor Levitt, *see* Justin Levitt, *The list of COVID-19 election cases*, ElectionLawBlog, June 11, 2020,[10] gets bigger every day. *See*, *e.g.*, *Bond v. Dunlap*, 1:20cv-216 (D. Me., filed June 19, 2020) (challenge by independent candidate in Maine who needs 4000 signatures); *Maryland Green Party v Hogan*, 1:20cv-1253 (D. Md., June 19, 2020) (announcing settlement agreement reached between board of elections and party requiring 5,000 signatures instead of usual 10,000).

The Sixth Circuit's published decision in *Thompson v. DeWine*, 959 F.3d 804, reflects a United States Court of Appeals' first stab at the ballot access/COVID-19 dilemma. Unfortunately, the Sixth Circuit's stab is so flawed, "deeply problematic," Hasen, *supra*, at 6, and "dismissive of the rights of direct democracy," *id.* at 2, that it "portends bad things to come" in States across the country. *Id.* (footnote omitted).

If correct and followed by other Courts -- and that now appears to be happening -- *Thompson* threatens ballot access across the United States. Its faulty "COVID-19 is not that bad" logic has hamstrung the frontline jurists needed to properly conduct the required fact-finding on a case-by-case basis. Perhaps even more worrisome for the COVID-19 future, the Sixth Circuit's holding encourages

[10] https://electionlawblog.org/?p=111962.

citizens to ignore content-neutral emergency restrictions based on their purported "First Amendment protected" rights.

If the Sixth Circuit's stay (and the logic behind it) stands, it risks quickly setting a misguided precedent for the rest of the United States during this continuing time of crisis. States will begin building into their emergency orders vague First Amendment exemptions that can only spell future difficulties, Courts will begin un-remembering the terrible burdens COVID-19 has placed on and continues to cause its people, and democracy will suffer a serious blow. The reality is, as numerous Courts before *Thompson* recognized, there is simply no way that circulators can collect the necessary signatures in-person and up close with pen and paper during a killing pandemic. This reality is not going to change in the foreseeable future even as States begin relaxing restrictions. Like it or not, COVID-19 marks a sea change in America's experiment with popular democracy.

In terms of *Thompson*'s dual propositions that (1) COVID-19 was never that serious in the first place and (2) federal courts are not constitutionally equipped to address its ramifications, post-*Thompson* precedents have thus far produced mixed results.

A. The Seventh Circuit Rejects *Thompson*.

In Illinois the State Elections Board, emboldened by *Thompson*, belatedly attempted to use it to unravel a month-old order directing it to relax signature collection requirements because of COVID-19. *See Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020), *appeal pending*, No. 20-1961

(7th Cir., filed June 6, 2020). On June 9, 2020, repeatedly citing *Thompson*, it asked the Seventh Circuit to reinstate the State's June 22, 2020 deadline, remove candidates from the ballot, and undo the District Court's order allowing remote signature collection. *See* Appellants' Brief, No. 20-1061, Doc. No. 13 (7th Cir., filed June 15, 2020).

The Seventh Circuit, after two rounds of briefing, on June 21, 2020, denied the Illinois State Board of Elections Request. *See Libertarian Party of Illinois v. Pritzker*, slip op., No. 20-1961, Order, Doc. No. 23 (7th Cir., June 21, 2020) (Attachment 1). The Seventh Circuit noted the Board's argument under *Thompson* that a Federal Court is not "in the best position to determine the necessary election modifications that will balance the rights of candidates to access the ballots," *id.* at page 5, but rejected it. "[N]owhere in its motions papers does [the Board] explain what, if any, changes it would make to the statutory petition requirements to ensure that independent candidates are not excluded from the ballot. Nor does it acknowledge the serious safety concerns and substantial limitations on public gatherings that animated the parties' initial agreement and persist despite some loosening of restrictions in recent weeks." *Id.* It accordingly refused the Board's request for a stay.

