**Nos. 16-3350, 16-3352 & 16-3357**

# In the United States Court of Appeals for the Sixth Circuit

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IN RE: 2016 PRIMARY ELECTION

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HAMILTON COUNTY BOARD OF ELECTIONS; OHIO SECRETARY OF STATE; BUTLER COUNTY BOARD OF ELECTIONS,
*Appellants.*

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

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## BRIEF OF APPOINTED PRO BONO *AMICUS* COUNSEL IN SUPPORT OF THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

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## INTRODUCTION

The March 15, 2016 Ohio primary has come and gone. The election results have been certified. No one challenges the outcome of any race or issue. Yet Secretary of State Jon Husted, along with two county boards of elections, appeals a district court order that kept the polls open for one more hour in four counties so that motorists—stuck for hours due to a catastrophic accident in which a car went off a bridge—had the chance to exercise their fundamental right to vote. At this point, however, no decision by this Court could remedy any alleged harm. Simply put, this case is moot.

Just before rush hour and only a few hours before polls for Ohio's primary were scheduled to close, a twelve-vehicle accident involving a semi-trailer truck caused a car to tumble over the I-275 bridge and into the Ohio River. People were held up for hours. Authorities shut down several miles on I-275, causing a bottleneck that stretched into the evening on a key commuter artery that connects Kentucky to Ohio. The Secretary of State did nothing to ameliorate the impact of the shutdown on voters. A motorist who could not get to court to file a formal complaint made an oral complaint to the district court at approximately 7:00 pm, only half an hour before the polls were scheduled close. People stuck in the crash wanted to vote. Without time to notify all parties and hold a hearing, the district court extended voting by one hour in the four counties most affected by the

accident. The district court was confronted with extraordinary circumstances meriting an extraordinary order. But any effects of that order have ended, and this Court lacks jurisdiction to review controversies that, even if hotly disputed at the time, have become moot.

To avoid mootness, the State asserts that the "same controversy" is "capable of repetition, yet evading review." State Br. at 24–31. But this Court has never held that this exception applies to unique factual circumstances, like those presented here, where a dispute is unlikely to recur between the "same parties" and will not "invariably" recur in a future election, even with respect to different parties. *Lawrence v. Blackwell*, 430 F.3d 368, 370–72 (6th Cir. 2005). Unlike election cases in which this Court has applied the "capable of repetition, yet evading review" doctrine, this case does not involve a challenge to any existing law or policy that will continue to affect voters, candidates, or political parties in future elections. *See id.* Instead, the State's appeal is undergirded by nothing but speculation that a confluence of extraordinary events similar to those that played out during the March 2016 primary *might* recur.

In an effort to downplay the unique circumstances that gave rise to the district court's order, the State characterizes the underlying facts as a "traffic jam"—using that phrase a dozen times. State Br. at 2, 4, 5, 9, 14, 17, 30, 34, 36, 37, 43. The State compares the situation to any "run-of-the-mill" "common

problem" that makes up the "vagaries of life." State Br. at 17, 30, 35. But that is simply not the case. Interstate 275, a major artery serving Butler, Clermont, Hamilton, and Warren counties, was "closed" for "hours." Order, R.1, PageID#1. No one, upon finally reaching home after being stuck behind the fatal accident on the I-275 bridge, would have reported that she had been held up by a "run-of-the-mill" "traffic jam." Instead, she would have come home and said, "You can't believe what happened!" Voters did not face an "everyday occurrence," State Br. at 30, but a unique situation the likes of which the State has failed to demonstrate has occurred in past elections, and hence cannot reasonably be expected to occur on future election days.

Because this election is over—and because there is no reasonable expectation that this "same controversy" will recur—the State's appeal amounts to a request for a prospective advisory opinion that will govern future elections. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Indeed, the State asks this Court to broadly limit the authority of district courts in future elections, even in factual circumstances far removed from those here. It asks for a ban on all *ex parte* election orders, a prohibition on all orders issued after the polls have closed, and the mandatory joinder of county boards of elections, no matter the circumstances. State Br. at 40, 49–50. Such a pronouncement by this Court would amount to an unprecedented restriction of district courts' discretion. But more to the point, this

Court does not decide hypothetical future questions based on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 479–80 (1990) (internal quotation marks omitted). Even if an opinion here could be instructive in future election-day cases, gaining "a useful precedent to brandish in disputes with other[s]" is not a sufficient interest to avoid mootness. *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 571–74 (7th Cir. 1987). An opinion here would thus be truly advisory.

Accordingly, although the district court did not abuse its discretion in issuing a one-hour extension of the polls, this Court simply "ha[s] no power" under Article III to reach that question because no live controversy remains. *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997). The appeal is moot, and consequently, this Court should vacate the district court's decision with instructions to dismiss the case. *Id.*

## INTEREST OF *AMICUS CURIAE* AND STATEMENT REGARDING ORAL ARGUMENT

*Amicus curiae* was appointed by the Court "to defend the district court's order," Dkt. 8-1, at 1, and will gladly appear at a hearing if the Court believes oral argument would aid it in resolving this matter. Because the controversy at issue is over, and there is no reasonable expectation that it will recur, *amicus curiae* does not join the State's request for an expedited oral argument.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. Defendant Ohio Secretary of State Jon Husted filed a notice of appeal on April 11, 2016. Notice, R.8, PageID#57. While this Court lacks jurisdiction to review the district court's order because the case is moot (as described below), "'a federal court always has jurisdiction to determine its own jurisdiction.'" *Lacey v. Gonzales*, 499 F.3d 514, 518 (6th Cir. 2007) (quoting *United States v. Ruiz,* 536 U.S. 622, 628 (2002)).

## STATEMENT OF THE ISSUES

The Court requested that *amicus curiae* address the following issues:

1. Whether this case has become moot on appeal.
2. Whether this case presents an issue capable of repetition yet evading review.
3. If the case is moot, whether this court must vacate and remand for dismissal.

*Amicus curiae*, in response to the State's arguments, further addresses:

4. Whether the district court lacked Article III jurisdiction to enter an injunction upon an oral complaint requesting that voting in four counties be extended by one hour.
5. Whether the district court, faced with a complaint that a large group of voters would be disenfranchised by an emergency accident on a bridge that held up rush-hour traffic for hours, abused its discretion in entering an injunction extending voting by one hour in four affected counties.

## STATEMENT OF THE CASE AND THE FACTS

This case arises from a catastrophic car accident that shut down a major highway at rush hour, caused a bottleneck that held up traffic for hours, and—given the late hour on election day—threatened to extinguish the right to vote of countless persons stuck in its aftermath. At 4:30 pm on March 15, 2016—the day of Ohio's presidential primary—a crash involving eleven cars and a semi-trailer truck sent a vehicle toppling off the Combs-Hehl Bridge into the Ohio River. *See* Kate Murphy & Mallory Sullivan, *Officials ID man recovered from car that fell into Ohio River*, Cincinnati Enquirer (Mar. 27, 2016);[1] *Witness recalls Combs-Hehl bridge crash*, Fox19Now (Mar. 16, 2016).[2] As a "crash reconstruction expert" told the news media, "something unusual happened on the bridge" to make the accident so bad that the car went "over the [bridge's] wall." *WATCH: Video shows car falling off Combs-Hehl Bridge*, 9WCPO Cincinnati, (updated Apr. 18, 2016).[3]

The Combs-Hehl Bridge, connecting Kentucky and Ohio along I-275, is a major artery for the region. The bridge falls along a major commuter route, and daily brings thousands of workers between the two states, as well as a large number of Ohioans who work in downtown Cincinnati back home to the eastern suburbs (they cross over the I-471 bridge into Kentucky before taking I-275 eastbound back

[1] Available at http://cin.ci/1MvOR5j.

[2] Available at http://bit.ly/1pmwvJv.

[3] Available at http://bit.ly/1UmmpoU.

to Ohio via the bridge). *See* Felix Winternitz & Sacha DeVroomen Bellman, *Insiders' Guide to Cincinnati* 20 (2009). In 2015, the Kentucky Transportation Cabinet calculated that an average of 82,438 cars traveled daily on the section of I-275 that crosses over the bridge into Ohio. *See* Kentucky Transportation Cabinet Traffic Count Reporting System, Historical Traffic Volume Summary, Station ID 019811.[4]

Because of the catastrophic accident, transportation authorities "closed" a section of I-275 for "hours," just as rush hour started. Order, R.1, PageID#1; *see I-275 reopened after accident on Combs-Hehl Bridge*, Local12.com (Mar. 15, 2016) (closed section of I-275 not reopened until 10:30 pm).[5] "As a result of the crash, police emptied the eastbound lanes of I-275 back to the I-471 split. Normal I-275 traffic toward the East Side instead went through via U.S. 50, which was experiencing delays into the night." Patrick Brennan & Bob Strickley, *Witness: Car was hit, "went into the Ohio River,"* Cincinnati Enquirer (Mar. 16, 2016).[6] Traffic was backed up for miles into the evening. *See Car falls off Cincinnati bridge and into Ohio River*, NBC26 (Mar. 16, 2016) ("The eastbound lanes of the bridge were closed for almost six

[4] Available at http://bit.ly/29D3FwD.

