In The Supreme Court of the United States

No. 19-A____

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

EMERGENCY APPLICATION TO VACATE STAY

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Application to Vacate Stay

Pursuant to Supreme Court Rules 21 and 22, Applicants respectfully request that Justice Sotomayor, Circuit Justice for the Sixth Circuit, vacate the United States Court of Appeals for the Sixth Circuit's stay, entered on May 26, 2020, (hereinafter "Sixth Circuit Order") (Attachment 1), of the United States District Court for the Southern District of Ohio's preliminary injunction (hereinafter "District Court Order") (Attachment 2), entered on May 19, 2020. *See Frank v. Walker*, 574 U.S. 929 (2014) (vacating stay).

The Sixth Circuit, *see* Sixth Circuit Order at 12, stayed a preliminary injunction entered by the District Court enjoining Ohio authorities from enforcing their in-person, "wet," witnessed signature collection requirements and July 16, 2020 deadline as applied to the November 3, 2020 general election. *See* District Court Order at 40. The District Court, like numerous Courts, Governors, and elections officials across the country, had concluded that in-person signature collection was rendered factually impossible and legally questionable by the COVID-19 pandemic and Ohio's mandatory shelter orders that were implemented on March 22, 2020. *See* District Court Order at 33-34.

The Sixth Circuit's Order staying the District Court's injunction pending appeal is published and reported at 959 F.3d 804 (6th Cir. 2020). As explained in more detail below, it likely spells the death knell for Applicants'

efforts to collect enough signatures by the July 16, 2020 deadline in most cities in Ohio. Applicants have lost too much time, and future in-person efforts are still compromised by Ohio's ban on gatherings and distancing requirements. Moreover, serving as a potential precedent in the approximately 116 COVID-19 cases pending across 35 States, *see* Justin Levitt, *The list of COVID-19 election cases*, ElectionLawBlog, June 11, 2020,[1] the Sixth Circuit's reasoning threatens to disenfranchise thousands of Americans who support democracy through alternative candidates and popular initiatives. Many of both will be left off ballots without relief from the effects of COVID-19.

The relief being sought here was also sought from the Sixth Circuit Panel that rendered the stay and the Sixth Circuit En Banc. *See* Supreme Court Rule 23.3. Applicants on the very day (May 26, 2020) the Sixth Circuit announced its stay petitioned the Sixth Circuit for Rehearing En Banc, *see* Attachment 3, and at the same time moved the En Banc Court to vacate the stay. *See* Attachment 4.

Applicants' May 26, 2020 request for En Banc review supplemented Respondents' own prior request on May 21, 2020 that the Sixth Circuit address the case initially En Banc. The Sixth Circuit on that day, May 21, 2020, ordered a Response to the initial En Banc petition by May 28, 2020.

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

On May 30, 2020, just hours after this Court handed down its decision in *South Bay United Pentecostal Church v. Gavin*, 590 U.S. __, No. 19A1044 (May 29, 2020) (Attachment 8), Applicants notified the En Banc Sixth Circuit of that decision and separately moved the original Panel to reconsider its stay based on that intervening case. *See* Attachment 5. Three weeks after Applicants requested the En Banc Court to vacate the stay, and more than two weeks after *South Bay Pentecostal Church* was decided, the Sixth Circuit on June 16, 2020 refused to vacate its stay and denied En Banc review. *See* Attachment 9.

Because of the Panel's stay and the En Banc Court's refusal to intervene and vacate the stay, Applicants' First Amendment rights remain on hold. Ohio's July 16, 2020 deadline closely approaches, Applicants cannot safely collect in-person, "wet" signatures, Ohio's shelter orders continue to require physical separation until at least July 1, 2020, and irreparable harm compounds with each passing day.

As explained below, in addition to vacating the Sixth Circuit's stay based on the traditional principles discussed below, *see infra*, the Sixth Circuit's stay should be vacated because it contradicts this Court's decision in *South Bay United Pentecostal Church*, 590 U.S. __. The principal reason supporting its stay -- a reason the Panel deemed "vitally important" -- was that Applicants were always free (the Sixth Circuit erroneously claimed) under the First Amendment, even during the height of the COVID-19 crisis,

to ignore Ohio's content-neutral shelter restrictions and go door-to-door circulating their petitions. This was the key to the Sixth Circuit's holding. Because it cannot be squared with this Court's decision in *South Bay United Pentecostal Church*, 590 U.S. __ (May 29, 2020), which ruled that Americans do not have protected First Amendment rights during times of crisis to ignore content-neutral shelter-in-place restrictions, the Panel's stay should be reconsidered.

Applicants therefore request that this Court either vacate the Sixth Circuit's stay under traditional principles, alternatively vacate and remand the matter for further consideration in light of *South Bay United Pentecostal Church*, *see*, *e.g.*, *Alridge v. Louisiana*, No. 18-8748, 2020 WL 1978920 (U.S., Apr. 27, 2020), or take any additional action the Court deems appropriate to provide relief to Applicants and a timely resolution to this case. *See*, *e.g.*, *Veasy v. Abbott*, 136 S. Ct. 1823 (2016) (stating that "[t]he Court recognizes the time constraints the parties confront in light of the scheduled elections in November").

Introduction

Applicants are residents of Ohio who regularly circulate marijuana decriminalization initiative petitions throughout Ohio in order to amend municipal codes. *See Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019), *cert. denied*, No. 19-974 (U.S., May 26, 2020). Because of prior litigation in *Schmitt*, Ohio elections officials recognize that Applicants' petitions are proper subjects and Applicants have continued their efforts.