Had it followed *Thompson*, of course, the Seventh Circuit would have granted the stay. Ohio, after all, also failed to explain in *Thompson* what changes it would make to accommodate candidates and initiatives. The District Court instructed it to, but the Sixth Circuit stayed even this aspect of the lower Court's order. Like

Illinois, Ohio failed to acknowledge "the serious safety concerns and substantial limitations on public gatherings" that continue to exist, yet that did not matter to a Sixth Circuit Panel that agreed with Ohio's new-found sentiments.

The Seventh Circuit's decision reflects a common problem in this spate of COVID-19 election litigation. Those States that want to help do so quickly and voluntarily. Those that don't, like Illinois, Ohio and Michigan (discussed below), steadfastly refuse any measure of cooperation. When this happens, and it is happening frequently, Courts must be able to take action to correct constitutional deficiencies. They cannot be handicapped in the fashion mandated by the Sixth Circuit in *Thompson*.

B. *Thompson*'s Impact In Ohio, the Sixth Circuit and Elsewhere.

In *Duncan v. LaRose*, No. 2:20-cv-2295 (S.D. Ohio, June 4, 2020), the District Court on June 4, 2020 denied preliminary relief to a perennial independent presidential candidate in Ohio who needs to collect 5000 signatures: "While *Thompson* involves initiative petitions as opposed to Plaintiff's desire to be placed on the presidential ballot, the Court sees no basis to distinguish this case from the reasoning in *Thompson*." Doc. No. 16, at PAGEID # 81.

This same result appears pre-ordained in *Hawkins v. DeWine*, No. 2:20-cv-2781 (S.D. Ohio, filed May 29, 2020), where the Green Party's presidential candidate in Ohio also needs to collect thousands of signatures before August 5, 2020. Ohio moved to dismiss the Green Party's challenge under *Thompson* on June 12, 2020, *see* Motion to Dismiss, No. 20-2781, Doc. No. 11, and the Green Party

would seem to have little hope of avoiding the same fate as Duncan should *Thompson*'s stay remain in place.

Demonstrating the inherent flaw in the *Thompson* Panel's "vitally important" "First Amendment exception" logic -- reasoning that simply cannot be squared with this Court's refusal to grant a stay in *South Bay United Pentecostal Church v. Gavin*, 590 U.S. __, No. 19A1044 (May 29, 2020) -- the Court in *SawariMedia, LLC v. Whitmer*, 2020 WL 3097266 (W.D. Mich., June 11, 2020), went to lengths to avoid it. Notwithstanding *Thompson*, and despite Michigan's also having a formal "First Amendment exception" built into its emergency orders (contrary to what the *Thompson* Panel erroneously said), the *SawariMedia* Court preliminarily enjoined "strict application of Michigan's signature requirement and filing deadline for ballot initiatives." *Id.* at *15. Michigan, like Ohio, had included a First Amendment exemption to its COVID-19 stay-at-home orders.

Though the Court recognized that in *Thompson* these First Amendment exemptions proved "'vitally important' to the Sixth Circuit's determination that Ohio's stay-at-home orders did not impose a severe burden on the plaintiffs' First Amendment rights," *SawariMedia*, 2020 WL 3097266 at * 8, it found Michigan's exemption sufficiently different. "In sharp contrast" to Ohio's First Amendment exemptions, the Court observed that Michigan's stay-at-home orders' "Constitutional Exemption Language" left it "far from clear that that language permitted citizens to gather petition signatures." *Id.* "The Constitutional Exemption Language provided that the restrictions imposed by the Governor did not 'abridge

protections guaranteed by the state or federal constitution *under these emergency circumstances*.'" *Id.* (emphasis original and footnote omitted).

"But that begs the difficult question: how do 'these emergency circumstances' impact constitutional protections?," the Court observed. *Id.* "Do citizens have a First Amendment right to gather signatures in public at the height of a raging COVID-19 pandemic that threatens the health and, indeed, the lives of millions of Americans?" *Id.* Of course, this Court in *South Bay United Pentecostal Church*, 590 U.S. __, No. 19A1044, made clear they do not.

