IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 20-3526

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

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

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

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

PLAINTIFFS-APPELLEES' REPLY TO DEFENDANTS-APPELANTS' RESPONSE TO EMERGENCY MOTION FOR RECONSIDERATION AND TO VACATE STAY IN LIGHT OF INTERVENING SUPREME COURT DECISION

Appellants' argue that *South Bay United Pentecostal Church v. Gavin*, 590 U.S. __, No. 19A1044 (May 29, 2020), is irrelevant because Ohio created an exception to its ban on public gatherings for circulators on April 30, 2020. Appellants' Response to Motion to Vacate Stay, Doc. No. 59, at Page 4. They fail to explain, however, how this April 30, 2020 exception could retroactively cure the at-least six-plus weeks Appellees lost to COVID-19 and Ohio's emergency orders before April 30, 2020.

If Appellees are correct and the prior "First Amendment protected speech" exemption was either (1) vague, or (2) legally meaningless as indicated by the Court's holding in *South Bay Pentecostal Church* because it could not offer any protection for otherwise protected speech during the COVID-19 crisis from a content-neutral law (like Ohio's and California's), then *South Bay Pentecostal Church* proves that Ohio caused Appellees to lose a large chunk of the collection time they were entitled to by Ohio law before the pandemic.

Taking February 27, 2020 as the start date for several of Appellees' targeted Cities and Villages (including Akron), which was stipulated to by the parties, see Stipulated Facts, R.35, at PAGEID # 469 ("[o]n or before February 27, 2020, Plaintiffs filed proposed

marijuana initiatives with local officials in Jacksonville, Ohio, Trimble, Ohio, Glouster, Ohio, Maumee, Ohio, and Akron, Ohio, see Exhibits 2, 3, 4, 5, and 6, respectively, in order to begin collecting the signatures needed to have those proposed measures placed on the November 3, 2020 general election ballot."), approximately 18 weeks of collection time existed before July 16, 2020.

Conservatively using March 22, 2020 as when Appellees were forced to stay home, that means they lost 40 days before the April 30 Order took at effect at 11:59 PM. That translates into approximately six weeks, meaning Appellees lost roughly one-third of the collection time they would have had but for the pandemic and Ohio's stay-at-home orders. The April 30 Order cannot and does not give this back. Appellants refuse to give this back to this day.

Next, Appellants claim that *South Bay Pentecostal Church* is irrelevant because it involved the Free Exercise Clause. While that is true, it fails to distinguish the holding since First Amendment protections afforded religion and religious speech are at least as protective as those applied to speech alone. 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) for religious practices (and necessarily the accompanying speech) during the COVID-19 crisis necessarily means it would be just as "improbable" for non-religious gatherings, including collecting signatures.

If such an exemption to a content-neutral law will only "improbably" be recognized for religious speech -- which is a particularly offensive 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 is doubly improbable that a First Amendment exception will be recognized for non-religious speech. This is an a fortiori case.

Having apparently recognized they have a problem with their First Amendment exception's "improbability" as well as vagueness, Appellants turn to complaining that Appellees are "not challenging the stay-at-home orders" anyway. Appellants' Response at Page 5. This would certainly have been true had Appellants not injected this improbable First Amendment exception as their principal defense. But now that they have, Appellees have no choice but to call a horse a horse

and challenge it. Indeed, Appellees have a right to challenge the improbability of a concocted exemption defense -- one that no other Court has ever recognized -- that is injected solely to deny them their First Amendment right to ballot access.

The purported First Amendment exemption, after all, is only one piece in the puzzle that severely burdens Appellees' ballot access rights. Appellees were told by Appellants that they would be prosecuted if they defied the shelter orders. Appellees complied. Now they are being told it was a trick and they really could have defied the shelter orders all along if they could have understood the trick -- which was "improbable" according to the Supreme Court. If that were not enough, Appellees (according to Appellants) should not be heard to complain about the trick that was played on them -- even though that trick has dire legal consequences (that is, the loss of First Amendment rights).

Next, Appellants argue that Appellees are "particularly poorly situated" to complain about the stay because, Appellants claim, Appellees have so few signatures to gather. Appellants' Response to Motion to Vacate Stay, Doc. No. 59 at Page 5-6. This is not true. The cherry-picked villages that Appellants point to are small, but

Appellants conveniently omit the fact that Appellees are also circulating in Akron, Ohio's fifth largest City, where Appellees initially filed on or before February 27, 2020. *See* Stipulated Facts, supra, at 469.

According to the Stipulated Facts, "Akron, Ohio is a city in Summit County. As of the census of 2010, there were 199,110 people residing in Akron. The median age in the city is 35.7 years. 22.9% of residents are under age 18." *Id.* at 470. Deducting the number of residents under age 18, that leaves 153,514 voting age adults in Akron. Using Appellants' logic and assuming that half voted in the last election -- a realistic assumption after deducting the minors -- that would mean that almost 77,000 votes were cast. Ten percent of that number translates to 7700 signatures needed. This in turn means that many thousand more must be collected in order to survive verification. What the exact number is in the hands of Akron's officials, the Summit County Board of Elections, and Appellants. But it plainly is not small, let alone trivial, as Appellants would have the Court believe.

Basically, then, Appellees must collect ten thousand signatures over roughly 18 weeks in Akron, with at least one-third of those weeks (and probably many more) being lost to COVID-19 and Defendants'

orders. Yet Appellants continue without evidence to insist this does not present any problem at all.

Last, Appellants claim that "Ohio's stay-at-home orders are no longer in effect." Appellants' Response, supra, at Page 3. This is simply not true, as Appellants (who wrote the orders) must know. On May 29, 2020, three days after this Court's stay was entered, Appellants extended their April 30, 2020 closure/shelter orders until July 1, 2020. *See* Ohio Department of Health, Director's Order.[1] So much for Ohio opening up.

Schools remained closed and gatherings of more than ten people, including those for "parades, fairs, festivals, and carnivals," and those at "auditoriums, stadiums and arenas," remained prohibited. Ohioans are only allowed to leave their homes for "authorized activities," *id.* which does not include gathering and going anywhere they choose. The May 29, 2020 Order (which was filed by Appellees with their Rule 28(j) letter on June 1, 2020, *see* Doc. No. 58-1) speaks for itself. This is the continuing reality in Ohio until at least July 1, 2020.

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

Again viewing this as a percentage of the total 18-week time Appellees have had to circulate since February 27, 2020, and assuming this May 29, 2020 order is lifted on July 1, 2020 (which is uncertain), it means that Appellees have lost more than ten weeks to Ohio's restrictions in one form or another. That is more than one-half of the time they would have had to circulate but for the pandemic and Ohio's emergency orders. They must now collect ten thousand signatures in a limited locality in half the time. And Appellants continue to claim this is not severe. And neither was COVID-19 according to Appellants' reasoning.

Conclusion

Appellees respectfully request that their Motion for Reconsideration be **GRANTED**.

Respectfully submitted,

/s/ Mark R. Brown

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Plaintiffs-Appellees certify that they have prepared this document in 14-point Century font and that excluding the Caption, Signature Blocks and Certificates, the document includes 1299 words.

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

CERTIFICATE OF SERVICE

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

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