[5] Available at http://bit.ly/2aaxuGG.

[6] Available at http://cin.ci/1Xu0gDe.

hours, which caused a major traffic backup on I-275 toward Ohio. Eastbound traffic was stopped at I-471 and backed up for miles.").[7]

As the State acknowledges, the scant record does not contain many details about the events after the crash that led to the district court's order. State Br. at 8. Contrary to the State's assertion that the district court *sua sponte* reached out to "find wrongs and right them," *id.* at 4, 20, however, the record reflects that the district court responded to an "oral complaint requesting that the polling locations . . . be extended for one hour due to Interstate I-275 being closed for hours due to a fatal accident." Order, R.1, PageID#1. As a *Cincinnati Enquirer* article cited by the State (at 9) reports: "[P]eople stranded in the traffic jam contacted the federal court clerk's office . . . . People were using their cell phones from the highway. They wanted to vote." Dan Horn, *Husted: Judge wrong to keep polls open after bridge crash*, Cincinnati Enquirer (Apr. 11, 2016).[8] The clerk's office contacted U.S. District Judge Susan Dlott to notify her of the oral complaints at approximately 7:00 pm, as she was attending a dinner at a law school in downtown Cincinnati. Dan Horn, *Judge: Stranded drivers "wanted to vote,"* Cincinnati Enquirer (Mar. 16, 2016).[9] "[M]otorists affected by the traffic jam could not get to court to file a formal complaint. And if she waited to act, it would be too late to prevent them from

[7] Available at http://bit.ly/29xLDwU.

[8] Available at http://cin.ci/29D4xBe.

[9] Available at http://cin.ci/29K9YlO.

being disenfranchised." *Id.* The fatal bridge accident was all over the news, but the State did nothing to ameliorate its impact on voters.

Given the last-minute nature of the request, just as the polls were about to close, the district court called the Secretary of State's office to notify the State of its order to keep the polls open for one hour in the four counties most affected by the accident. *See* Damschroder Decl., R.3-1, ¶¶ 4–6, PageID#14–15. The district court followed with a written order at 8:01pm:

> This matter is before the court upon an oral complaint requesting that the polling locations within the counties of Butler, Clermont, Hamilton and Warren be extended for one hour due to Interstate I-275 being closed for hours due to a fatal accident. The request is hereby GRANTED and the Secretary of State is hereby order to keep the polling locations within the counties of Butler, Clermont, Hamilton and Warren open until 8:30pm.

Order, R.1, PageID#1. Even before the written order, the Secretary of State and the affected county boards of elections acted to implement the order. Damschroder Decl., R. 3-1, ¶13, PageID#15–16. Some polling locations had already closed and were unable to reopen in a timely manner, others "reopened briefly, and others may have remained open to process voters in line at 7:30 pm" and remained open until 8:30. Order Granting Mots. to Intervene, R.6, PageID#50–51.

The votes cast as a result of the district court's order did not impact the outcome of any race or issue. In accordance with federal law, all voters who were able to vote because of the court's order cast provisional ballots. *See* 52 U.S.C.

§ 21082. Those ballots are segregated so that an order extending polling hours cannot sway an election without an opportunity for judicial review and the ability, if necessary, to discard the ballots. *See id.* But no race in the March 2016 primary was swayed by the district court's order, which allowed approximately 141 extra ballots in Butler, Clermont, Hamilton, and Warren counties. Bucaro Aff., R.3-2, ¶ 16, PageID#19; Poland Decl., R.4-1, ¶ 12, PageID#32; Sleeth Decl., R.3-3, ¶ 13, PageID#21.[10] The election results from each of these counties for the March 2016 primary have been certified. *See News Release: Secretary Husted Certifies 2016 Presidential Primary Election Results*, Jon Husted, Ohio Secretary of State (Apr. 18, 2016).[11]

A few weeks following the primary, the Hamilton and Butler County Boards of Elections moved to intervene to participate in this appeal, arguing that they have special interests in administering elections such that they must be given notice and an opportunity to be heard before any (non-statewide) order extending polling hours is issued. Order Granting Mots. to Intervene, R.6, PageID#51, 53. Given the "rather *expansive* notion of interest sufficient to invoke intervention" in the Sixth Circuit, and its conclusion that the interests of the "Boards of Elections *may* not be

[10] The State does not include the number of ballots cast in Clermont County based on the district court's extension. The Minutes from the Clermont County Board of Elections, "Official Canvas for the March 15, 2016 Primary Election" and attached table titled "Ballots Cast After 7:30pm," reflect that 50 provisional ballots were cast and counted as a result of the one-hour extension.

[11] Available at http://bit.ly/1SOxFVds.

adequately represented on appeal by the Secretary of State," the district court (Black, J.) granted the motion to intervene under Rule 23(a)(2). *Id.* at PageID#52–54. This appeal followed.

## SUMMARY OF THE ARGUMENT

This appeal centers on whether an order that kept the polls open in four counties for an extra hour, but had no effect on the election, counts as a live controversy four months later. The State argues that the district court acted beyond its authority in extending polling hours during the March 2016 primary. Yet before this Court can reach that question, it must be sure that there is still a live controversy vesting it with jurisdiction over the appeal. *See Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 461–62 (2007); *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997). Under Article III, this Court can only decide ongoing "cases or controversies"; it can neither opine on disputes that have past, nor can it project answers to hypothetical future disputes. *Lewis*, 494 U.S. at 477. "Matters of great public interest," such as the election-law questions presented here, "are precisely the kinds of issues that demand the federal courts to be most vigilant" in ensuring that they exercise their limited jurisdiction only over disputes that are still live and that require resolution to remedy concrete harms. *Fialka-Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 715 (6th Cir. 2011).

Thus, before addressing the merits or even questioning the district court's jurisdiction, this Court must first consider its own jurisdictional limitations.

This appeals falls outside the bounds of Article III because it is moot. Because the election has passed and there is no relief this Court can order that will remedy any alleged harm to the parties, this Court has no jurisdiction over the appeal. *See Dean v. Austin*, 602 F.2d 121, 122 (6th Cir. 1979) (case moot because "election has long since been held" and "relief sought is now impossible"); *Ford v. Clevenger*, 78 F.3d 584, No. 94-6119, 1996 WL 78164, at *1 (6th Cir. Feb. 21, 1996) (case moot because election has "long since come and gone"). There is, in short, no ongoing controversy between the parties that would justify this Court's exercise of jurisdiction.

To save this appeal from mootness, the State asserts that this controversy is "capable of repetition, yet evading review." But the State's argument fails for two reasons. First, as a general matter, this Court and the Supreme Court only deem cases "capable of repetition, yet evading review" if the "same controversy" is reasonably expected to recur between the "same parties"—that is, between the oral complainant and the State. *See, e.g., Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 430 (6th Cir. 2013). No one thinks that will happen. Though this Court has "somewhat relaxed" the "same parties" requirement in election cases, it has done so only where a challenged law or policy "remains and

controls future elections," thereby reflecting a *continuing* controversy between the state and existing voters, candidates, or political parties. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Lawrence v. Blackwell*, 430 F.3d 368, 370–72 (6th Cir. 2005). Because there is no such continuing controversy here, this Court would have to lower its bar for Article III jurisdiction to consider this appeal.

Second, this case arises from extraordinary circumstances, and the State has failed to demonstrate a reasonable expectation that a materially similar controversy will recur. Cases that "are heavily dependent on the specific context"—such as extensions of polling hours—typically "fail[] to meet the capable of repetition prong of the exception to mootness." *Unified Sch. Dist. No. 259, Sedgwick Cty., Kan. v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1147 (10th Cir. 2007). Unsurprisingly, then, cases based on emergency situations and singular orders by state actors are usually considered too individualized—and their likelihood of repetition too speculative—to avoid mootness. To obscure the unique issues underlying this case, the State characterizes the dispute in broad terms, noting that it is likely to face last-minute election-day orders again, even orders extending voting hours. But the potential for future orders extending polling hours does not demonstrate that *this*, or even a materially similar, controversy will recur. It only invites this Court to issue an advisory opinion governing future situations that may bear little

resemblance to what unfolded on the Combs-Hehl Bridge during the March 2016 primary.