Before the onset of COVID-19 crisis in Ohio, Applicants on or about February 27, 2020 timely filed proposed initiatives with several cities in Ohio in order to collect signatures to support placing their initiatives on Ohio's November 3, 2020 general election ballot. Under Ohio law, the initial filings of these initiatives were required to "start the clock" in these cities and allow circulators to begin collecting the needed signatures. *See* O.R.C. § 731.32. The needed numbers vary with the size of the City or Village, *see* O.R.C. § 731.28, and can be dozens, hundreds or thousands (as in Akron, for instance, where Applicants are circulating petitions). They are due by July 16, 2020. *See State ex rel. Harris v. Rubino*, 155 Ohio St.3d 123, 127, 119 N.E.3d 1238, 1243 (2018).

Section 3501.38(B) of the Ohio Revised Code provides that "[s]ignatures shall be affixed in ink" and must be original, meaning that collection efforts must produce "wet" signatures. Section 3501.38(E) of the Ohio Revised Code adds that circulators must personally witness the

signatures collected. The combination of these laws establishes that collection must be in-person and close enough to facilitate witnessing. Nothing in the record suggests it can be accomplished from a distance of six feet.

The COVID-19 Crisis

COVID-19 erupted across the globe in January 2020. The World Health Organization (WHO) on January 30, 2020 declared a Public Health Emergency of International Concern. On January 31, 2020, the Director of the National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention (CDC) announced that COVID-19 had spread to the United States. *See* Press Release: CDC Confirms Person-to-Person Spread of New Coronavirus in the United States.[2]

Ohio's Governor acted quickly. On March 3, 2020, he closed the Arnold Sports Festival, a large gathering of athletes and spectators in downtown Columbus that was fertile ground for signature collection. *See* Shawn Lanier, *Arnold Sports Festival cancels convention due to coronavirus, will allow athletes to compete*, NBCI.COM, March 3, 2020.[3] On March 9, 2020 declared a state of emergency in Ohio. *See* Executive Order 2020-01D.[4] Parades and public events were canceled throughout Ohio, including the Mid-American

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[2] https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html.

[3] https://www.nbc4i.com/news/local-news/dewine-ginther-set-press-conference-on-arnold-classic/.

[4] https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d.

Conference Men's and Women's Basketball tournament in Cleveland, Ohio, the Columbus International Auto Show in Columbus, Ohio, and St. Patrick's Day parades throughout the State. *See generally* Mark Ferenchik, *Coronavirus: What's closed, canceled in Columbus area*, COLUMBUS DISPATCH, March 12, 2020.[5] All of these large, well-attended gatherings were prime signature-collection ground.

Beginning with Ohio State University on or about March 9, 2020, *see Ohio State Suspends Classes Until March 30 Due to Coronavirus Outbreak*, THE LANTERN, March 9, 2020,[6] colleges and universities throughout Ohio began closing their physical facilities. They would remain closed for the rest of the semester, a fact that further hampered signature collection efforts.

On March 12, 2020, Respondents extended their closure orders throughout Ohio to private and public schools (grades K through 12). *See* News Release: Governor DeWine Announces School Closures.[7] They also banned, with limited exceptions, all gatherings of 100 or more persons. *See* Director's Order: In re: Order to Limit and/or Prohibit Mass Gatherings in

[5] https://www.dispatch.com/news/20200312/coronavirus-whats-closed-canceled-in-columbus-area.

[6] https://www.thelantern.com/2020/03/ohio-state-suspends-classes-until-march-30-due-to-coronavirus-outbreak/.

[7] https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/announces-school-closures.

Ohio.[8] On March 17, 2020, Respondents extended their ban on gatherings to include those with 50 or more persons, and also banned most recreational activities in Ohio. *See* Director's Order: In re: Amended Order to Limit and/or Prohibit Mass Gatherings in Ohio.[9]

On March 16, 2020, Respondents canceled Ohio's primary elections scheduled for the following morning. *See* Director's Order: In re: Closure of Polling Locations in the State of Ohio on Tuesday, March 17, 2020.[10] This cancellation was particularly devastating to Applicants, since experience has taught them that local polling places present the best single opportunity for the collection of signatures needed for local ballots.

On March 22, 2020, Respondents' most sweeping order was issued, directing everyone in Ohio to "stay at home or at their place of residence"

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[8] https://coronavirus.ohio.gov/wps/wcm/connect/gov/b815ab52-a571-4e65-9077-32468779671a/ODH+Order+to+Limit+and+Prohibit+Mass+Gatherings%2C+3.12.20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-b815ab52-a571-4e65-9077-32468779671a-n6IAHNT.

[9] https://coronavirus.ohio.gov/wps/wcm/connect/gov/dd504af3-ae2c-4d2e-b2bd-02c1a3beed89/Director%27s+Order-+Amended+Mass+Gathering+3.17.20+%281%29.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-dd504af3-ae2c-4d2e-b2bd-02c1a3beed89-n5829IL.

[10] https://coronavirus.ohio.gov/wps/wcm/connect/gov/7c8309f8-9f28-4793-9198-05968d01a640/Order+to+Close+Polling+locations+3-16-2020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-7c8309f8-9f28-4793-9198-05968d01a640-n5829UP.

unless subject to a specific, stated exception, maintain at least a six foot social distance between themselves and others outside "a single household or living unit," and avoid altogether gatherings of ten or more people. *See* Director's Stay at Home Order: Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity.[11]

These orders were mandatory and came with criminal penalties. Governor DeWine repeatedly emphasized that they were a "'matter of life and death.'" Ian Cross, *Gov. DeWine clarifies enforcement, reporting of stay-at-home order violations*, News5Cleveland.com, March 23, 2020.[12] The Governor encouraged Ohioans to report violations, *id.*, and stated that he and local authorities were prepared to prosecute. *See* Laura Mazade, *What does the stay-at-home order mean for Ohio*, Cincinnati Enquirer, March 22, 2020.[13] None of Ohio's orders at this point said anything about circulators being able to go into public, approach others, and in any other way collect signatures in-person. Circulators, like everyone else, understood that Ohio law precluded that action.

