IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 21-3466

ERIC KOHLER,

Plaintiff-Appellant

v.

CITY OF CINCINNATI, OH, *et al.*;

Defendants-Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

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# UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL

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## INTRODUCTION

Plaintiff-Appellant Eric Kohler challenges the ongoing enforcement of two consent decrees that govern the City of Cincinnati's hiring and promotion of police officers. The United States is a party only to one of those consent decrees: the 1981 Federal Consent Decree. Kohler alleges that the Federal Consent Decree violates his rights under the Equal Protection Clause because it treats him less favorably than similarly situated individuals because of his race and sex. The district court denied his motion for a preliminary injunction, and he has appealed. He has also filed a motion for an injunction pending appeal, asserting that he is suffering ongoing harm. As discussed below, this Court should deny that motion.

First, Kohler lacks standing to enjoin the Federal Consent Decree. Because Kohler has already been hired and promoted to sergeant in the City's police department, he will never again be subject to the Federal Consent Decree. Nor would the Federal Consent Decree allow any other police officer to leapfrog Kohler in seniority. Thus, because Kohler will not suffer any imminent harm from the future use of the Federal Consent Decree, he lacks standing to enjoin it.

Second, Kohler cannot satisfy the stringent prerequisites for an injunction pending appeal. In particular, he fails to show irreparable harm. And without irreparable harm, Kohler cannot enjoin enforcement of the Federal Consent Decree even if his constitutional claims were meritorious. As the district court noted, if

Kohler proves that the City violated his constitutional rights by enforcing the consent decrees, then the court can make him whole by ordering the City to pay him damages and restore his seniority. Thus, this Court should deny Kohler's motion for an injunction pending appeal.

## BACKGROUND

*1. Facts*

*a. The 1981 Federal Consent Decree*

In 1980, the United States sued the City of Cincinnati to enforce the equal employment rights of Blacks and women within the Cincinnati Police Department. *United States* v. *City of Cincinnati*, No. 80-369 (S.D. Ohio). That lawsuit led to the 1981 Federal Consent Decree, which ensures "that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunity is provided to all." (Federal Consent Decree, RE 25-1 ¶ 2, Page ID # 255).[1] The Federal Consent Decree permits the City to use—as "interim measures"—numerical goals to hire Blacks and women and promote them to sergeant. (Federal Consent Decree, RE 25-1 ¶¶ 2(A) and (B), Page ID ## 255-256).

[1] Citations to "RE __" refer to documents, by number, on the district court docket sheet in this case, *Kohler* v. *City of Cincinnati*, No. 20-889 (S.D. Ohio), and citations to "Page ID # __" refer to the page numbers in the paginated electronic record.

The City has administered the Federal Consent Decree through a "rule of four" and "double fill" process. (Report and Recommendation (R&R), RE 40, Page ID ## 408-409 (citation omitted); Order Adopting Report and Recommendation (Order), RE 44, Page ID # 481). Under this process, once four people are hired or promoted in the police department, the City must review the race and sex of those four individuals. (Order, RE 44, Page ID # 481). If no Blacks or women were hired or promoted in that group, then the City must double fill the fourth position by creating and funding a new position for the next qualified Black or woman from the promotions list. (Order, RE 44, Page ID # 481).

*b. The 1987 State Consent Decree*

In 1987, the City entered into a second consent decree, this time in state court, which also governed hiring and promotion practices in the police department. (R&R, RE 40, Page ID # 408). Like the Federal Consent Decree, the State Consent Decree contains sex- and race-based criteria for new hires and promotions and was enforced through the "rule of four" process. (R&R, RE 40, Page ID # 408) (citation omitted). But unlike the Federal Consent Decree, which does not address promotions beyond the rank of sergeant, the State Consent Decree applies to more senior promotions, including lieutenant, captain, and assistant chief. (R&R, RE 40, Page ID # 408). The United States is not a party to the State Consent Decree.

*c. Eric Kohler's Employment With The Cincinnati Police Department*

Kohler is a white male who was hired as an entry-level Cincinnati police officer in 1999. (R&R, RE 40, Page ID ## 404, 409). In 2020, when Kohler took a promotional test to be a sergeant, the City committed several administrative errors in the promotion process. (R&R, RE 40, Page ID # 409; Order, RE 44, Page ID # 482). After the City corrected these errors, Kohler ranked 9th on the promotion list and a Black officer ranked 12th. (R&R, RE 40, Page ID ## 409-411; Order, RE 44, Page ID # 482). The Black officer was promoted ahead of Kohler under the City's procedure to administer the Federal Consent Decree, effective September 20, 2020. (R&R, RE 40, Page ID ## 409-411; Order, RE 44, Page ID # 482). Kohler later received a promotion to sergeant as well, effective November 15, 2020. (R&R, RE 40, Page ID # 411; Order, RE 44, Page ID # 482).

*2. Procedural History*

*a. Kohler's Lawsuit*

In 2021, Kohler filed an amended complaint under 42 U.S.C. 1983 challenging the ongoing enforcement of the two consent decrees and seeking relief against the City, the United States, and others. (Amended Complaint, RE 26, Page ID # 287). Specifically, Kohler alleges that the consent decrees violated his rights under the Equal Protection Clause by treating him differently than similarly situated persons because of his race and sex. (Amended Complaint, RE 26 ¶¶ 50, 53, Page ID # 297). As to the United States, Kohler seeks only declaratory and

injunctive relief regarding the Federal Consent Decree. (Amended Complaint, RE 26 ¶ 5 n.1, Page ID # 288). Kohler also seeks to represent a class of similarly situated persons whom he alleges have been or will be harmed by the City's continued adherence to the consent decrees. (Amended Complaint, RE 26 ¶¶ 44-48, Page ID ## 295-296).

