

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0170p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAD THOMPSON; WILLIAM T. SCHMITT; DON
KEENEY,

Plaintiffs-Appellants,

v.

RICHARD MICHAEL DEWINE, in his official capacity as
the Governor of Ohio; STEPHANIE B. MCCLOUD, in her
official capacity as Director of Ohio Department of
Health; FRANK LAROSE, in his official capacity as
Ohio Secretary of State,

Defendants-Appellees.

No. 21-3514

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:20-cv-02129—Edmund A. Sargus, Jr., District Judge.

Decided and Filed: July 28, 2021

Before: SUTTON, Chief Judge; McKEAGUE, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellants. Benjamin M. Flowers, ZACHERY P. KELLER, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

OPINION

PER CURIAM. This is the third time we have seen this case. Plaintiffs are three Ohioans who, during the 2020 election, tried to get initiatives to decriminalize marijuana on local

ballots. To do so, they had to comply with Ohio's ballot-access laws. Those laws impose various requirements on an initiative's proponents, including submitting a petition with a minimum number of ink signatures witnessed by the petition's circulator.

Plaintiffs say the laws, as applied during the COVID-19 pandemic, made it too difficult for them to get any of their initiatives on 2020 ballots. So they sued for declaratory and injunctive relief. But plaintiffs tied their requests for relief exclusively to the November 2020 election. That election has come and gone—and with it the prospect that plaintiffs can get any of the relief they asked for. This case is thus moot. We **AFFIRM** the district court's dismissal of plaintiffs' complaint.

I.

We need not restate the facts at length. See *Thompson v. DeWine*, 461 F. Supp. 3d 712 (S.D. Ohio), *stayed*, 959 F.3d 804 (6th Cir.) (*Thompson I*), *rev'd*, 976 F.3d 610 (6th Cir. 2020) (*Thompson II*). The short of it is this: Plaintiffs are three Ohio voters. They regularly circulate petitions to get initiatives on local and statewide ballots. For the 2020 election cycle, plaintiffs hoped to place initiatives on municipal ballots to decriminalize marijuana.

Before an initiative finds its way onto a local ballot, its proponents must circulate a petition. Ohio Rev. Code Ann. § 731.28. The petition must get signatures from at least ten percent of the number of electors who voted for governor in the municipality's previous election. *Id.* And those signatures must be original and in ink, and the petition's circulator must witness them. *Id.* § 3501.38. Once a petition has enough qualifying signatures, the circulator must submit it to the Secretary of State at least 110 days before the election. *Id.* § 731.28.

Soon after plaintiffs filed proposed initiatives for November 2020 ballots, Ohio declared a state of emergency because of COVID-19 and ordered Ohioans to stay at home. As a result, plaintiffs found it harder than usual to gather signatures for their initiative petitions. So they sued Governor Mike DeWine and other state officials for declaratory and injunctive relief. They allege that, because the pandemic and emergency orders made signature gathering difficult, "Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election violate" the First and Fourteenth Amendments. (R. 1, Compl. at 16–17, PID 16–17.)

And they asked the district court to “immediately place” their initiatives “on local November 3, 2020 election ballots without the need for supporting signatures.” (*Id.* at 18, PID 18.) If that failed, they also asked the court to reduce the number of signatures they needed to qualify for the ballot, extend the deadline for submitting petitions, and order the state to develop a way for voters to sign petitions electronically.

The district court enjoined the ink and witness requirements, extended the deadline for submitting petitions, and ordered the state to accept electronic signatures. *Thompson*, 461 F. Supp. 3d at 739–40. We stayed that injunction, *Thompson I*, 959 F.3d at 804, and then reversed it, *Thompson II*, 976 F.3d at 614. After plaintiffs unsuccessfully sought review in the Supreme Court, defendants moved to dismiss plaintiffs’ complaint, claiming it was moot and barred by the Eleventh Amendment. The district court, relying on our opinions in *Thompson I* and *II*, dismissed the case on its merits after holding that it was not moot. Plaintiffs appeal, and we review the decision de novo. *See, e.g., Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012).

II.

Under Article III of the Federal Constitution, we can only decide “Cases” or “Controversies.” U.S. Const. art. III, § 2. So we adjudicate “only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). Thus, “[i]f ‘the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,’ then the case is moot and the court has no jurisdiction.” *Id.* (quoting *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)).