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

[12] https://www.news5cleveland.com/news/continuing-coverage/coronavirus/gov-dewine-clarifies-enforcement-reporting-of-stay-at-home-order-violations.

[13] https://www.cincinnati.com/story/news/2020/03/22/coronavirus-ohio-stay-home-order/2895154001/.

Faced with no certain end to the shelter orders, over six weeks' worth of lost time and the need to collect dozens, hundreds, and thousands of signatures by July 16, 2020, Applicants filed this action on April 27, 2020 in an effort to force Respondents to relax their strict enforcement of Ohio's in-person signature collection laws. Applicants did not challenge Ohio's emergency orders -- indeed, Applicants had always complied and wanted to continue to comply for their and others' safety. Applicants instead sought to have Respondents relax their ballot access requirements to allow remotely collected signatures, to reduce the numbers required, or to provide additional time to compensate for Applicants' lost six-plus weeks.

On April 30, 2020, three days after this case was filed, Ohio responded with a new order stating that circulation of initiatives was permitted. That same order, however, also extended Ohio's prior shelter restrictions for many businesses, most public places and virtually all gatherings until at least May 29, 2020. *See* Ohio Department of Health, Director's Stay Safe Ohio Order.[14] In his announcement of this order on May 8, 2020, Governor DeWine continued to emphasize that Ohioans needed to maintain compliance with his orders, especially physical distancing. *DeWine warns 'risk is up' as Ohio*

[14] https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-Safe-Ohio-Order.pdf.

continues reopening process: 'This is a high-risk operation', 10tv.com, May 8, 2020 (emphasis added).[15]

Public and private places, such as primary/secondary schools and businesses, remained closed. Ohio Department of Health, Coronavirus (COVID-19): Continued Business Closures, May 2, 2020.[16] "Parades, fairs, festivals, and carnivals" remained on the list of prohibited activities, *id.*, as did gatherings at "Country clubs and social clubs." *Id. See* Randy Ludlow, *Coronavirus in Ohio: Gov. Mike DeWine warns virus remains 'a dangerous risk' even as state reopens*, Columbus Dispatch, May 12, 2020.[17]

On May 29, 2020, Respondents extended their April 30, 2020 closure/shelter orders until July 1, 2020. *See* Ohio Department of Health, Director's Order.[18] Contrary to the Sixth Circuit's factually unsupported claim that Ohio was opening up after May 20, 2020, *see* Sixth Circuit Order at 7, schools remained closed and mass gatherings, including those for "parades, fairs, festivals, and carnivals," and those at "auditoriums, stadiums and arenas," remained prohibited. Further, the May 29, 2020 order extending

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

[16] https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio/Continued-Business-Closures/.

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

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

the shut-down until at least July 1, 2020 continued to require physical distancing.

The April 30, 2020 order's new exception for "petition or referendum circulators" was an obvious litigation tactic designed to moot Applicants' case. It could not, however, give them back their lost six-plus weeks. Further, in addition to ignoring the six-plus weeks of circulation time Applicants had already lost because of Ohio's orders and the COVID-19 crisis, the April 30 order offered only an exception to Ohio's general ban on public "gatherings." It said nothing about Ohio's additional physical separation requirements and its bans on gatherings. Thus, even though circulators are now free to venture out without risk of criminal prosecution, they are still required to maintain a six foot separation and will find few lawful public gatherings. This means they will have to go door-to-door, a recipe for infectious disaster.

Before the April 30, 2020 order, Ohio had no circulator exception. It had included in its March 22, 2020 closure/shelter order exceptions for several places and activities, like "essential businesses," "funerals," "medical" personnel, etcetera, but said nothing about circulators. Respondents also had tucked into the middle of these many bold-lettered exceptions listed from "**a**" to "**y**" one for "**g. First Amendment protected speech**." *See* Director's Stay at Home Order, March 22, 2020.[19] Unlike all of the other bold-lettered exceptions, however, this exception included no description or definitions of

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

any sort. It was absolutely blank. Respondents would later claim after this litigation commenced that this First Amendment "protected" speech exception made clear that Applicants could have circulated even before April 30. The Sixth Circuit agreed, observing that this was "vitally important." Sixth Circuit Order at 7.

No one in Ohio before April 30, including Respondents, understood Respondents' "protected" First Amendment speech exception to mean that all arguably "protected" First Amendment places could remain open. No one understood the exception to mean that arguably protected activities could proceed. Political conventions, parades, fairs, festivals, social clubs, movie theatres, book stores, schools, etcetera, all of which are "protected" to one extent or another by the First Amendment, *see*, *e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (parades); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (theatres); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (social clubs), remained prohibited and closed. Likewise, petition circulation in Ohio completely ceased.

District Court's Preliminary Injunction

The District Court on May 19, 2020 after full briefing, the filing of stipulated facts, and Respondents' decision to forego an evidentiary hearing, entered a preliminary injunction in Plaintiffs' favor (1) prohibiting enforcement of Ohio's in-person, "wet," witnessed signature collection

requirements, (2) prohibiting enforcement of Ohio's July 16, 2020 deadline for the submission of signatures, and (3) "[d]irect[ing] Defendants to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements 'so as to reduce the burden on ballot access.'" District Court Order at 40 (citation omitted).