Because this appeal is moot due to the passage of time and not the fault of any party, the Court should follow the "established practice" and vacate the district court's decision and remand with instructions to dismiss the case. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Assuming *arguendo*, however, that this Court concludes it has jurisdiction to review the district court's order, there was no abuse of discretion. To start, there is no jurisdictional problem with the district court issuing an *ex parte* order based on an oral complaint, as Article III requires neither the presence of all parties nor a written pleading. The district court responded to an oral complaint approximately half an hour before the polls closed. And the State, despite the emergency, was still preparing to close the polls, jeopardizing voters' constitutional rights. There was no time to file a formal complaint, notify the defendants, or hold a hearing while motorists—stuck for hours in a fatal bridge accident—risked losing their ability to vote. Accordingly, the district court did not abuse its discretion in concluding that, on balance and in light of the potential disenfranchisement of Ohioans, a short extension was warranted.

## STANDARD OF REVIEW

Because the appeal is moot, this Court lacks jurisdiction to review the merits of the district court's order. *See* Part I *infra*. Assuming the Court nonetheless decides to review the district court's decision to enter a temporary injunction extending voting by one hour, it would do so only for an abuse of discretion. *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). As described below, in evaluating a temporary injunction, a district court weighs multiple interrelated factors, and it is given great deference in balancing those factors. *See* Part II.B *infra*. "[D]eference to the district court's decisions 'is the hallmark of abuse of discretion review.'" *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)).

## ARGUMENT

### I. The appeal should be dismissed as moot.

It is a fundamental principle of Article III jurisdiction that federal courts may decide "only . . . *ongoing* cases or controversies." *Lewis*, 494 U.S. at 477 (emphasis added). Mootness is a "critical component of this jurisdictional limitation," because it requires that there be "'a live case or controversy'" at the time a circuit court decides an appeal. *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 822 (6th Cir. 2012) (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987)). "The test for mootness is

whether the relief sought would, if granted, make a difference to the legal interests of the parties." *McPherson*, 119 F.3d at 458 (internal quotation marks omitted).

As the State acknowledges (at 15), the March 2016 primary is over, and resolving this appeal will have no impact on any race. What is more, the resolution of this appeal cannot redress any harm the State allegedly experienced as a result of the one-hour extension in voting. Because "the election has long since been held" and any cognizable relief is now "impossible," this case is moot. *Dean*, 602 F.2d at 122; *accord SEIU v. Husted*, 531 F. App'x 755, 755 (6th Cir. 2013) ("Because this appeal concerns a preliminary injunction affecting those [past] elections, and because that injunction has now expired by its own terms, . . . the appeal [i]s moot."); *Clevenger*, 1996 WL 78164 at *1 (case moot because election has "long since come and gone"); *Indep. Party of Richmond Cty. v. Graham*, 413 F.3d 252, 256 (2d Cir. 2005) (election case moot because it was "'impossible for the court to grant *any* effectual relief whatever to a prevailing party' on appeal" (citation omitted)). There is, quite simply, no "live" controversy for this Court to resolve. *Coventry*, 714 F.3d at 429.

The State attempts to escape this basic conclusion with two arguments. Both fail. *First*, the State argues that the Court should jettison the mootness inquiry altogether and first decide whether the district court had jurisdiction below. State Br. at 23–24. But mootness is a threshold issue that must be addressed first because,

if there remains no live controversy, then this Court would be acting beyond the bounds of its own Article III authority by reviewing the district court's authority. *Second*, the State argues in the alternative that, even if this Court must consider mootness, the controversy can be reviewed because it is "capable of repetition, yet evading review." *Id.* at 24–31. But it strains both common sense and existing doctrine to fit this case into that narrow exception to mootness. The "capable of repetition, yet evading review" exception requires that (1) the "same parties" be (2) reasonably expected to engage in this dispute again; neither requirement is met here, nor is "relaxing" this standard warranted under this Court's election jurisprudence. *See Coventry*, 714 F.3d at 430*; Lawrence*, 430 F.3d at 370–72. Because the appeal is moot, per this Court's usual practice, the district court's order should be vacated and the case remanded with instructions to dismiss. *See U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994).

### A. Because the appeal is moot, the Court should dismiss the appeal as a threshold matter.

"The mootness inquiry must be made at every stage of the litigation," including on appeal. *Lawrence*, 430 F.3d at 370–71; *Lewis*, 494 U.S. at 477. That way, a court can ensure that a case has not "lost its character as a present, live controversy of the kind that must exist . . . to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969). Article III denies federal courts the power "to decide questions that cannot affect the rights of litigants in the

case before them," *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). That is, the parties must continue to have a "'personal stake in the outcome'" of the lawsuit. *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)).

Though the State complains that the district court acted without jurisdiction, it ironically requests that this Court refrain from examining its own jurisdiction before reviewing the lower court's order. State Br. at 23–24. Mootness, however, is a threshold issue that "derives from the requirement of Article III." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). If a case is no longer live, there is no Article III jurisdiction for this Court to review the district court's order. *Id.*; *Ahmed v. Univ. of Toledo*, 822 F.2d 26, 27 (6th Cir. 1987) ("It is fundamental that we may not decide moot issues."); *Coventry*, 714 F.3d at 429 (Court has "no power to adjudicate disputes which are moot.").

The State argues that this Court should address whether there was standing for the district court's order first. State Br. at 23–24. To be sure, standing is also often a threshold question—a court must ensure that a plaintiff has standing before reaching the merits. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). But a court has no jurisdiction to question whether there was standing below if the case is no longer live on appeal. If, for example, a plaintiff died while his case was pending on appeal, and there was a dispute about whether he had standing below, this

Court would be acting without jurisdiction if it nonetheless decided the standing question on appeal. *See Allen v. Mansour*, 928 F.2d 404, No. 89-2217, 1991 WL 37832, at *3 (6th Cir. Mar. 19, 1991) (holding that death rendered controversy moot). Even though, as the State argues (at 23), mootness can be viewed as "standing set in a time frame," there is no basis for looking back to earlier time frames unless the case has "continuing vitality, even throughout the course of appellate review." *Allen*, 1991 WL 37832, at *1.

Attempting to sidestep this flaw, the State posits that addressing standing first is necessary to determine "whether to vacate the decision below," as opposed to entering a different disposition. State Br. at 24. It asserts that when a case becomes moot an appellate court does not *necessarily* have to vacate the decision below, whereas when jurisdiction for the district court order never existed, the decision *must* be vacated. *Id.* If this case has become moot on appeal, however, the proper remedy under Supreme Court precedent would be to vacate the order, since none of the recognized exceptions to vacatur apply. *See* Section I.C., *infra*. The State presents no contrary argument. Thus, standing in the district court need not be addressed first to determine the proper disposition.

In a last-ditch effort to dodge the mootness inquiry, the State argues that standing should be addressed first because it "is part of the broader 'likelihood of success' inquiry" that informs whether the district court properly issued a

preliminary injunction. State Br. at 24. But this argument puts the cart before the horse. The *merits* question is whether the district court abused its discretion in granting a preliminary injunction; the Court must be satisfied that the appeal is not moot before it reaches that question. *See Fialka-Feldman*, 639 F.3d at 715. Just as district courts must abide by Article III, so too must this Court.

### B. The State fails to meet its burden of demonstrating that this controversy is "capable of repetition, yet evading review."

Seeking shelter from mootness, the State argues that this controversy falls within the exception for cases "capable of repetition, yet evading review." *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). To fit within this exception, the controversy must satisfy two requirements. *Coventry*, 714 F.3d at 430. "First, it must be too short in duration to be fully litigated before it ceases." *Id.* There is no dispute that there was no time for the emergency request to extend polling hours to be fully litigated before it became moot. *See Lawrence*, 430 F.3d at 371–72 ("Challenges to election laws are one of the quintessential categories of cases which usually fit this prong" because "the remedy sought is rendered impossible by the occurrence of the relevant election.").