For its part, the District Court in *SawariMedia*, 2020 WL 3097266, at *8, concluded that because Michigan's First Amendment exemption included the phrase "under these emergency circumstances," it was less clear than Ohio's "First Amendment protected speech" exemption, which did not include this language. It could not therefore be held against the circulators who could not have understood it.[11] It is quite doubtful, of course, that there exists any meaningful difference at all between the Michigan and Ohio First Amendment exceptions. This further impeaches the Sixth Circuit's reasoning that Ohio's exception was "vitally important" since it allowed Ohio circulators all along to gather signatures. The people who were and are expected to follow emergency orders during times of crisis could not have understood this.

[11] The Court also noted that "[t]here are no obvious answers to the questions posed above. But there is at least some authority for the proposition that liberties that citizens enjoy under the Constitution may be subject to at least some otherwise impermissible restraints during a public health crisis." *Id.* at * 8 n.18 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925 (6th Cir. 2020)).

In terms of relief, the *SawariMedia* Court was left by *Thompson* with only authority to ask that Michigan (just as the District Court had done in *Thompson*) propose a remedy. Michigan did so on June 15, 2020, four days after the Court's emergency order, but refused to adjust either its numerical requirements or its in-person requirement for collecting signatures. *See* State Defendants Notice of Proposed Remedy, No. 20-11246, Doc. No. 18, at PAGEID # 260.

It instead offered what can only be described as meaningless relief, that is, to "toll § 472a's application to Plaintiffs' petition for a period of 69 days extending from March 24, 2020, the day after the first Stay-Home Order issued, to June 1, 2020, the day restrictions on gatherings of groups of persons not residing in the same household were significantly reduced." *Id.* at 261. How this would provide assistance was not explained, nor is it evident since June 1, 2020 has already passed. The Court on June 16, 2020 rejected the State's proposal as "contraven[ing] the terms of the Court's injunction." Status Conference Order, No. 20-11246, Doc. No. 22, at PAGEID # 289. The State was given another opportunity, with another conference scheduled for June 22, 2020. *Id.*

Thompson's infection has spread outside Ohio and the Sixth Circuit. In *Sinner v. Jaeger*, 2020 WL 3244143, *4 (D.N.D., June 15, 2020), for example, the Court refused emergency relief from North Dakota's signature collection requirement, specifically relying on *Thompson*: "None of the Governor's executive orders even tangentially prohibited signature collection." (Citing *Thompson*, 959 F.3d at 809-10). In doing so it paraphrased *Thompson* as "determining [that] similar

Ohio in-person signature requirements created less than a severe burden where pandemic restrictions did not limit First Amendment activity." *Sinner*, 2020 WL 3244143, at *4.

Quoting *Thompson*, 959 F.3d at 810, for its proposition that "just because procuring signatures is now harder ... doesn't mean that Plaintiffs are *excluded* from the ballot," the Court concluded that "[a]lthough the precautions NDVF has chosen to implement increase the burden on canvassers, garnering the requisite number of signatures is far from impossible." *Sinner*, 2020 WL 3244143, at *6 (quoting *Thompson*, 959 F.3d at 810) (emphasis in original). It then added, again quoting *Thompson*, 959 F.3d at 810, "[t]he Court 'cannot hold private citizens' decisions to stay home for their own safety against the State.'" *Sinner*, 2020 WL 3244143, at *7 (quoting *Thompson*, 959 F.3d at 810).

In *Gottlieb v. Lamont*, 2020 WL 3046205, *6 (D. Conn., June 8, 2020), the Court denied relief to candidates in Connecticut, again relying on *Thompson*. That the State had been locked down by COVID-19 and governmental stay-at-home orders for weeks on end was deemed ancient history since the "[t]he Governor began to ease the 'Stay at Home' restrictions on May 20, 2020," and "[p]etitions could also be circulated in person consistent with social distancing restrictions." (Citing *Thomas v. DeWine*, 959 F.3d 804). It paraphrased *Thompson* as "declining to find a severe burden on plaintiffs' rights when Ohio had begun to lift its stay-at-home restrictions by the time the petitioning period began." *Gottlieb*, 2020 WL 3046205, at *6.