In support of the preliminary injunction, the District Court concluded that Ohio's purported exception for "First Amendment protected speech" was irrelevant: "the state action challenged here is 'Ohio's strict enforcement of its ballot access provisions – in the face of this pandemic' and not the State's Orders." *Id.* at 18 (citation omitted). "The issue before this Court," it explained, is "whether strict enforcement of Ohio's signature requirements, combined with the COVID-19 pandemic and effect of the Stay-at-Home Orders, unconstitutionally burden Plaintiffs' First Amendment rights as applied here." *Id.* at 18-19. Applying *Anderson-Burdick* balancing, *see Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992), the District Court concluded, "[a]s did the [Sixth Circuit just three weeks before in *Esshaki v. Whitmer*, __ Fed. App'x __, 2020 WL 2185553 (6th Cir., May 5, 2020), discussed *infra*] … that in these unique historical circumstances of a global pandemic and the impact of Ohio's Stay-at-Home Orders, the State's strict enforcement of the signature requirements for local initiatives and constitutional amendments severely burden Plaintiffs' First Amendment rights *as applied here*." *Id.* at 25 (italics original

and citation omitted). Weighing the remaining factors and the equities involved, the District Court ruled that limited relief in the form of a prohibitive injunction was necessary, *id.* at 38, and directed Respondents to propose "adjustments." *Id.* at 40. The District Court also denied Respondents' motion to stay the injunction pending appeal. *See* Attachment 6.

Sixth Circuit's Stay

A panel of the Sixth Circuit, Sutton, McKeague & Nalbandian, JJ., on May 26, 2020 (just minutes before Respondents' as-yet-to-be-filed report on its adjustments was due in the District Court) vacated the District Court's preliminary injunction in a published per curiam opinion. Key to the panel's decision were Ohio's post-litigation circulator exception created on April 30, 2020 and its pre-litigation exception for "First Amendment protected speech" issued on March 22, 2020. The panel found these "vitally important" to its conclusion that Applicants were not totally excluded from placing initiatives on ballots, and thus were not severely burdened. Sixth Circuit Order at 7.

Because of Ohio's "First Amendment protected speech" exception, the Sixth Circuit stated, it was not the combination of the pandemic and Ohio's strict in-person signature collection requirement that caused any injury, it was circulators' own fault: "we cannot hold private citizens' decisions to stay home for their own safety against the State. Because the State has not excluded Plaintiffs from the ballot, the burden imposed on them by the State's initiative requirements cannot be severe." *Id.* at 8. It explained: "Ohio

specifically exempted conduct protected by the First Amendment from its stay-at-home orders." *Id.* at 6 (citation omitted). "And in its April 30 order, the State declared that its stay-at-home restrictions did not apply to 'petition or referendum circulators[.]'" *Id.* (citation omitted). "So none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions." *Id.*

The Panel minimized the impact of the COVID-19 crisis: "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 8-9. Without evidentiary support, it offered circulators advice on how they could have collected their signatures:

> 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.

The Panel further concluded, in violation of a wealth of precedent from this Court and the Supreme Court, that the District Court exceeded its authority by attempting to fashion relief -- even though the District Court did not order any affirmative relief at all for Plaintiffs: "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Id.* at 10 (citing *Esshaki*, 2020 WL 218553 at *2).

Reasons to Vacate Stay

This Court has jurisdiction under 28 U.S.C. § 1254(1) and the All Writs Act, 28 U.S.C. § 1651.

> [A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding the issue of the stay.

Western Airlines, Inc. v. International Board of Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (citation omitted). *See also Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 571 U.S. 1061 (2013) (Scalia, J., concurring).

When deciding whether to issue the stay in the first instance, the Sixth Circuit was required to balance

> (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.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The "most critical" factors are the applicant's (Respondents') likelihood of success and the irreparable harm they risk. *See Nken v. Holder,* 556 U.S. 418, 434 (2009). Here, the Sixth Circuit's stay under these two "most critical" factors is demonstrably incorrect. First, Respondents risk no irreparable harm whatsoever. All Applicants seek is relaxation of the in-person requirement and more time.

Far from experiencing harm, forcing circulators to go door-to-door risks inflicting irreparable harm on Applicants and people across Ohio.

Second, the Sixth Circuit's stay was premised on erroneous legal conclusions. In particular, as made clear by the Chief Justice in this Court's recent ruling in *South Bay United Pentecostal Church*, 590 U.S. __, at 2, denying an emergency injunction to a church that claimed that California's COVID-19 restrictions "limit[ing] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees" violated its First Amendment rights, "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *Id.* at 2. "The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable." *Id.* at 3.

Likewise here. The Sixth Circuit's conclusion that Applicants had an "indisputably clear" First Amendment right to circulate in the face of a content-neutral emergency shelter order is "quite improbable." At bare minimum, Applicants could not have reasonably known they possessed such a powerful, overriding First Amendment right. Ohio's and the Sixth Circuit's after-the-fact conclusion that they should have known is not only wrong because one cannot know of a right they do not possess, it is wrong because it assumes that the average American knows more than federal judges about the complexities of the First Amendment.

Additionally, as explained below, the Sixth Circuit both erroneously ruled that federal courts cannot affirmatively redress First Amendment violations in the context of elections, and ruled that this limitation somehow applied to the District Court's prohibitive orders in Applicants' favor directed at Respondents -- none of which were affirmative.

The Sixth Circuit's stay is riddled with momentous legal mistakes and unsupported factual conclusions. As one noted election law expert has observed, the Panel's holding is "deeply problematic," Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative in a Pandemic*, 2020 U. CHIC. L. REV. ONLINE 1, 6 (May 27, 2020) (Attachment 7) (cited with permission),[20] "very dismissive of the rights of direct democracy," *id.* at 2, and "portends bad things to come." *Id.* (footnote omitted).