"Second, there must be a reasonable expectation that the same parties will be subjected to the same action again." *Coventry*, 714 F.3d at 430 (citing *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995)). To demonstrate a "reasonable expectation" or "demonstrated probability" of

recurrence, the appellant does not need to prove that repetition is "more probable than not." *Wis. Right to Life, Inc.*, 551 U.S. at 463; *Lawrence*, 430 F.3d at 371. But "when the chance of repetition is remote and speculative, there is no jurisdiction." *Williams v. Alioto,* 549 F.2d 136, 142 (9th Cir. 1977). Thus, the State bears the burden of proving that there is a real danger that the controversy will repeat; there must be "more than the mere possibility . . . to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). "The [Supreme] Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test [for 'capable of repetition']. If this were true, virtually any matter of short duration would be reviewable." *Murphy v. Hunt,* 455 U.S. 478, 482 (1982). As described below, the State fails this second prong for multiple reasons.

### 1. Because there is no challenge to a law or policy affecting future elections, the standard for the "capable of repetition" exception is not "relaxed."

As an initial matter, this controversy is not "capable of repetition, yet evading review" because there is no suggestion that the controversy would recur between the "same parties"—the oral complainant and the State. *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004). Nor does it fall within the scope of the cases in which this Circuit has "relaxed" the "same parties" requirement.

The Supreme Court has required that, for a case to be "capable of repetition, yet evading review," it must be reasonably probable that the controversy

will recur between the *same* plaintiff and defendant. *Lyons*, 461 U.S. at 110 (plaintiff has to establish that he, not someone else, will be subjected to a chokehold by city police again); *Wilson v. Gordon*, —F.3d—, No. 14-6191, 2016 WL 2957155, at *13 (6th Cir. May 23, 2016) ("[T]here must be a *reasonable* expectation that the *same parties* will be subjected to the same action again"); *Tigrett v. Cooper*, 595 F. App'x 554, 557–58 (6th Cir. 2014) (same). "[T]he probability of recurrence between the same parties is essential to [Article III] jurisdiction" because it tethers a court's review to an existing "case or controversy" between parties before the court. *Honig v. Doe*, 484 U.S. 305, 339, 341 (1988) (Scalia, J., dissenting). Otherwise, it would be difficult to say that the "same [case or] controversy" is ongoing for Article III purposes, *Murphy,* 455 U.S. at 482, and the litigants would lack "the necessary personal stake in the appeal," *Camreta v. Greene*, 563 U.S. 692, 702 (2011). Accordingly, even assuming *arguendo* that the State would face a similar controversy in the future, the relevant question is whether the dispute would recur with the *same plaintiff*.

Oddly, the State argues that no "relaxation" of this "same parties" requirement is needed. State Br. at 26–27. It contends that it need show only that the "same complaining party will be subject to the same action again," and because it is the "appealing party" and likely to face requests to extend polling hours in the future, it meets that standard. *Id.* at 25, 27. While the State properly quotes the

"same complaining party" language from the Supreme Court in *Weinstein v. Bradford* and its progeny, it fails to faithfully apply this standard. The cases using the "same complaining party" language presume that the "complaining party" is a private plaintiff challenging a state action. *Weinstein,* 423 U.S. at 149; *Chirco*, 384 F.3d at 309 ("Normally, parties raise the 'capable of repetition, yet evading review' doctrine against the government, hence the second element's language that the same complaining party would be subjected to the same action again."). Because (as here) the government is the constant party, these cases ask whether the controversy is "capable of repetition" with the same *plaintiff*. *See Chirco,* 384 F.3d at 309. In the end, though, they impose the same requirement: that the controversy be reasonably expected to recur between both existing parties. *Id.* That is true even when, as here, the government is the appealing party. *See, e.g., Weinstein*, 423 U.S. at 149 (though state continues to administer parole system, case moot because "there is no demonstrated probability that [plaintiff-]respondent will again be among that number"); *Fialka-Feldman*, 639 F.3d at 714 (explaining that "key problem [with state's invoking the capable-of-repetition exception on appeal] is that the 'complaining party'—[Plaintiff]—will not 'be subject to the same action again'"). As a result, the only way the State can avoid mootness is if this Court abrogates the "same parties" requirement that is typically necessary to demonstrate that the same controversy is "capable of repetition." *See Lawrence*, 430 F.3d at 372.

To be sure, the Supreme Court has implied that the "same parties" requirement may be relaxed in certain election cases. But these cases offer the State no help because they require that a challenged law or policy "remains and controls future elections," thereby reflecting a "continuing controversy" required by Article III. *Moore*, 394 U.S. at 816; *see e.g., Morse v. Republican Party of Va.*, 517 U.S. 186, 235 n.48 (1996) (challenge to political party's decades-long policy of charging a delegate filing fee not moot); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (though "election is long over," appeal not moot because controversy "persist[s] as the California statutes are applied in future elections"); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1971) (though candidate had fulfilled residency requirement before appeal, case not moot because "the laws in question remain on the books"). In such a situation, the original plaintiff stands in for a class of similar voters, candidates, or political parties that face a *continuing* harm based on an existing law or policy that "has adversely affected and continues to affect a present interest." *Weinstein*, 423 U.S. at 148 (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125–26 (1974)). As Justice Scalia observed (disapprovingly), some of the Court's election law decisions "differ from the body of [its] mootness jurisprudence *not* in accepting less than a probability that the issue will recur . . . but in dispensing with the same-party requirement entirely" because there is a "great likelihood that the issue will recur *between the defendant and the other members of the public at large.*" *Honig*, 484 U.S. at 335–

36 (Scalia, J., dissenting). "The important ingredient in these [election] cases [is] governmental action directly affecting, and continuing to affect, the behavior of citizens in our society"—not just the chance that there would be some disputed governmental action in the future. *Super Tire Eng'g Co.*, 416 U.S. at 124.

Following this lead, the Sixth Circuit (in conflict with several others[12]) has "somewhat relaxed" the requirement that a controversy be reasonably expected to recur between the *same* parties in election cases where the controversy "invariably will recur" or has a "great likelihood" of repetition based on an ongoing harm—*e.g.*, an existing adverse law—to a defined class of persons. *Lawrence*, 430 F.3d at 372. In *Lawrence v. Blackwell*, for example, a candidate for office and a supporting voter challenged the constitutionality of an Ohio law that required independent congressional candidates to file their nominating petitions before the primary. *Id.* at 370. The election in which the plaintiff wanted to run had already passed, and there was "no evidence in the record addressing whether [the candidate] plans to

[12] Given that the Supreme Court has not explicitly excused the "same parties" requirement in election cases—but has appeared to do so in several of its decisions—the Circuits have taken different views regarding whether the Supreme Court made a "deliberate decision . . . not to apply the same-complaining-party requirement in election cases." *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 230 (4th Cir. 2016). Unsurprisingly, then, the Circuits have diverged as to whether to relax the "same parties" requirement in election-related controversies. *Id.* (siding with the Second and Ninth Circuits, which have applied the "same-plaintiff requirement" in election cases, and rejecting the Fifth, Sixth, and Seventh Circuits' contrary approach).

run for office or [the voter] plans to vote for an independent candidate in a future election." *Id.* at 371.

Nonetheless, the appeal was saved from mootness by the "capable of repetition, yet evading review" doctrine because the harm alleged "was the direct result of an extant Ohio statue" affecting all independent congressional candidates. *Id.* at 372. The Court reasoned that "[e]ven if the court could not reasonably expect that the controversy would recur with respect to [these plaintiffs], the fact that the controversy *almost invariably* will recur with respect to some future potential candidate or voter in Ohio is sufficient." *Id.* (emphasis added); s*ee also Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013) (allowing challenge to election statute "to move forward even if the challenging parties do not have cognizable legal interests" because "the sore loser statute is still on the books, and future candidates may find themselves in a similar situation"); *Carey v. Wolnitzek*, 614 F.3d 189, 197 (6th Cir. 2010) (though election was over, "all candidates for judicial office" remained subject to state law restricting judicial campaigns). *But see Speer v. City of Oregon,* 847 F.2d 310, 312 & n.3 (6th Cir. 1988) (failing to relax "same parties" requirement when plaintiff challenged two-year residency requirement for candidates to city council, and dismissing appeal as moot).

In relaxing the "same party" requirement, this Circuit has essentially treated the plaintiff in an election-related case as a class representative for similarly situated

voters, candidates, or political parties, even if the lawsuit was brought by only one person. *See e.g., Corrigan v. City of Newaygo*, 55 F.3d 1211, 1214 (6th Cir. 1995) (though plaintiffs "have now paid their taxes" and can run for office, they "have standing as members of the class of people who will be affected by the statutes in the future"); *Dunn*, 405 U.S. at 333 n.2 (plaintiff with individually moot challenge to election laws has "standing to challenge them as a member of the class of people affected by the presently written statute"). And, as in a class action, even when the named plaintiff's case becomes moot, the entire case is not mooted as long as other class members face an ongoing harm. *See Sosna v. Iowa*, 419 U.S. 393, 400 (1975); *Wilson*, 2016 WL 2957155 at *4.