A.

This case is moot. Plaintiffs request two types of relief, injunctive and declaratory. But unlike many election cases, plaintiffs do not challenge Ohio’s ballot-access laws standing alone. *See Common Sense Party v. Padilla*, 834 F. App’x 335, 336 (9th Cir. 2021) (COVID-related challenge to a ballot-access law was moot because plaintiff did not challenge “the constitutionality of the provision itself or its constitutionality as applied to [plaintiff] outside this context”); *cf. Storer v. Brown*, 415 U.S. 724, 727 (1974).

Instead, plaintiffs tie all their requested relief to the November 2020 election, COVID-19, and Ohio's stay-at-home orders. *See Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) (case was moot when plaintiff's injury and motion for a preliminary injunction were "inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis"). Plaintiffs' complaint was one to "declare unconstitutional, enjoin and/or modify" Ohio's ballot-access laws so that their initiatives could be included "on Ohio's November 3, 2020 general election ballot." (R. 1, Compl. at 1, PID 1.) Why? Because "the current public health emergency caused by COVID-19 and defendant DeWine's and defendant Acton's emergency orders effectively shutting down the State" made it hard for them to gather signatures. (*Id.*) So they asked the court to "immediately place" their initiatives "on local November 3, 2020 election ballots." (*Id.* at 18, PID 18.) And in case they didn't get that relief, plaintiffs also asked the court to enjoin enforcement of Ohio's ballot-access laws and to unilaterally modify them—but again, only "for Ohio's November 3, 2020 general election," and only because COVID-19 and Ohio's stay-at-home orders made signature gathering too difficult. (*Id.* at 14, PID 14, 18–19, PID 18–19.)

Without a time machine, we cannot go back and place plaintiffs' initiatives on the 2020 ballot. So plaintiffs' first request for injunctive relief is moot. *See Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) ("The 2014 election has come and gone, so we cannot devise a remedy that will put the Green Party on the ballot for that election cycle."). And plaintiffs' alternative requests for an injunction, which they tied *specifically* to the 2020 election, also became moot when the election passed. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th at 560; *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007); *Padilla*, 834 F. App'x at 336 (noting in a COVID-19 election case that "the occurrence of an election moots relief sought with respect to that election cycle").

Plaintiffs' request for declaratory relief is likewise moot. To determine whether a request for declaratory relief is moot, we ask "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Preiser v.*

Newkirk, 422 U.S. 395, 402 (1975) (emphasis altered) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

No such controversy exists for plaintiffs’ declaratory relief claim. Like their demands for injunctive relief, plaintiffs tie their declaratory relief request specifically to the 2020 election. They ask the court to declare that Ohio’s ballot-access laws—as applied to “measures proposed for local November 3, 2020 elections in Ohio”—violate the Constitution “in light of the current public health emergency caused by the COVID-19 pandemic and the executive orders requiring that Ohio citizens stay at home and shelter in place.” (R. 1, Compl. at 19, PID 19.) But those orders are no longer in place, and the election is over. (See *Rescinded Public Health Orders*, OHIO DEP’T OF HEALTH, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/public-health-orders/public-health-orders-rescinded> (last accessed July 23, 2021, 9:45 AM)). So no “substantial controversy” of “immediacy and reality” exists. See *Preiser*, 422 U.S. at 402; see also 28 U.S.C. § 2201 (requiring “a case of actual controversy” before a court can issue declaratory relief).

Plaintiffs sought specific relief. They challenged Ohio’s ballot-access laws as applied to the unique circumstances existing during the 2020 election. But because of intervening events—the passing of the election and the rescission of Ohio’s stay-at-home orders and emergency declaration—we cannot give plaintiffs what they ask for. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (noting that a case is moot when the court cannot “grant any effectual relief”); *Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 564 (6th Cir. 2020). Thus, “in view of the limited nature of the relief sought, we think the case is moot because the . . . election is over.” *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969).

B.

The capable-of-repetition-yet-evading-review exception to mootness does not apply here. See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Plaintiffs point out that they are trying to get initiatives on the ballot for local 2021 elections. And because COVID-19 persists, the threat that Ohio will again implement stay-at-home orders keeps this case alive.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.