I. The Sixth Circuit Was demonstrably wrong in its application of accepted standards in issuing the stay.

A. Applicants were precluded by Ohio law under threat of criminal punishment from gathering signatures.

It is undisputed that Ohio imposed justified, highly restrictive orders beginning no later than March 22, 2020 and extending until at least May 29, 2020. People have been and remain limited in where they can go and what they can do. Ohio's physical separation requirement remains in place to this day, and gatherings remain strictly limited. Criminal penalties remain in place. Applicants remained model citizens and duly complied with these

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

orders. No official ever informed them that an exception for "First Amendment protected speech" absolutely allowed them to go door-to-door, gather in public, approach others, and collect signatures. No one in Ohio ever imagined door-to-door solicitation was still allowed.

Neither did Respondents. Only on April 30, 2020, three days following Petitioners' filing of this action, did they decide that their "First Amendment exception" included "circulators." Before then, no such exception existed. Applicants, like fellow Ohioans, complied. Applicants accordingly lost several weeks' worth of possible in-person signature collection. Ohio recognizes no other kind.

Ignoring these undisputed facts, the Sixth Circuit Panel concluded that Respondents' vapid exception for "First Amendment protected speech" was plainly understandable by all. Indeed, it insured that Applicants were free to exercise their First Amendment rights in the face of a content-neutral shelter restriction issued during a time of national emergency. Regardless of COVID-19, the Sixth Circuit ruled, Applicants possessed a "First Amendment protected" right to ignore the emergency and Ohio's shelter orders. Because this erroneous conclusion, as this Court's ruling in *South Bay United Pentecostal Church*, 590 U.S. __, makes clear, was the "vitally important" lynchpin in the Sixth Circuit's stay, the fact that it has now definitively been proven wrong requires that the stay be vacated.

Even before this Court's holding in *South Bay Pentecostal Church* the Sixth Circuit's summary conclusion in this case was baffling. Whether conduct demands First Amendment protection from a content-neutral emergency law (like Ohio's) always presented a difficult constitutional question. It was no slam dunk either way. There simply is no ready answer. The best one can do is predict what a court will say at the end of a complicated constitutional analysis. Concluding that Applicants always could have gathered signatures, as the Sixth Circuit did, put the constitutional cart in front of the proverbial horse in summary fashion.

This Court, of course, has often expressed disagreement over First Amendment protections for conduct, especially in the face of content-neutral restrictions and triply so during times of crisis. *South Bay Pentecostal Church* proves this fact. Justices have many times indicated that whether conduct is constitutionally protected and what protection it receives present "difficult" First Amendment questions. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), to use another example, the Court explained in terms of a ban on "political badge[s], political button[s], or other political insignia … at or about the polling place," *id.* at 1883, that the law failed because it presented "riddles that even the State's top lawyers struggle to solve." *Id.* at 1891. *See also Smith v. Goguen*, 415 U.S. 566, 591-92 (1974) (Rehnquist, J., dissenting) ("The issue of the application of the First Amendment to expressive conduct, or 'symbolic speech,'

is undoubtedly a difficult one"); *Morse v. Republican Party*, 517 U.S. 186, 239 (1996) (Breyer, J., concurring) ("First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, are difficult ones").

This reality is further demonstrated by this Court's decision in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), discussed below, which extended First Amendment protections to circulators under some circumstances; the Chief Justice dissented, Justice Thomas concurred, and Justices O'Connor and Breyer both concurred and dissented in part.

The Sixth Circuit itself should have recognized this fact, since just three days before it stayed the preliminary injunction in the present case in *Ramsek v. Beshear*, No. 20-5542, slip op., at 5 (6th Cir., May 23, 2020),[21] it stated that it could not "on this exceptionally short notice ... conclude that [Kentucky's] prohibition on in-person protests would likely fail strict scrutiny."

South Bay United Pentecostal Church's logic applies three-times-over here, since Respondents get to decide when their "First Amendment" exception applies under their emergency orders, just recently (after this litigation commenced) discovered it includes circulators, and have consistently claimed throughout this litigation that the First Amendment does not protect initiative circulators *at all*. *See*, *e.g.*, Appellants' Petition for

[21] See https://www.wtvq.com/wp-content/uploads/2020/05/ramsek-appeals-court-ruling-in-favor-of-protesters.pdf.

Initial Hearing En Banc, Doc. No. 9, at Page 14-17 (6th Cir., May 21, 2020). From March 22, 2020 until at least April 30, 2020 it was clear that Respondents were not going to recognize initiative circulation as one of their "First Amendment protected" activities. It was only after this litigation commenced that they came upon that discovery.

The Supreme Court's decision in *South Bay United Pentecostal Church* that it is "quite improbable" that a First Amendment exception will be carved out of a content-neutral limit on gatherings (like California's and Ohio's) during the COVID-19 crisis necessarily means that it could not have been clear -- nor likely even correct -- that Ohio's First Amendment protected speech exception encompassed circulation of initiatives. If such an exemption to a content-neutral law will not necessarily be recognized for religious speech and practice, which is recognized as a form of viewpoint discrimination under the Speech Clause, *see Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), it seems inconceivable that one would so plainly be carved out for initiative circulation. This is an a fortiori case.

At bare minimum, Applicants could not have reasonably known what the Justices of the Supreme Court do not even know. Because the Sixth Circuit's contrary conclusion was "vitally important" to its decision to issue a stay, that stay must be vacated and reconsidered.

The Sixth Circuit's conclusion was and remains indefensible. Even before *South Bay United Pentecostal Church*, no Court had ever given effect to vague and standard-less First Amendment exceptions. If they did, after all, States could insulate all of their laws from First Amendment scrutiny by just stating the obvious -- that the law does not override "protected" First Amendment activities. Such a statement means nothing at all since this First Amendment protection already exists -- it is a constant.