By contrast, when voters, candidates, or political parties do not challenge an existing law or longstanding policy causing continuous harm, neither the Supreme Court nor this Court have relaxed the "same parties" requirement. For instance, the Supreme Court dismissed as moot an appeal by plaintiffs who had been prohibited from voting under their state's six-month residency requirement. *Hall*, 396 U.S. at 49. Before the appeal concluded, the legislature reduced the residency requirement to two months. *Id.* Even though the plaintiffs and the class they represented (those challenging the old law) still objected to the new two-month requirement, the Court did not relax the "same parties" requirement to consider a related law that was not in force when the plaintiffs filed their action. Rather,

because it was "unlikely" that the plaintiffs themselves would leave the state and return within two months of a new election, it deemed the controversy moot. *Id.* at 49; s*ee also, e.g., Dean*, 602 F.2d at 124 (considering only whether the "U.S. Labor Party will be subjected to the same [ballot instructions] again"); *Clevenger*, 1996 WL 78164 at *2 (challenge to state election coordinator's refusal to place candidate's name on the ballot moot after election). Without a challenge to an existing law or policy that currently affects the rights of a discrete group of voters, candidates, or parties, the Supreme Court (like this Court) would not relax the "same parties" requirement to find the controversy "capable of repetition, yet evading review." No case that the State cites shows otherwise.

Likewise, here, the Court may view the oral complainant as a proxy for the class of voters requesting an extension of polling hours due to the emergency bridge closure. But because there is no continuing harm to the plaintiff or that purported class, the issue is moot. The Court would have to dramatically overstretch its already relaxed standard to fit this case—where the controversy stems from a confluence of particularly unusual events—into its existing mootness jurisprudence. While this Court has been willing to overlook the fact that a dispute may not recur between the exact same parties when it remains "live" for other voters, candidates, or parties who remain subject to the same challenged law or policy, the Court has not gone so far as to reach out to address cases involving an unlikely potential

future dispute that involves yet unidentified parties. In such circumstances, the Court would indeed be deciding a hypothetical question of the type well beyond its Article III power.

### 2. The Secretary's generalized concerns about election-day orders fail to establish a "reasonable expectation" that the "same controversy" will recur.

Even assuming that relaxing the "same parties" requirement is appropriate here, the State still fails to demonstrate a "reasonable expectation" or "demonstrated probability" that the "same controversy" will recur. *Murphy,* 455 U.S. at 482. To describe the factual circumstances here as unique is an understatement: a catastrophic accident on a bridge, late on election day, caused one of the most traveled highways in the region to be closed for hours, thereby leaving a district judge to respond to an oral complaint of widespread voter disenfranchisement without time to hear from all parties. It is not—as the State would have this Court believe—just an "everyday occurrence" or garden-variety "traffic jam." State Br. at 30. Though the State points to election-day polling-hour extensions generally, it cites no prior similar election-day scenarios that provide evidentiary grounding to believe this situation can reasonably be expected to recur. Instead, this case emanates from precisely the type of unlikely emergency situation that courts have refused to consider "capable of repetition, yet evading review." *See Williams,* 549 F.2d at 143.

To obscure the unlikely recurrence of a similar situation, the State opts for a panoramic view. *First*, it argues that this controversy is "capable of repetition" because Ohio routinely faces "late-breaking election orders." State Br. at 27–28 (citing pre-election-day orders). The orders it cites were based on the Secretary's unconstitutional actions that bear no similarity to this case except that they were "late-breaking"; indeed, the State draws no other comparison. The State cannot parlay this minimal similarity into an argument that this case is "capable of repetition." Put differently, just because the State may face § 1983 cases in the future does not mean that an individual § 1983 suit is always "capable of repetition, yet evading review." So too here. If the State could avoid mootness by pulling the camera that far back, it would render meaningless Article III's mootness limitations. Though the State may well desire a broad "admonishment" about late-breaking election orders generally, State Br. at 16, such a pronouncement would be purely advisory. The proper analysis hinges on the particular facts of each case—and these facts are unlikely to repeat.

*Second*, the State argues that "the specific case of polls being kept open" is "capable of repetition and has repeated." State Br. at 28. And, "most important," the State emphasizes that such orders might "change[] the outcome of an election." *Id.* at 6–7, 31, 44. In the rare event that an extension of polling hours might swing an election, however, the Court could review the order before the

results are certified. As the State acknowledges, all ballots cast pursuant to a district court's extension are segregated and can be rejected if the court erred. *Id.* at 14 (citing 52 U.S.C. § 21082(c)). The State's groundless fear cannot overcome this Court's jurisdictional limitations.

Moreover, the State's generalized grievance about polling-hour extensions does not demonstrate that the "same controversy" will recur. Cases that "'are heavily dependent on the specific context'"—such as extensions of polling hours—typically "'fail[] to meet the capable of repetition prong of the exception to mootness.'" *Disability Rights Ctr. of Kan.*, 491 F.3d at 1148 (10th Cir. 2007) (quoting *O'Connor v. Washburn Univ.,* 416 F.3d 1216, 1222 (10th Cir. 2005)). This matter stems from a bridge closure late on election day that potentially prevented countless people from exercising their fundamental right to vote. And the State asks the Court to opine on the propriety of an *ex parte* order, based on an oral complaint, where the State argues that it did "nothing wrong." State Br. at 5. Accordingly, based on the State's own description, this case is a far cry from the orders extending polling hours that it cites. *See id.* at 28–29. The orders the State cites were based mainly on the failure of the State's election machinery, *Kearney v. Hamilton Cnty. Bd. of Elections,* Hamilton Ct. of Common Pleas No. A1505953 (Nov. 3, 2015), or the failure of the polls to open on time, *see Ohio Democratic Party v.*

*Cuyahoga Cnty. Bd. of Elections*, N.D. Ohio 1:06-cv-2692—grounds that the State concedes (at 4) often merit extending voting hours.

The most similar situation the State points to stems from "bad weather" during the 2008 primary election. State Br. at 29. But the district court's order in that matter—which was neither issued *ex parte* nor based on an oral complaint—rested on the fact that precincts "ran out of ballots," that "ballot shortages . . . could not be cured" due to the severe weather in part of one county, and that voters "may have been deprived of an opportunity to vote as a result thereof." *Obama for Am. v. Cuyahoga Cnty. Bd. of Elections*, No. 1:08-cv-562 (N.D. Ohio March 4, 2008). Thus, "all [the] problems" the State asks this Court to redress here, State Br. at 31, were not present in that 2008 primary case and are too remote a future possibility to confer Article III power over this appeal.

That is not to say that the "capable of repetition, yet evading review" doctrine requires every relevant characteristic "down to the last detail" to recur. *Wis. Right to Life, Inc.*, 551 U.S. at 463. To demonstrate a reasonable probability that the "same controversy" will recur, however, the appellant must show that a "materially similar" circumstance raising the "same issues" will recur. *Id.*; *Williams,* 549 F.2d at 143 n.8. Given the unusual circumstances here, it is unsurprising that the State can point to no similar issue in election history to sustain its burden of proving that this Court can "reasonably expect" a like situation to recur. A

materially similar case is, of course, a "physical . . . possibility," *Murphy,* 455 U.S. at 482, but "speculative contingencies" cannot save this case from mootness, *Hall*, 396 U.S. at 49.

*Last*, the State claims that this controversy's "likelihood of repetition is enhanced greatly by the district court's reliance on an everyday occurrence like traffic delays," such that this controversy could recur with any election-day "delayed flights," "bad weather," "fender-bender," "flat tire," "or other common problem." State Br. at 30. That mischaracterization of the catastrophic and fatal accident underlying this order trivializes the crisis that the region faced and the magnitude of disenfranchisement that the district court had to weigh. Closing the polls in the face of a "fender-bender" is very different from doing so in the face of a widespread emergency. Because "[t]he series of events that led to the [oral] complaint was idiosyncratic and highly unlikely to recur," this case is moot. *Marek v. Rhode Island*, 702 F.3d 650, 654–55 (1st Cir. 2012).