In *Fair Maps Nevada v. Cegavske*, 2020 WL 2798018, *13 (D. Nev., May 29, 2020), the Court ordered relief for circulators because Nevada had no built-in First Amendment exemption: "That makes this case distinguishable from *Thompson [6th Cir.]*, where Ohio's equivalent orders included a specific carve-out for protected First Amendment activity." Still, the Court looked to *Thompson* in terms of the precise relief, observing that "the mandatory injunction that Plaintiffs seek here—affirmatively ordering the Secretary to do things—is untenable because 'federal courts have no authority to dictate to the States precisely how they should conduct their elections.'" (quoting *Esshaki v. Whitmer*, __ Fed. App'x __, 2020 WL 2185553 (6th Cir., May 5, 2020); *Thompson*, 959 F.3d at 812).

As Professor Hasen has explained, this approach is wrongheaded; It "has put a thumb on the scale favoring the state, denigrating the right to petition along the way, and minimizing the real costs that the pandemic has placed on democratic petitioning activity." Hasen, *supra*, at 11. "Most importantly, the Sixth Circuit decision sends a disturbing signal about how some courts may approach burdens on fundamental voting rights questions during the pandemic." *Id.* (footnote omitted).

The Supreme Court needs to step in now to set a more reasoned example for the lower federal Courts that are being asked to deal with this problem. As recently stated by Professor Pildes, "the best overarching framework for understanding the actions of many federal courts across the county, particularly the district courts, is that federal courts -- like many other other governmental institutions -- are indeed exercising exceptional emergency powers when it comes to voting and

the virus." Richard H. Pildes, *The Constitutional Emergency Powers of Federal Courts*, page 9, SSRN, June 17, 2020.[12] District Courts should be allowed to do their jobs based on real evidence, not armchair assumptions like those drawn by the Sixth Circuit. The Sixth Circuit's stay should be vacated.

Dealing later with the COVID-19 crisis and the lower Courts' various approaches to it is not a viable option. Deadlines loom. Cases are pending. Action is needed. The *Thompson* Court's rationale, if followed, risks infecting more Americans. It forces people into the streets and requires that they go door-to-door. Not once or twice or even dozens of times, but thousands of time.

Conclusion

The Sixth Circuit motion Panel's stay should be vacated.

Respectfully submitted,

/s/ Mark R. Brown

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[12] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629356.

Certificate of Service

I certify that this Application was e-mailed pursuant to a service of process agreement entered into by all parties to: Benjamin Flowers, Ohio Solicitor General, Counsel of Record for Respondents, at benjamin.flowers@ohioattorneygeneral.gov, Freda Levenson, Counsel of Record for Proposed Intervenors-Appellees-Ohioans for Secure and Fair Elections, et al., at flevenson@ohioaclu.org, and Donald J. McTigue, Counsel of Record for Proposed Intervenors-Appellees-Ohioans for Raising the Wage, et al., at dmctigue@electionlawgroup.com, this 22nd day of June 2020.

/s/ Mark R. Brown
Mark R. Brown

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RICHARD MICHAEL DEWINE,
in his capacity as the Governor of Ohio;
AMY ACTON, in her official capacity as Director of Ohio Department of Health; **FRANK LAROSE**, in his official capacity as Ohio Secretary of State,
Defendants - Appellants - Respondents

OHIOANS FOR SECURE AND FAIR ELECTIONS; DARLENE L. ENGLISH; LAURA A. GOLD; ISABEL C. ROBERTSON; EBONY SPEAKES-HALL; PAUL MOKE; ANDRE WASHINGTON; SCOTT A. CAMPBELL; SUSAN ZEIGLER; HASAN KWAME JEFFRIES,
Proposed Intervenors - Appellees

OHIOANS FOR RAISING THE WAGE; ANTHONY CALDWELL; JAMES E. HAYES; DAVID G. LATANICK; PIERRETTE M. TALLEY,
Proposed Intervenors - Appellees

Application to the Honorable Sonia Sotomayor
Associate Justice of the United States
Circuit Justice for the Sixth Circuit

APPLICANTS' REPLY APPENDIX

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 21, 2020

By the Court

No. 20-1961

LIBERTARIAN PARTY OF ILLINOIS, *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM J. CADIGAN, individual member of the Illinois State Board of Elections, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 20-cv-2112

Rebecca R. Pallmeyer,
Chief Judge.