Not only does such a holding threaten free speech, moreover, it places religious practices at dire risk. If the Sixth Circuit is correct, then California by the simple expedient of announcing a "First Amendment" exception could fully insulate all of its laws from Free Exercise challenges. California's successful defense, like Ohio's here, would be that its law did not prohibit the religious practices after all, thus no foul no harm.

No one can know beforehand in the face of a content-neutral health restriction issued during a world crisis like COVID-19 that they would have an iron-clad First Amendment right to ignore the law. The exception was hopelessly vague. This Court has repeatedly warned against these kinds of traps in the context of First Amendment rights. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning"). No Court has ever concluded that a statutory "First Amendment exception" means enough to insulate a law from First Amendment scrutiny. *See*, *e.g.*, *Rubin v. City of Santa Monica*, 823 F. Supp.

709, 712 (C.D. Cal. 1993) (stating that a "First Amendment" exception "does not define the concept of 'First Amendment Activities,' nor, indeed, could it define this concept"). The *Rubin* Court, for example, cited *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987), to "suggest[] the peril in drafting an ordinance which uses the term 'First Amendment Activities' as if the meaning of such a term were self-evident or easily discernible. More precisely, *Jews for Jesus* suggests that such provisions are inherently vague and unenforceable, and hence unconstitutional." 823 F. Supp. at 712 n.6.

Applicants here want to remain safe. They want their families to remain safe. They want their friends to remain safe. They want Ohioans to remain safe. They also do not want to be arrested. What Applicants want is to exercise their First Amendment rights in a way that is consistent with the COVID-19 crisis. The Sixth Circuit's conclusion not only makes that impossible, it encourages people to flout content-neutral emergency restrictions like those in Ohio in the name of the First Amendment. It encourages people to take the law into their own hands, which is the last thing this Country needs during this time of crisis. Its stay must be vacated.

B. The Sixth Circuit's interpretation of *Anderson-Burdick* and how it applies to the mechanics of signature collection for initiatives contradicts this Court's and every Circuit's precedents.

The Sixth Circuit's application of *Anderson-Burdick* presents a dramatic split from existing precedent. Many Courts, including the Supreme

Court and this Court, *see Buckley*, 525 U.S. 182; *Meyer* v. *Grant*, 486 U.S. 414, 22 (1988); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993); *Schmitt v. LaRose*, 933 F.3d 628, have concluded that the First Amendment applies equally to the mechanics of ballot access for both candidates and initiatives.

This Court in *McCullen v. Coakley*, 573 U.S. 464, 488-89 (2014), described the protections afforded "petition campaigns" in the strongest terms:

> In the context of petition campaigns, we have observed that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." And "handing out leaflets in the advocacy of a politically controversial viewpoint ... is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

Circulators of petitions are thus afforded the same First Amendment protections be they for candidates or initiatives, as this Court's decision in *Buckley*, 525 U.S. 182, makes clear.

Burdens placed on the efforts of circulators of candidate petitions and initiative petitions must thus be judged under *Anderson-Burdick* equally. If a burden -- such as the State's enforcement of the challenged provisions during a pandemic -- is severe for circulators of candidate petitions, it must also be severe for circulators of initiatives. The relief required might differ, but the analysis is the same. There is no principled constitutional basis for conducting it differently.

Professor Hasen in his thoughtful critique of the Panel's disparate application of *Anderson-Burdick* calls it "deeply problematic." Hasen, supra, at 6. He describes the Panel's decision as being "very dismissive of the rights of direct democracy … that portends bad things to come." *Id.* at 2 (footnote omitted). While the District Court below "did a good job trying to put the plaintiffs in the position they would have been in if there had been no pandemic," *id.* at 8, the Panel "[d]ismissed the realities of how the pandemic had essentially ended successful petitioning activity," *id.* at 9, and "suggest[ed] without evidence that petition circulators would have an easier time collecting signatures in Ohio than in Michigan as the pandemic spread in both states." *Id.* at 10.

"The decision of the Sixth Circuit is unfortunate," *id.* at 11, Professor Hasen laments. The Panel "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." *Id.* " 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.*

As Professor Hasen explains, failing to accord equal First Amendment consideration to circulators of initiatives is "unsupported by any reasoning." *Id.* at 6. Indeed, the Panel's disparate approach to restrictions on the mechanics of initiatives here is particularly troubling. It cannot be squared

with decisions of the Supreme Court, prior decisions of this Court, or the many decisions handed down in other Circuits. This Circuit and every other Circuit agrees that the First Amendment applies to the signature collection process used for initiatives, just as it applies to the same kind of process used for candidates. The effects of COVID-19 on both are the same. The constitutional analysis must be the same.

The Panel's analysis under *Anderson-Burdick* was not only improperly "dismiss[ive] [of] the realities of how the pandemic had essentially ended successful petitioning activity" in Ohio, Hasen, *supra*, at 9, it was detached from the reality that the Sixth Circuit itself acknowledged just weeks ago when it affirmed a district court order granting relief from petitioning requirements. *See Esshaki*, 2020 WL 2185553 at *1. In *Esshaki*, under a nearly identical time-frame and indistinguishable facts, the Court ruled that "[t]he district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access …." (Emphasis added).

Michigan officials there, like Ohio officials here, had assured citizens that they were free to engage in First Amendment activities during the State's lockdown. The Sixth Circuit ignored Michigan's exception for First Amendment activity and concluded that Michigan's in-person signature collection requirement was severe. *See Esshaki*, 2020 WL 2185553, at *1.

Equal application of *Esshaki* to the present case can leads to only one result: Ohio's strict in-person signatures requirements during the COVID-19 crisis, like Michigan's, place a severe burden on the rights of circulators. Plaintiffs-Appellees lost time to the COVID-19 crisis and Ohio's emergency shut-down. The Panel's conclusion contradicts the Sixth Circuit's own precedents.