In contrast to their treatment of routine events, courts are understandably reluctant to assume that a one-time incident will recur without evidence of a historical pattern. Even for deliberate state action, courts consider the possibility of recurrence too speculative without a "policy it ha[s] determined to continue" or a "consistent pattern of behavior." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187–88 (1979) (board's allegedly unauthorized settlement agreement not

"capable of repetition" because action had not occurred previously and did not reflect a consistent pattern); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006) (group's challenge to Secretary of State's disqualification of petitions because required language had changed after signature collection began was moot, even though State could potentially change required language again in future); *Beethoven.com LLC v. Librarian of Cong.*, 394 F.3d 939, 950–51 (D.C. Cir. 2005) (controversy not "capable of repetition" because Librarian's actions "motivated by factors unique to this proceeding"); *Am. Med. Ass'n v. Bowen*, 857 F.2d 267, 271 (5th Cir. 1988) (HHS failure to provide physicians with timely information moot because action "can not be said to reflect either a policy of HHS or a consistent pattern of behavior"). Indeed, because city-county consolidation referenda are "not regularly scheduled and do not occur frequently," this Court did not consider a challenge to a Tennessee law regarding vote dilution in consolidation referenda "capable of repetition." *Cooper*, 595 F. App'x at 557. In other words, when a "unique factual situation" arises, even if it *could* happen again, this Court has recognized that it does not fall within the bounds of its limited Article III jurisdiction. *Libertarian Party of Ohio*, 462 F.3d at 584.

Likewise, courts have consistently refused to consider emergency situations "capable of repetition, yet evading review," even when state actors claim they *would* repeat the same challenged conduct if a similar emergency arises again. *See*

*Williams*, 549 F.2d at 143 ("presented with another series of unsolved homicides," police chief testified that he would take same actions, yet court concluded that recurrence of emergency too speculative). Accordingly, even though courts "can imagine" recurrence of similar emergency situations, "states of emergency and the responses they trigger do not fit readily into the repetition/evasion exception to the mootness doctrine." *Id.* at 144; *see also, e.g., McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (recurrence of "emergency situation" leading to use of temporary jail facilities without allowing for inspection pursuant to district court order was "remote and speculative"); *Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1478–79 (10th Cir. 1984) (challenge to statute passed "to remedy a dangerous, if not an emergency, situation" regarding state's water resources moot); *Halvonik v. Reagan*, 457 F.2d 311 (9th Cir. 1972) (loitering and assembly regulations promulgated to address violence and riots in Berkeley not likely to recur).

The State's "commonplace" hypotheticals, therefore, suggest that the State does not want review of *this* controversy, but instead wants to use this appeal as a vehicle for an advisory opinion related to election-day orders broadly. Indeed, it asks for a blanket ban on *ex parte* election-day orders, and the intervenors claim that the county boards of elections too must be included in *every* non-statewide election-day case. State Br. at 40, 49–50. True, as the State reiterates (at 6, 20, 44), the

Court's opinion here could be instructive in future elections. Indeed, "[s]ince the future is unknown, one can never be certain that findings made in a decision concluding one lawsuit will not some day . . . control the outcome of another suit." *Commodity Futures Trading Comm'n v. Bd. of Trade of Chi.*, 701 F.2d 653, 656 (7th Cir. 1983). "But if that were enough to avoid mootness, no case would ever be moot." *Id*; *see also Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) (case moot because "only possible interest in this appeal is to establish a precedent" for future lawsuits). The State, then, must prove more than that an opinion here could be instructive for future matters; it has to prove that *this* controversy can reasonably be expected to repeat, and thus is still alive today. It has not done so.

### 3. The State fails to demonstrate a "reasonable probability" that it will face a similar order.

Though the State emphasizes how *sui generis* the district court's order is, it simultaneously argues that the Court cannot take into account the unlikelihood of another such order in determining whether "this controversy" is likely to recur. State Br. at 30 ("no mootness case has ever addressed repetition in terms of how a court might act"). But without evidence indicating that this Court will see a similar order—and given that the existing order has no effect—nothing keeps the case alive and gives this Court jurisdiction to reach the merits. And "'[s]hould this court be confronted with repeated controversies of this nature . . . it could determine that the dispute truly was capable of repetition, yet evading review,'" and review it then

without having to speculate. *Coventry*, 714 F.3d at 430 (quoting *McIntyre v. Levy*, No. 06-5898, 2007 WL 7007938, at *1 (6th Cir. Aug. 1, 2007)).

Contrary to the State's assertions, courts have often considered whether lower courts or other public authorities are likely to issue similar orders in the future (even in the face of similar circumstances) in determining whether a controversy is truly expected to recur. *E.g.*, *Ill. State Bd. of Elections*, 440 U.S. at 187 (case moot because "no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections"); *Coventry*, 714 F.3d at 430 (appellant "has not shown that a court is likely to grant other hospitals' requests to enjoin [appellant's] termination of their provider agreements"); *Dean*, 602 F.2d at 124 (even if "Michigan election officials may have made mistakes in the instructions . . . in the 1978 election," case moot because there is "no reason to believe from this record that any inadequacy of the ballot instructions in 1978 will be repeated in future elections"). Notably, this Court has previously stated that a public official defending a challenged order as lawful is insufficient to establish a "reasonable expectation" that the official would issue another such order again. *See Youngstown Pub. Co. v. McKelvey*, 189 F. App'x 402, 407 (2006) (First Amendment challenge to mayor's order limiting staff-member communication with newspaper was mooted when order was rescinded, even though city continued to defend order's constitutionality). Therefore, naked

assertions that a court or other authority will issue similar orders in the future do not withstand scrutiny. Even if the State questions whether the district court had jurisdiction for its order, this Court lacks jurisdiction to reach that issue unless it reasonably expects another similar order will soon appear on its docket.

### C. Because the appeal is moot, the district court's order should be vacated.

Given that this case has become moot through no fault of either party, the district court's order should be vacated in accordance with the Supreme Court's and this Court's established practice. *See Lewis*, 494 U.S. at 482; *Wilder*, 469 F.3d at 505; *Constangy, Brooks & Smith, Inc. v. N.L.R.B.*, 851 F.2d 839, 842 (6th Cir. 1988). Indeed, though the State fears the precedential import of the district court's order, the State does not dispute that if the appeal is moot, the district court's order should be vacated, thereby depriving any future party of precedential or persuasive authority. *See* State Br. at 21.

"When a civil suit becomes moot pending appeal," the Court has "the authority to 'direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.'" *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting 28 U.S.C. § 2106); *U.S. Bancorp Mortgage Co.*, 513 U.S. at 21–22 (court may "make such disposition of the whole case as justice may require"). The "'established' (though not exceptionless) practice in this situation is to vacate the judgment below" and

remand with directions to dismiss. *Camreta*, 563 U.S. at 712 (citing *Munsingwear*, 340 U.S. at 39); *Libertarian Party of Ohio*, 462 F.3d at 584.

Vacating the district court order is typically the "just" remedy when a case becomes moot on appeal because "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in that judgment." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25. The equitable remedy of vacatur ensures that "those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review." *Munsingwear*, 340 U.S. at 39; *Stewart v. Blackwell*, 473 F.3d 692, 693 (6th Cir. 2007) (vacatur "generally appropriate to avoid entrenching a decision rendered unreviewable through no fault of the losing party"). As this Court has emphasized, this procedure "'eliminates a judgment, review of which was prevented through happenstance . . . from spawning any legal consequences.'" *Constangy*, 851 F.2d at 842 (quoting *Munsingwear*, 340 U.S. at 40–41); *see also* 13C Charles Alan Wright, et al., Federal Practice & Procedure § 3533.10 (3d ed., April 2016 update). Accordingly, when other voting cases have become moot on appeal solely due to the passage of the election, this Court and the Supreme Court have vacated the decisions below and remanded for dismissal. *See, e.g., Hall*, 396 U.S. at 50; *Brockington v. Rhodes*, 396 U.S. 41, 44 (1969); *Libertarian*

*Party of Ohio v. Husted*, 497 F. App'x 581, 583 (6th Cir. 2012); *Clevenger*, 1996 WL 78164 at *2.

There are exceptions to this established procedure, but none is warranted by the circumstances here. Specifically, the Supreme Court has recognized that vacating the district court decision may not be warranted when mootness results from "voluntary action" by the appealing party, such as a settlement agreement or the failure of the losing party to appeal. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24; *accord Constangy*, 851 F.2d at 842; *Wilder*, 469 F.3d at 505 ("question of fault is central to [Court's] determination regarding vacatur"). That is not this case. Because this appeal is moot based on the sheer passage of time, the appropriate disposition is to vacate the order below and remand for dismissal of the case.

