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/APPELLANTS' RESPONSE TO EMERGENCY MOTION TO PARTIALLY LIFT STAY

1. Defendants/Appellants (hereinafter "Defendants") devote little effort to refuting the substance of Thompson's Motion to Partially Lift the Stay put in place on May 26, 2020. They summarily claim that nothing has changed since May 26, 2020. Defendants' Response, Sixth Cir. Doc. No. 68, at 4. They ignore the many emergency orders entered in the interim as well as the evidence that COVID-19 presents an even greater threat today than it did in March, April and May.

Whether this is true, of course, is left to this Court and is not a decision that Defendants themselves are free to make. Defendants are, however, obliged to address the new facts presented here, or to concede that they are undisputed, which is what Defendants have now done. Accordingly, such undisputed developments are now properly before the Court for its consideration.

2. As for the Sixth Circuit's recent intervening decision in *SawariMedia, LLC v. Whitmer*, 2020 WL 3097266 (W.D. Mich., June 11, 2020), *stay denied*, __ F.3d __, 2020 WL 3603684 (6th Cir., July 2, 2020), which Thompson has also raised, Defendants merely claim without analysis that it is "no different than his earlier reliance on another case out of Michigan, *Esshaki v. Whitmer*, [__ Fed. App'x __,

2020 WL 2185553 (6th Cir., May 5, 2020)]." Defendants' Response, *supra*, at 5.

Defendants are wrong, as even a cursory perusal of the opinion makes plain. *SawariMedia*, after all, involved initiatives, not candidates which is what *Esshaki* addressed. Defendants in this case have devoted a tremendous amount of effort to distinguish initiative cases from those involving candidates, and this Court made note of that argument here. *See Thompson v. DeWine*, No. 20-3526, slip op., at 5 n.2 (6th Cir., May 26, 2020) (hereinafter "Sixth Circuit Order") (Attachment 2 to Thompson's Motion to Partially Lift Stay) ("this court has often questioned whether *Anderson-Burdick* applies to anything besides generally applicable restrictions on the right to vote"). That this Court applied *Anderson-Burdick* in *SawariMedia* to deny a stay in the context of COVID-19's interruption of initiative petitioning is certainly an important development beyond *Esshaki*.

Further, *SawariMedia* addressed COVID-19's continuing limitations on petitioning beyond Michigan's re-opening. The deadline in *SawariMedia*, 2020 WL 3097266, *1, was May 27, 2020. In *Esshaki*, 2020 WL 1910154, *1, the deadline of April 21, 2020 fell in the middle of

the Governor's continuing stay-at-home mandate, a fact that this Court found significant in distinguishing the *Esshaki* result: "Michigan's stay-at-home orders remained in place through the deadline for petition submission. So Michigan abruptly prohibited the plaintiffs from procuring signatures during the last month before the deadline, leaving them with only the signatures that they had gathered to that point." Sixth Circuit Order at 6 (citation omitted).

The petitioners in *SawariMedia* had an additional five weeks to gather signatures beyond April 21, 2020, and several of these weeks followed Michigan's beginning of phased changes to its emergency orders. It cannot be gainsaid, therefore, that "Michigan abruptly prohibited [them] from procuring signatures during the last month before the deadline," Sixth Circuit Order at 6, as was the case in *Esshaki*. Michigan's treatment of initiative circulators was much more like Ohio's in the present case than was its treatment of candidates in *Esshaki*. Still, this Court sustained the District Court's preliminary injunction in *SawariMedia*.

Lastly, *SawariMedia* devoted significant discussion to a formal, official First Amendment exception in Michigan's May 7, 8 and 21

orders (called its "Constitutional Exemption Language") that was not and could not have been addressed in either the District Court or this Court in *Esshaki*. The Constitutional Exemption Language could not have been addressed in *Esshaki* because it did not exist when that case was decided, having been added later. All that existed at the time of *Esshaki*, as this Court indicated here, was an informal announcement that the emergency orders would not be enforced "against those engaged in protected activity." Sixth Circuit Order at 7. This difference, moreover, proved important to this Court's distinguishing the result in *Esshaki*; "that promise is not the same as putting the restriction in the order itself." Sixth Circuit Order at 7.

In *SawariMedia*, Michigan had "put[] the restriction in the order itself." The State of Michigan, moreover, found this added First Amendment exception to its emergency orders significant enough to distinguish *Esshaki* and justify its seeking an emergency stay in this Court. That this Court then on July 2, 2020 denied Michigan's requested stay notwithstanding Michigan's new First Amendment exception "in the order itself" is an important jurisprudential development within this Circuit.

A comparison of Michigan's and Ohio's First Amendment exceptions, meanwhile, reveals that they differ by only four words, "under these emergency circumstances," which were included in Michigan's but not Ohio's exception. Whether this slight difference in language is meaningful enough to justify refusing a stay in one case while granting a stay in another, when the bulk of the material facts are the same, is something that needs to be timely addressed.

3. Defendants devote the bulk of their Response to complaining about Thompson's temerity in seeking relief at this stage rather than waiting for full briefing. Thompson, Defendants complain, can make these arguments "when he files his merit brief in August." Defendants' Response, *supra*, at 5. This is quite obviously untrue, since the July 16, 2020 deadline will have long passed before that briefing can occur, and it is unclear that Defendants' interlocutory appeal will even remain viable after that date. *See Boegart v. Land*, 543 F.3d 862, 864 (6th Cir. 2008) (holding that interlocutory challenge to preliminary injunction became moot in Court of Appeals once candidate qualification had occurred).

Furthermore, Defendants ignore the importance of the timely exercise of First Amendment rights. Even a brief temporal interference, the Supreme Court has stated, constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Waiting until after the deadline had passed is simply not an option, as Defendants well know.

It is Thompson's position that the new factual developments in Ohio and the recent legal results in this Court warrant a fresh look at the stay this Court imposed on May 26, 2020. Whether they justify partially lifting or modifying that stay is for this Court, and not Defendants, to decide. But if Thompson is to obtain meaningful relief – *i.e.*, a modification or lifting of the stay – now is the time that Thompson must seek that relief.

4. Thompson prefers not to belabor Defendants' indecorous and unwarranted request that Thompson be required to seek leave before filing further motions in this case. Suffice it to say that before filing the present motion Thompson had filed exactly the same number of motions (two) with this Court as had Defendants.

* * *

Like it or not, we live in an unprecedented time. COVID-19 has infected Ohio, the Nation and the World. Unfortunately, this has resulted in more than one hundred COVID-19 election law cases being filed across the country. *See* Justin Levitt, *The list of COVID-19 election cases*, ElectionLawBlog, June 11, 2020.[1] They are all expedited and courts are handing down decisions on a daily basis. Many are relevant to the case before the Court. Those that are relevant must be immediately brought to the attention of the Court for it to make informed, timely decisions, especially when expedited action is being requested by all parties.

Conclusion

Appellees respectfully request that their Motion be **GRANTED** and the stay partially lifted.

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

Respectfully submitted,

/s/ Mark R. Brown

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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 1252 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