No Circuit has ever ruled that the First Amendment does not apply equally to the mechanics of signature collection requirements for initiatives. True, Circuits have split over the First Amendment's application to *subject matter* restrictions placed on initiatives, *compare Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (holding First Amendment applied); *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012) (same); *Biddulph v. Morham*, 89 F.3d 1491 (11th Cir. 1996) (same), *with Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (First Amendment does not apply); *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) (same), but as Professor Hasen explains, this does not reflect a split over the First Amendment's application to the mechanics of signature collection. Hasen, *supra*, at 6. The Sixth Circuit's approach is unprecedented.

C. The Sixth Circuit's "total exclusion" standard contradicts *Anderson-Burdick* and this Court's many other precedents.

The Sixth Circuit further erred by grafting onto this Court's *Anderson-Burdick* analysis a singular litmus test for assessing the severity of burdens. It ruled that in the absence of "total exclusion" a State's burdens on

signature collection cannot be severe. No Court, and certainly not this Court, has ever recognized such a rule, and it certainly cannot be squared with this Court's holding in *McCullen*, 573 U.S. at 489, where it stated that "[w]hen the government makes it more difficult to engage in these modes of communication [i.e., a "petition campaign"], it imposes an especially significant First Amendment burden."

Ohio's restrictions on petition circulators' and signers' ability to closely interact with one another -- which Ohio admits is still prohibited by its six-foot separation rule -- thus as a matter of law presents a "significant First Amendment burden." The Sixth Circuit's marginalization of that restriction by asserting without evidentiary support that circulators can stand back several feet and use sterilized pens, Sixth Circuit Order at 8, reflects a fundamental misunderstanding of how petitioning works.

In developing its contrary standard, the Sixth Circuit put great weight on the availability of its proposed possible collection methods, as well as the remaining time circulators have before July 16, 2020. That Applicants *might* be able collect signatures by standing back and sterilizing pens and clip boards, the Sixth Circuit concluded, meant any burden they experienced could not be severe. This holding plainly contradicts *Coakley* and the cases it cites, like *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). Even assuming Ohio had all along exempted circulators from its gathering restrictions, its physical separation requirement (which had and has no

similar exemption, as the Sixth Circuit's suggestion demonstrates) presents a significant and severe burden.

Ohio's First Amendment exception, which the Sixth Circuit found "vitally important" to its conclusion, *id.* at 6, cannot alter this conclusion. Even assuming it could be understood as allowing circulators to venture out and go door-to-door, they would have still been required to maintain physical separation.

Further, the exception cannot distinguish Ohio from Michigan, where the Sixth Circuit ruled that the same kinds of restrictions were a severe burden. See *Esshaki*. Michigan, after all, informed its citizens that there was a First Amendment exception. The Sixth Circuit's claim that "none of Ohio's pandemic response regulations changed the status quo on the activities Plaintiffs could engage in to procure signatures for their petitions," Sixth Circuit Order at 6, is thus no more true of Ohio than Michigan, or any other State for that matter, since there is necessarily a First Amendment exception for "protected" speech everywhere in the United States.

The Sixth Circuit's reasoning is shocking to say the least. It amounts to nothing less than saying that a State may constitutionally place its polling places in the middle of a flood-plain during a hurricane, threaten voters with prosecution if they take swimming lessons, and then tell them to swim for it. It is the weather that changed the status quo, after all. Voters should have learned how to swim before the crisis. If they cannot, or simply choose to

"stay home for their own safety" that is their own fault. The State bears absolutely no responsibility.

The Sixth Circuit's analysis erroneously grafts onto *Anderson-Burdick* not only a "total exclusion" requirement, but a "total exclusion caused solely by the State" litmus test. Neither requirement alone finds support in case law; together they are doubly unprecedented. The Supreme Court has made clear there is no single test for severity, let alone a "total exclusion" caused solely by government requirement. "In neither *Norman* [*v. Reed*, 502 U.S. 279 (1992),] nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes." *Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 191 (2008). The Court's decision just three weeks ago in *Esshaki*, 2020 WL 2185553, demonstrates that the *combination* of state action and COVID-19 placed a severe burden on circulators.

Nothing has changed since *Anderson*, 460 U.S. at 789, *Storer v. Brown,* 415 U.S. 724, 730 (1974), and *Crawford* were decided. *See*, *e.g.*, *Stone v. Board of Elections*, 750 F.3d 678, 681 (7th Cir. 2014); *Cowen v. Ga. Sec'y of State*, 2020 WL 2896354 (11th Cir., June 3, 2020). This Court and every Circuit reject any single litmus test, let alone one that requires total exclusion. In *Anderson*, 460 U.S. 780, for example, John Anderson was not totally banned from the ballot by Ohio law; he was burdened by Ohio's early-filing deadline. Yet the Court found it severe and ruled it unconstitutional.

Indeed, even the Sixth Circuit has rejected any litmus test, at least until the Panel imposed one in the present case. In *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 694 (6th Cir. 2015), the Sixth Circuit concluded that a 5% of the total vote signature collection requirement was a severe, unconstitutional restriction on ballot access. *See also Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Esshaki*. No other Court has applied a 'total exclusion' litmus test like the Panel here.

D. Courts and officials across the country recognize that petitioning cannot safely proceed during the COVID-19 pandemic.