## II. The district court acted within its Article III power and equitable discretion in extending voting by one hour.

Because this appeal is moot, there is no jurisdiction to reach the merits. Indeed, examining the merits only highlights why cases that are no longer in an adversarial context—where the parties no longer have a stake sufficient to develop the record and defend on appeal—lead to impermissible advisory opinions of "what the law would be upon a hypothetical state of facts." *Lewis*, 494 U.S. at 479. That is not how a court should decide the weighty constitutional issues the State asks this Court to adjudicate. Because little is in the record here, the State asks this Court to decide broad questions about election law: whether Article III jurisdiction

can ever be based on an oral complaint, under what conditions the State can be required to extend polling hours, whether voting hours can ever be extended on an *ex parte* basis, and whether boards of elections are always necessary parties. State Br. at 33, 36, 38, 40, 49–50. But "[m]atters of great public interest are precisely the kinds of issues that demand the federal courts to be most vigilant" in ensuring that the matters "pressed before the Court [have] that clear concreteness provided when a question emerges precisely framed and necessary for decision from a class of adversary argument exploring every aspect of a multifaceted situation and embracing conflicting and demanding interests." *Fialka-Feldman*, 639 F.3d at 715; *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

If the Court turns to the merits, however, there is nothing in the sparse record demonstrating that, given the emergency, the district court abused its discretion in issuing a temporary injunction to give voters stuck in the catastrophic bridge accident the opportunity to exercise their right to vote. Specifically, the Court should reject the State's arguments for three reasons. *First*, the district court had jurisdiction to issue an *ex parte* order based on an oral complaint, as Article III requires neither a writing nor the presence of both parties. *Second*, balancing the equities and the potential violation of citizens' First and Fourteenth Amendment right to vote, the district court acted within its discretion in erring on the side of the franchise when the State was about to close the polls. *Third*, there is no reason to

determine in this case, where there was no time to notify any defendants, whether county boards of elections must be joined in future matters.

### A. The district court, responding to an oral complaint, did not lack jurisdiction to issue an *ex parte* order.

The State first attacks the district court's order as lacking jurisdiction, but its shifting arguments on this point only demonstrate its weakness. Article III requires that federal courts adjudicate disputes only where the plaintiff or petitioner has standing. *Lujan*, 504 U.S. at 560–61. Here, the district court's order responded to a complaint made by a plaintiff who had standing—a voter who was stuck in the bridge accident chaos and was not going to make it to the polls. Given the emergency, the complaint was made orally and the temporary injunction was issued *ex parte*, but neither of those facts removes this dispute from the district court's Article III power. As described below, the federal courts' jurisprudence is replete with examples of both oral complaints and *ex parte* orders.

Initially, the State argues that the district court lacked jurisdiction because it "had no plaintiff" and *sua sponte* issued an order. State Br. at 20, 33. Yet even the scant record tells otherwise.[13] The district court responded to an "oral complaint."

[13] The State argues that the district court (after the case was transferred to Judge Black) "said[] no plaintiff existed." State Br. at 33. But that is not so. In ruling on the motion to intervene, Judge Black's order did not consider whether there was a plaintiff requesting an order extending the polls. The intervention ruling only noted that "no responses [were] expected" at the time of the motion for intervention and

Order, R.1, PageID#1. Despite the State's protestations about the importance of a writing and the necessities of Rule 11 affirmations, State Br. at 38–39, nothing in Article III requires that a complaint be in writing; Article III does not prescribe any particular form. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151–52 (1970) (standing can be demonstrated in any "form historically viewed as capable of judicial resolution"). Instead, there are well-established orders by district courts that are based on oral pleadings, like search warrants. *See, e.g.*, *United States v. Shorter*, 600 F.2d 585, 587 (6th Cir. 1979) (affirming denial of motion to suppress even though FBI agent failed to "fill out a search warrant form in advance of his telephone communication with" the federal magistrate who issued telephonic warrant); Fed. R. Crim. P. 41(d)(2)(B) (allowing for warrants based on oral pleadings). Search warrants are normally requested by "nonlawyers in the midst and haste of a criminal investigation," so the "[t]echnical requirements of elaborate specificity once exacted under common law pleadings" are excused. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). The lack of formality does not deprive district courts of Article III jurisdiction over warrants; nor does it here.

In this case, "motorists affected by the traffic jam could not get to court to file a formal complaint" before the polls closed. Horn, *Judge: Stranded drivers "wanted to vote,"* Cincinnati Enquirer (Mar. 16, 2016). And there may be other disputes

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that the only original party left in the case was the Secretary of State. Order Granting Mots. to Intervene, R.6, PageID#50.

where the adverse interests of the parties fall well within Article III's "case or controversy" requirement, yet the parties are unable to file a formal verified complaint based on emergency, disability, or other restraint. The Court should not conclude as a blanket matter that a federal court would lack jurisdiction in those circumstances.

Recognizing the oral complainant, the State next argues that the plaintiff did not have standing, speculating that the plaintiff may not have been "a registered Ohio voter who had not yet voted." State Br. at 33. It is unclear from the record why the plaintiff was not identified; for instance, it is unclear whether the plaintiff did not identify himself or herself, or whether the district court, given its haste, simply failed to identify the plaintiff in its order. But "an appellate court is to assume that the district court was aware of the law it was called upon to apply," so it is improper to speculate that the district court issued the order without the plaintiff having standing. *United States v. Harris*, 145 F.3d 1334, 1998 WL 152922, at *1 (6th Cir. 1998); *see also Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) ("[N]oting the time constraints under which it issued its decision, we will assume that the district court issued the TRO on the basis of federal law."); *Precor Inc. v. Keys Fitness Products, L.P.*, 178 F.3d 1313, 1999 WL 55298 at *3 n.1 (Fed. Cir. Feb. 5, 1999) (assuming "jurisdictional prerequisite was satisfied" when district court did not address it explicitly).

If anything, though not in the record, news reports cited by the State (at 9) following the accident indicate that the oral complaint was made by a voter who was stuck in the accident who wanted to vote but, because of the bridge and highway closure, could not make it before the State closed the polls. *See* Horn, *Husted: Judge wrong to keep polls open after bridge crash*, Cincinnati Enquirer (Apr. 11, 2016) ("[P]eople stranded in the traffic jam contacted the federal court clerk's office . . . . People were using their cell phones from the highway. They wanted to vote."). Any such voter would have a clear "injury-in-fact," caused by the fact that the State was going to close the polls without providing an opportunity to vote for all those thwarted by the late-breaking bridge accident. The oral complainant, then, had the requisite "personal stake" to request that the district court extend the polling hours. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks omitted).

Moreover, the absence of a typical dispute, where both parties are present and heard before the court, does not deprive the district court of Article III jurisdiction. There is no question that federal courts are empowered to issue *ex parte* temporary restraining orders (as here). *See Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438–39 (1974). While a temporary restraining order envisions the imminent presence of an opposing party, there are other examples of Article III jurisdiction where no real adversarial party may ever surface. For example,

"[t]he Supreme Court has long treated the *ex parte* consideration of naturalization petitions as an appropriate exercise of judicial power." James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 Yale L.J. 1346, 1363 (2015); *see also Tutun v. United States*, 270 U.S. 568, 577 (1926) (Brandeis, J.) (describing Article III power over naturalization proceedings). The same is true for the *ex parte* administration of estates in bankruptcy or probate. *See, e.g.*, Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 837 n.352 (2000); John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 Prob. L.J. 77, 84 (1997). And both regular-warrant and FISA-warrant proceedings are likewise understood as satisfying Article III, despite the fact that both take place *ex parte*—and the latter effectively permanently so. *See In re Sealed Case*, 310 F.3d 717, 732 n.19 (Foreign Int. Surv. Ct. Rev. 2002) ("[W]e do not think there is much left to an argument . . . that the statutory responsibilities of the FISA court are inconsistent with Article III case and controversy responsibilities of federal judges because of the secret, non-adversary process."); Stephen I. Vladeck, *The FISA Court and Article III*, 72 Wash. & Lee L. Rev. 1161, 1167–76 (2015). *See generally* Pfander & Birk, *supra*, at 1359–91 (detailing a long list of examples of *ex parte*, nonadversarial Article III proceedings); *id.* at 1418 ("Chief Justice Marshall and Justice Story were both familiar with the range of *ex parte* matters that had been assigned to the federal

courts. . . . [and] upheld the exercise of judicial power in such matters."). Though this case may not have looked like a typical lawsuit, neither the oral complaint nor its *ex parte* nature removed it from the scope of Article III.