O R D E R

Appellants, individual members of the Illinois State Board of Elections (the "Board"), ask this court to stay enforcement of the district court's preliminary injunction. We deny the motion because the Board has not shown that it would be irreparably harmed by injunctive relief that it initially agreed to and because staying the preliminary injunction at this late date would result in clear harm to the plaintiffs who have relied on its terms.

On April 3, 2020, the Libertarian Party of Illinois, the Illinois Green Party, and several individuals who wish to run for state or federal office in the November 2020 election or vote or gather signatures for independent candidates, sought injunctive relief in the district court. They sought to enjoin or modify Illinois's signature collection requirements for independent and third-party candidates in light of the public health emergency caused by the novel coronavirus COVID-19 and Governor Pritzker's

emergency executive orders that effectively shut down the state. In its briefing, the Board agreed that some relief was warranted due to the pandemic. It proposed delaying the filing deadline by two weeks until July 6, 2020, and reducing the signature requirement first to 50% and later to 33% of the number required by the Illinois Election Code. After several hearings with the district court's emergency judge, the parties reached agreement and submitted a proposed order, apparently drafted by the Board.

The district court noted that a court considering a challenge to state election laws must carefully balance "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The district court said it did not need to devote significant attention to constitutional questions, however, because the parties "proposed an order that grants appropriate relief in these unprecedented circumstances." Opinion and Order at 7-8. The district court found that the combination of restrictions on public gatherings imposed by Governor Pritzker's shelter-at-home order, which started at nearly the same time as the window for gathering signatures, and the in-person signature requirements in the Illinois Election Code was "a nearly insurmountable hurdle for new party and independent candidates attempting to have their names placed on the general election ballot." *Id.* at 7. The district court concluded that the parties' agreed order would ameliorate plaintiffs' difficulty meeting the signature requirement while accommodating the state's interest in ensuring that only parties with measurable public support will gain access to the 2020 general election ballot. The district court adopted the parties' proposed order as the preliminary injunction. Entered on April 23, 2020, the preliminary injunction addressed four main points:

> (1) Plaintiff political parties are permitted to nominate candidates without petitions in any race in which they had nominated a candidate in either 2016 or 2018, and the three individual candidates are permitted to appear on the ballot for any office they qualified for in 2016 or 2018 without a petition;
>
> (2) New political party and independent candidates not subject to item (1) are required to file nomination petitions signed by not less than 10% of the statutory minimum number required;

(3) Petition signers are permitted to affix their signatures to a petition electronically, by using a computer mouse, a stylus, or their finger; and

(4) The statutory petition filing deadline is moved from June 22, 2020, to August 7, 2020.

Despite agreeing to each of these terms, the Board filed a motion to reconsider on May 8. It argued that after consulting with local election officials, it believed the later filing deadline would impact its ability to conduct an accurate and orderly election. It asked the district court to amend its preliminary injunction order and direct the Board to establish appropriate ballot access requirements for independent and new political party candidates. Alternatively, the Board asked the court to move the deadline for candidate nomination and petition filings from August 7 to July 6 and set the minimum petition signature threshold at 25% of the statutory minimum. On May 15, after a hearing, the district court granted the motion in part; it moved the deadline for candidate nomination and petition filings to July 20, but denied the motion to reconsider in all other respects.

The Board then waited until June 6, a Saturday, to file its notice of appeal. On June 9 it asked this court to stay the preliminary injunction order, as modified on May 15, and to drastically expedite briefing. Although Federal Rule of Appellate Procedure 8(a)(1) says a "party must ordinarily move first in the district court" before seeking a stay pending appeal, the Board did not do so. It argues that moving first in the district court would be impractical, see FED. R. APP. P. 8(a)(2)(A)(i), because the district court already denied its request to be allowed to establish appropriate ballot access requirements.

When deciding whether to enter a stay, this court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

The Board argues that it is likely to succeed on the merits of its appeal because the district court exceeded its authority when it dictated how Illinois must conduct its elections. We are mindful that the Constitution grants states "broad power" to conduct elections. Art. I, § 4, cl. 1; see *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). As relevant to this case, however, a state's broad power also encompasses the ability to agree to the terms of a preliminary injunction. The Board also argues that its recent receipt of

nominating petitions from twelve Republican and Democratic candidates shows that the statutory ballot access requirements do not categorically exclude third-party candidates from the ballot. But this is the type of new evidence that should have been presented to the district court in the first instance.