Courts across the country have recognized that people simply cannot collect signatures in-person in a safe way during the COVID-19 crisis. They have therefore routinely and uniformly extended petitioning relief to candidates in various forms, either by reducing the numbers of signatures, extending deadlines, or allowing remote collection. *See Libertarian Party of Illinois v. Pritzker*, 2020 WL 1951687 (N.D. Ill., Apr. 23, 2020); *Goldstein v. Sec'y of Commonwealth*, No. SJC-12931, 2020 WL 1903931, at *6 (Mass. Apr. 17, 2020); *Omari Faulkner for Virginia v. Va. Dep't. of Elections*, CL 20-1456 (Va. Cir. Ct. Mar. 25, 2020); *Warren v. Colorado Secretary of State Jena Griswold*, Denver County (Colo.) Dist. Ct. No. 20CV31077 (Apr. 21, 2020); *Dennis v. Secretary of the Commonwealth*, Mass. Case No. SJ-2020-278. More litigation continues to be filed each day in an effort to win relief from COVID-19. *See*, *e.g.*,, *Hawkins v. DeWine*, No. 2:20-cv-2781 (S.D. Ohio, June

9, 2020); *Libertarian Party of New Hampshire v. Sununu*, No. 1:20-cv-688 (D.N.H., June 8, 2020); *Alaska Libertarian Party v. Fenumiai*, No. 3:20-cv-127 (D. Ak., June 3, 2020); *Libertarian Party of Pennsylvania v. Wolf*, No. 2:20-cv-2299 (E.D. Pa., May 14, 2020); *Maryland Green Party v. Hogan*, 1:20-cv-1253 (D. Md., May 19, 2020).

Many States, moreover, have taken these steps voluntarily. *See* Fla. Emergency R. 1SER20-2 (Apr. 2, 2020); N.J. Exec. Order Nos. 105, 120 (Mar. 19, 2020, Apr. 8, 2020); Utah Exec. Order No. 2020-8 (Mar. 26, 2020); Connecticut Ex. Order No. 7LL, May 11, 2020 (described in *Gottlieb v. Lamont*, 3:20-cv-0623, Doc. No. 33, at 12 (D. Conn., June 8, 2020)); Jim Camden, *Candidates who are broke will get a break when filing to get names on the ballot*, Spokesman Review, May 6, 2020 (describing Governor Inslee's statement in Washington that "[g]athering signatures during the COVID-19 pandemic 'runs contrary to recommended public health practice'").[22]

While the same has not proven universally true for initiatives, *see* Hasen, *supra*, this small handful of contrary courts, including the Sixth Circuit now, represent a minority view in terms of dealing with COVID-19, at least for the present and assuming the Sixth Circuit's flawed approach does not catch on. Many States, either through litigation, *see*, *e.g.*, *SawariMedia LLC v. Whitmer*, 2020 WL 3097266 (E.D. Mich., June 11, 2020); *Miller v.*

[22] https://www.spokesman.com/stories/2020/may/06/candidates-who-are-broke-will-get-a-break-when-fil/.

Thurston, 2020 WL 2617312 (W.D. Ark., May 25, 2020), *stay pending appeal denied*, 2020 WL 2850223 (W.D. Ark., June 2, 2020); *Fair Maps Nevada v. Cegavske*, 2020 WL 2798018 (D. Nev., May 29, 2020); or executive action, *see*, *e.g.*, Jonathan D. Salant, *No knocking on doors. Murphy orders political petition signatures be collected electronically*, NJ.COM, April 29, 2020 (describing New Jersey Governor's order directing initiative circulators not go door-to-door but to collect electronically);[23] *Colorado State Court Approve Electronic Signatures for Initiatives*, Ballot Access News, May 29, 2020 (describing Colorado Governor's order authorizing electronic signature collection for initiatives),[24] have extended relief to initiatives.

This problem will not go away. The Sixth Circuit's stay needs to be immediately addressed. Lower Courts are struggling with the problem COVID-19 has caused voters and confused by the mistaken principles announced by the Sixth Circuit. Courts need to know that they can offer relief when States will not during this time of crisis to ensure that voters can trust government's orders and not be tricked into forfeiting their First Amendment rights.

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[23] https://www.nj.com/coronavirus/2020/04/no-knocking-on-doors-murphy-orders-political-petition-signatures-be-collected-electronically.html.

[24] https://ballot-access.org/2020/05/29/colorado-state-court-approves-electronic-signatures-for-initiatives/.

II. Applicants Will Suffer Irreparable Injury.

Applicants are threatened with continuing irreparable injury. Any impediment placed on First Amendment rights, even for brief periods, causes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Without the relief promised by the preliminary injunction, which merely directed Respondents to develop their own plan to "adjust" the collection requirements and deadlines in light of COVID-19, it is highly unlikely that Applicants will be able to exercise their First Amendment rights in a timely fashion.

III. Respondents Will Suffer No Significant Harm.

Because the District Court issued only a prohibitive preliminary injunction and awarded Applicants no affirmative relief, Respondents presently risk no harm whatsoever. The District Court instructed Respondents to develop their own "adjustments" to their in-person, wet, witnessed, signature requirement. District Court Order at 40. Respondents offered nothing, and just minutes before their plan was due in the District Court on May 26, 2020, the Sixth Circuit stayed the preliminary injunction. It is therefore impossible to ascertain any injury to Respondents since no one knows what kind of acceptable plan could be developed. It might be as simple as waiving the witness requirement. It might only require dropping for now the requirement of original signatures. It might be as simple as

extending the deadline for a short period of time. No one can know because the Sixth Circuit rushed to stay the preliminary injunction.

One thing is certain; forcing circulators to go door-to-door and collect signatures in-person through close witnessing will increase the risk to them and the public. Encouraging people to ignore shelter orders because of their purported "First Amendment rights," moreover, threatens to encourage disobedience across Michigan, Ohio, Kentucky and Tennessee (and elsewhere should other Courts follow the Sixth Circuit's lead). Contrary to the Sixth Circuit's conclusion, COVID-19 is not over. People still need help.

Conclusion

Applicants respectfully request that the stay be vacated.

Respectfully submitted,

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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 16th day of June 2020.

/s/ Mark R. Brown
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