### B. Given the fatal accident that held up traffic for hours and risked denying a large group of people the right to vote, the district court did not abuse its discretion in issuing an *ex parte* order extending voting by one hour.

This Court reviews the district court's entry of a temporary restraining order or preliminary injunction only for abuse of discretion. *NEOCH v. Blackwell*, 467 F.3d at 1009. In evaluating a request for a temporary restraining order or a preliminary injunction, a district court weights four factors: "(1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent a stay, (3) whether granting the stay would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay." *Id.* "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991); *Ohio Republican Party*, 543 F.3d at 363. "For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *NEOCH v. Blackwell*, 467 F.3d at 1009. "[D]eference to the district court's decisions 'is the hallmark of abuse of discretion review.'" *Hardyman*, 243 F.3d at 258 (quoting *Joiner,* 522 U.S. at 143). Comparing

the grave harm that voters faced against the minimal harm a short extension caused the State demonstrates that there was no abuse of discretion here.

At stake in this case was the potential disenfranchisement of a large group of Ohio citizens, who did not face a "flat tire" or "last-minute work emergency," State Br. at 37, but rather were blocked from reaching the polls by a bridge accident shutting down a major thoroughfare. "Voting rights are fundamental, and alleged disfranchisement of even a small group of potential voters is not to be taken lightly." *O'Brien v. Skinner*, 409 U.S. 1240, 1242 (1972). As the Supreme Court has emphasized: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). In light of a looming irreparable injury, the district court issued a narrowly crafted injunction, extending polling hours for only one hour in the specific counties most affected.

To be sure, last-minute election orders are "disfavored," particularly when—unlike here—the complaining party had an opportunity to seek or clarify relief "in

the months before an election, and then asks for . . . relief days before an election." *Serv. Employees Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012). And last-minute implementation of court orders may be imperfect and only carried out to various degrees depending on logistical difficulties. But the irreparable injury in denying someone the right to vote cannot be sidelined because of logistical imperfections. Indeed, under such reasoning, the polls could never be extended given the unequal implementation that could result. Such a result would impermissibly burden the franchise.

The harm to the State, moreover, is minimized because, despite the State's repeated fears (at 6, 31, 44), any extension order could not sway an election without full review, given that all additional ballots are cast provisionally and segregated. By contrast, citizens might (justifiably) question the results of an election where a group of voters were—based on an unforeseen public emergency—*prevented* from voting. The State's only harm, then, is monetary. *See* Poland Decl., R.4-1, ¶ 14, PageID#33 ($1,440 estimated cost for Hamilton County); Bucaro Aff., R.3-2, ¶ 17, PageID#17 (estimated $7,890 cost to Butler County). And the State's interest in saving money does not outweigh the irreparable injury to citizens unable to vote because of the catastrophic accident on the bridge, nor the public's interest in protecting the right to vote.

Despite the equities, the State argues that the district court's order must be reversed because the State "did nothing wrong"—that is, there was not "any state action" upon which a constitutional claim could be based. State Br. at 17, 35–37. But even though the State did not cause the bridge emergency, it is responsible for administering the elections, and it acts by opening and, more relevantly, *closing* polling locations. *See* Ohio Rev. Code § 3501.32. Simply because the State was planning to close polling locations in accordance with a state statute does not make it any *less* state action. *See* State Br. at 34, 36. And even when the State does not *cause* a problem, it still may have a duty to act, especially in a context like administering elections. *See Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 672 (7th Cir. 1972) (Supreme Court has held that rare "circumstances in cases involving fundamental rights may give rise to such a duty"); *Jennings v. Patterson*, 488 F.2d 436, 441 (5th Cir. 1974) (failure of public officials to act constitutes state action when the government is under a duty to act and the inaction results in the deprivation of constitutional rights). It is not possible that the State *never* has a duty to make election alterations based on *any* natural disaster or emergency.

The relevant question, then, is not whether there was state action—closing the polls is a state action—but instead whether closing the polls at 7:30 pm, given the emergency on the bridge, unduly or unfairly burdened the right to vote under

the First and Fourteenth Amendments.[14] *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (balancing the state's interest against "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"). Of course, under ordinary circumstances, just because an individual cannot make it to the polls does not make it unconstitutional for the State to close them. *Id.* at 788 (states' regulatory interests are "generally sufficient" to justify reasonable voting restrictions). But this was far from an ordinary circumstance: A major highway was closed—and traffic backed up for hours—late on election day due to a semi-trailer truck accident that led to a car flying off a bridge. The right to vote was threatened in an extraordinary manner, yet the State did nothing, as if the situation were business as usual. The district court's minimal extension of polling hours to protect voters' constitutional rights was not an abuse of discretion.

Finally, there was no time to notice the State (or county boards of elections) and hold a hearing, so the district court appropriately issued the order *ex parte*. Newspaper articles report that the district court received the oral complaint at approximately 7:00 pm; polls were set to close at 7:30 pm. *See* Horn, *Judge: Stranded*

[14] Contrary to the State's argument (at 36), the fact that an Ohio statute does not provide for an extension of voting hours for citizens in the event of a natural disaster or other emergency (except for uniformed service members called to respond to such emergency) does not dictate the terms of any federal or constitutional claims regarding the right to vote. *See* U.S. Constitution, art. VI, cl. 2.

*drivers "wanted to vote,"* Cincinnati Enquirer (Mar. 16, 2016). "[I]f [the judge] waited to act, it would be too late to prevent [voters stuck on the highway] from being disenfranchised." *Id.* Had the district court held a hearing, any relief would have been impracticable; as it was, even under the district court's *ex parte* order only some polling locations were able to stay open or reopen. In one breath, the State faults the district court for not holding a hearing and abiding the procedural formalities of Rule 65 and the like, State Br. at 38–39, and in the next it criticizes the order as "too late," *id.* at 40. The State cannot have it both ways.

Undeterred, the State (and county boards of elections) argue that there can never be an *ex parte* election order. *Id.* at 40, 49–50. But such a broad request goes well beyond the facts of this case and would strip district courts of their authority and equitable discretion to remedy even the gravest last-minute election violations. As here, there may be instances where strict adherence to the Rules of Civil Procedure and hearing from all parties is impossible if the court is going to award meaningful relief to people who wish to exercise their constitutional right to vote. The State's request that this Court prohibit all *ex parte* election orders goes too far.

Given the last-minute emergency thwarting countless Ohioans from exercising their constitutional right to vote, the district court did not abuse its discretion in granting a narrow *ex parte* injunction extending polling locations in four counties by one hour.

### C. This case does not present the question whether the county boards of elections were a necessary party.

The intervening county boards of elections contend that, given their role in administering elections, they are "necessary parties" under Federal Rule of Civil Procedure 19 in any case that "imposes duties upon them" that is not a "statewide legal challenge." State Br. at 46–47. But the Court need not reach this question to resolve the appeal, and therefore should refrain from doing so. *See In re Cardizem CD Antitrust Litig.*, 481 F.3d 355, 362 (6th Cir. 2007) ("[I]f it is not necessary to decide more, it is necessary not to decide more." (internal quotation marks omitted)); Black's Law Dictionary (10th ed. 2014) ("dictum" is "[a]n opinion by a court on a question . . . that is not essential to the decision and therefore not binding").

As the intervenors acknowledge, even "necessary parties" do not need to be joined if it is not "feasible." *Id.* at 46 (citing Fed. R. Civ. P. 19). And in this case, the district court determined that it was not feasible to notify and hear from the Secretary of State, nor any defendants, given the small window to issue an order before the polls closed. If the Court concludes that the district court was within its discretion in issuing an *ex parte* order, then even if the boards of elections should generally be joined as necessary parties, it was no error to exclude them here. Conversely, if the Court adopts the State's arguments that the *ex parte* order was improper, then, regardless of whether the boards of elections should have been joined, the order would be reversed. Either way, it is unnecessary to decide

whether the county boards of elections should have been joined here—in an election dispute that is moot—and it would be improper to speculate as to whether they are necessary parties in hypothetical future cases.

## CONCLUSION

For these reasons, the Court should conclude that the appeal is moot, vacate the district court order, and remand with instructions to dismiss the case. Alternatively, the Court should conclude that the district court did not abuse its discretion and affirm the district court's order.

Respectfully submitted,

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July 14, 2016

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,735 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief 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 brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

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July 14, 2016

## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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## CERTIFICATE OF SERVICE

I certify that, on July 14, 2016, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system.

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