

Case No. 20-3526
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAD THOMPSON, ET AL.

Plaintiffs-Appellees

v.

GOVERNOR OF OHIO, MIKE DEWINE, ET AL.

Defendants-Appellants

OHIOANS FOR SECURE AND FAIR ELECTIONS, OHIOANS FOR RAISING THE WAGE,
ET AL.

Proposed Intervenors/Appellees.

On Appeal from the United States District Court for the
Southern District of Ohio, No. 2:20-cv-2129

**RESPONSE IN OPPOSITION TO EMERGENCY MOTION TO
PARTIALLY LIFT STAY**

DAVE YOST
Ohio Attorney General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
STEPHEN P. CARNEY
ZACHERY P. KELLER
SHAMS H. HIRJI
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

BENJAMIN M. FLOWERS*
Ohio Solicitor General
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Defendants-Appellants

In late May, this Court ordered a stay of the District Court’s preliminary injunction, concluding that the State is likely to prevail in this case. *Thompson v. DeWine*, 959 F.3d 804, 811 (6th Cir. 2020). Since then, Plaintiffs Chad Thompson, William T. Schmitt, and Don Keeney—this brief refers to them collectively as “Thompson”—have filed numerous motions and 28(j) letters asking the Court to revisit its stay order. These filings generally raise already-rejected arguments, while making zero to little effort to engage with the Court’s actual reasons for granting a stay. So, unsurprisingly, this Court denied Thompson’s initial batch of requests a few weeks ago. Doc.65-1 (6th Cir. June 16, 2020). Armed with the same arguments, Thompson asked the Supreme Court to vacate the stay order. The Supreme Court rejected Thompson’s arguments, too, without any noted dissent. *Thompson v. DeWine*, No. 19A1054, 2020 U.S. LEXIS 3376 (U.S. June 25, 2020).

Undeterred, Thompson now takes yet another swing at this Court’s stay order. His most recent thirty-plus-page motion rehashes the same arguments that this Court previously considered and found unconvincing. At best, Thompson repackages his arguments by adding a few updates about Ohio’s ongoing response to the COVID-19 pandemic. Because Thompson offers nothing that undermines the stay order, the Court should deny his motion. Moreover, to end the current loop of

stay-related filings, the Court should require that Thompson seek leave before submitting any further motions in this matter.

1. Within his latest filing, Thompson still cannot point to any material change that justifies revisiting the stay order. To quickly review, this Court granted a stay after determining that Ohio’s signature requirements for ballot initiatives satisfy the *Anderson-Burdick* test—a sliding-scale test that balances voting burdens against state justifications. *Thompson*, 959 F.3d at 808–11. Of particular importance, the Court concluded that Ohio’s response to the COVID-19 pandemic did not ever totally deny or virtually exclude ballot access, and, in turn, did not impose a severe burden. It gave several reasons why: the State exempted First Amendment activity from its pandemic restrictions, including an express exemption for petition circulation in late April; the State was not responsible for the decisions of private citizens to protect their safety during a pandemic; and Thompson and other challengers failed to adapt their signature-collection efforts “within the bounds of our current situation.” *Id.* at 809–11. The Court then concluded that the State’s “compelling and well-established interests in administering its ballot initiative regulations” outweigh the non-severe burdens its signature requirements impose. *Id.* at 811.

None of this has changed. To be sure, Ohio’s officials have continued to issue orders in response to the pandemic. But they have also continued to exempt First Amendment activity, including petition circulation, from pandemic-related restrictions. *E.g.*, May 29 Order ¶3, online at <https://bit.ly/38EYHQ2>. What is more, Ohio’s restrictions, on the whole, have lessened over time. As a key example, the State has not reinstated the stay-at-home orders that were in place this past spring. *See* March 22 Order, online at <https://tinyurl.com/y8urb7mn>; April 2 Order, online at <https://tinyurl.com/vbwpwp2>. This all leads the Court back to the same place: the State has not totally or virtually excluded Thompson or anyone else from gaining ballot access for an initiative; the State’s signature requirements continue to serve “the State’s compelling and well-established interests in administering” its ballot-initiative process, *Thompson*, 959 F.3d at 811; and Thompson remains responsible for failing to adapt his efforts to pandemic times. So the *Anderson-Burdick* balancing necessarily comes out the same way.

Straining further, Thompson suggests that this Court’s recent order in *SawariMedia LLC v. Whitmer*, No. 20-1594, 2020 U.S. App. LEXIS 20716 (6th Cir. July 2, 2020), justifies lifting the stay here. Thompson, however, downplays a critical detail. The order in *SawariMedia*, like this Court’s stay order, distinguished the facts in Michigan from those in Ohio. *Id.* at *3. In other words, *SawariMedia*

did not suggest that the stay order in this case got things wrong. As with his other arguments, Thompson is recycling his positions: his current reliance on *Sawar-iMedia* is no different than his earlier reliance on another case out of Michigan, *Esshaki v. Whitmer*, No. 20-1336, 2020 U.S. App. LEXIS 14376 (6th Cir. May 5, 2020). And this Court already distinguished *Esshaki*. *Thompson*, 959 F.3d at 809–10.

2. Thompson’s repetitive filings have become an unjustified distraction for the State (and the Court, too). The State is in the process of preparing its merit brief in this case. It also has a separate expedited merit brief due next week, in a case that involves the same opposing counsel. *See Libertarian Party Ohio, et al. v. Degee Wilhelm, et al.*, No. 20-3585 (6th Cir.). The State should be able to focus its time and resources on those tasks instead of having to continually address Thompson’s repetitive filings. As a result, the State requests that the Court prohibit Thompson from submitting additional motions in this case without first obtaining leave. Such a restriction would not prejudice Thompson, since he will have the chance to present whatever arguments he chooses—including any updates he thinks relevant—when he files his merit brief in August. And if he has a meritorious motion, the Court can grant leave and permit it.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers _____

BENJAMIN M. FLOWERS*

Ohio Solicitor General

**Counsel of Record*

MICHAEL J. HENDERSHOT

Chief Deputy Solicitor General

STEPHEN P. CARNEY

ZACHERY P. KELLER

SHAMS H. HIRJI

Deputy Solicitors General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

bflowers@ohioattorneygeneral.gov

Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this response contains 871 words. *See* Fed. R. App. P. 27(d)(2)(A).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity type.

/s/ Benjamin M. Flowers
Benjamin M. Flowers

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, the foregoing was filed electronically through the CM/ECF system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers

Benjamin M. Flowers