Despite the Board's initial agreement to the injunction, the possibility that it would suffer irreparable injury absent a stay gave us pause. We ordered a supplemental expedited submission from the Board so it could explain with precision and with references to supporting evidence what irreparable harm it believes will result absent a stay, and directed the appellees to respond. In its supplemental submission, the Board provides more details about specific election deadlines, particularly that Illinois is required by statute to transmit requested absentee ballots to military and overseas voters at least 45 days before the election. *See* 52 U.S.C. § 20302(a)(8). The Board submitted two consent decrees entered after Illinois election officials failed to meet this deadline in 2010 and 2013, and argues that the terms of the preliminary injunction significantly increase the risk of another adverse action by the Justice Department.

We find the Board's arguments and evidence insufficient to demonstrate that it will suffer irreparable harm absent a stay. After independent candidates submit their petitions, currently due on July 20, voters have five days to object to a candidate's nomination papers and the Board must then hold a hearing. The Board says it has historically taken as long as five weeks to resolve voter objections, and relies on a declaration by Steve Sandvoss, the Board's Executive Director. But neither Sandvoss nor the Board provide specific examples or evidence to support this assertion. The Board also relies on declarations from two Illinois county election officials. These officials said that, based on their personal knowledge and professional experience, the lower signature threshold will lead to an increased number of non-viable candidates and petition objections and it is unlikely that all candidate objections will be resolved in time for timely printing of ballots, thus impeding their ability to meet the deadline for transmitting ballots to military and overseas voters by the September 18 statutory deadline. Notably, the three declarations were prepared in support of the Board's motion for reconsideration when the petition deadline was August 7, two weeks later than the deadline the Board seeks to stay, and are based on the officials' experiences with elections unaffected by a global pandemic. Further, the Board was aware of the September 18 deadline for mailing military and overseas ballots when it agreed to the terms of the preliminary injunction and there is no evidence that Illinois's previous difficulty meeting the deadline was the result of later petition deadlines. And as the appellees point out in their supplemental submission, at least 37 states have candidate

filing deadlines later than Illinois's current July 20 deadline, and routinely comply with the deadline for mailing military and overseas ballots. We conclude that none of the evidence submitted by the Board shows that the July 20 filing deadline or the reduced signature requirement is likely to impede election officials' ability to meet the deadline for transmitting ballots to military or overseas voters.

In contrast, the appellees have provided evidence showing that they would be significantly injured if we stayed the preliminary injunction. First, the injunction eliminated the petition requirement for Green Party and Libertarian Party candidates in any race in which the party had nominated a candidate in 2016 or 2018. As a result, those candidates have not gathered signatures and would be unable to do so by the statutory petition deadline. Second, other independent candidates are in the process of collecting a lower number of petition signatures in reliance on the preliminary injunction. Five of these candidates prepared declarations saying they would be excluded from the ballot if they were required to collect a larger number of signatures as a result of current restrictions on public gatherings and voters' reasonable apprehension about close contact. These difficulties are furthered by the lack of adequate notice from the state.

The Board asserts in its motion for stay that it, "not the federal court, is in the best position to determine the necessary election modifications that will balance the rights of candidates to access the ballots with the public interest in limiting the field of candidates to avoid ballot confusion." But nowhere in its motions papers does it explain what, if any, changes it would make to the statutory petition requirements to ensure that independent candidates are not excluded from the ballot. Nor does it acknowledge the serious safety concerns and substantial limitations on public gatherings that animated the parties' initial agreement and persist despite some loosening of restrictions in recent weeks. The Board has not made a strong showing that it is likely to succeed on the merits of its appeal, given its initial agreement to the terms of the preliminary injunction. It has also failed to show that the balance of harms favors a stay. Accordingly, the motion for stay is DENIED.

In light of this ruling and the approaching petition deadline, the parties shall file by July 6, 2020, statements of position addressing whether further briefing or oral argument are necessary.