Kohler moved in district court for a preliminary injunction to prohibit the City from enforcing the two consent decrees while he litigated his claims. (Motion for Preliminary Injunction, RE 7, Page ID ## 51-63; Proposed Order, RE 7-1, Page ID # 64). The magistrate judge recommended that Kohler's motion be denied because: (1) Kohler lacked standing (R&R, RE 40, Page ID ## 418-426); (2) Kohler would not suffer irreparable harm without an injunction (R&R, RE 40, Page ID ## 426-430); and (3) the public interest would be harmed by a preliminary injunction (R&R, RE 40, Page ID # 431). The district court adopted the report and recommendation in full and denied Kohler's motion for a preliminary injunction. (Order, RE 44, Page ID ## 479-488).

Kohler then filed a motion with the district court for an injunction pending appeal. (Motion for Injunction Pending Appeal, RE 45, Page ID ## 489-490). The district court denied that motion as well. (Order, RE 47, Page ID # 497). Kohler then filed a notice of appeal seeking review of the denial of his motion for a preliminary injunction. (Notice of Appeal, RE 50, Page ID # 501).

*b. The United States' Motion To Modify The Federal Consent Decree*

On June 2, 2021, the United States moved to modify the terms of the Federal Consent Decree in a separate case in which Kohler is not a party. (*United States* v. *City of Cincinnati*, No. 80-369 (S.D. Ohio) (*Cincinnati*), Motion to Modify, RE 193). The United States explained that over the past four decades, the consent decree has greatly increased the representation of Blacks and women in the City's police department. (*Cincinnati*, Motion to Modify, RE 193, Page ID # 57). The United States also recognized that the legal landscape has changed since the Federal Consent Decree was signed in 1981 and that continued reliance on the interim race- and sex-based numerical goals raises serious constitutional questions. (*Cincinnati*, Motion to Modify, RE 193, Page ID ## 55, 60-63). Thus, the United States asked the district court to remove the numerical hiring and promotion goals from the Federal Consent Decree unless the City can sufficiently justify their continued use. (*Cincinnati*, Motion to Modify, RE 193, Page ID ## 63-64).

The City's response to that motion is currently due July 15, 2021. (*Cincinnati*, Minute Entry dated June 3, 2021).

*c. This Appeal*

Kohler appeals the district court's denial of his motion for a preliminary injunction. (Notice of Appeal, RE 50, Page ID # 501). On May 25, 2021, he filed a motion in this Court for an injunction pending appeal under Federal Rule of

Appellate Procedure 8. He seeks an injunction "to be freed from the ongoing effects of an ongoing unconstitutional, race-based hiring and promotion practices within the Cincinnati Police Department, including racial hiring and promotion quotas, including to have his seniority corrected, which is skewed by racial quotas." Motion 1.

## ARGUMENT

This Court should deny Kohler's motion for an injunction pending appeal for two reasons: (1) he lacks standing to enjoin the future use of the Federal Consent Decree; and (2) he fails to satisfy the stringent requirements for an injunction pending appeal, particularly the showing of irreparable harm.

### I

### KOHLER LACKS STANDING TO ENJOIN THE FUTURE USE OF THE FEDERAL CONSENT DECREE

Kohler lacks standing to enjoin the future use of the Federal Consent Decree. R&R, RE 40, Page ID ## 418-426; Order, RE 44, Page ID # 487). Standing arises from the Constitution's limitation on federal courts' jurisdiction to certain cases or controversies. U.S. Const. Art. III; *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). And because standing is jurisdictional, standing "must be addressed as a threshold matter" before deciding the merits of a motion for a preliminary injunction. *Kanuszewski* v. *Michigan Dep't of Health & Hum. Servs.*, 927 F.3d 396, 405 (6th Cir. 2019).

To meet the constitutional requirements for standing, a plaintiff must show that:

> (1) he or she has suffered an injury in fact that is
>
> > (a) concrete and particularized and
> >
> > (b) actual or imminent, not conjectural or hypothetical;
>
> (2) the injury is fairly traceable to the challenged action of the defendant; and
>
> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Fieger* v. *Michigan Sup. Ct.*, 553 F.3d 955, 962 (6th Cir. 2009) (citation and internal quotation marks omitted), cert. denied, 558 U.S. 1110 (2010). This inquiry is "particularly rigorous" when a dispute would force a court to decide whether the Executive Branch acted unconstitutionally. *Parsons* v. *United States Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015). After all, the law of Article III standing "is built on separation of powers principles." *Clapper*, 568 U.S. at 408.

Kohler, as the party invoking federal jurisdiction, bears the burden of establishing standing. *Kanuszewski*, 927 F.3d at 405. Moreover, because "[s]tanding is not dispensed in gross," plaintiffs like Kohler must demonstrate standing not only for each claim they assert, but also for each form of relief they seek. *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (alteration and citation omitted). In other words, a plaintiff with standing to pursue a constitutional claim for damages may nonetheless lack standing to pursue

injunctive relief on that claim. See, *e.g.*, *City of L.A.* v. *Lyons*, 461 U.S. 95, 105 (1983); *Waskul* v. *Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 257 (6th Cir. 2018).

Kohler lacks standing here for two reasons. First, he cannot satisfy the injury-in-fact element of standing. Second, he cannot satisfy the redressability element of standing. Thus, this Court should deny his motion for an injunction pending appeal.

### *A. Kohler Fails To Show That Future Enforcement Of The Federal Consent Decree Presents A Real And Immediate Threat Of Future Injury*

First, Kohler cannot meet the injury-in-fact element of standing. To satisfy the injury-in-fact element of standing for prospective relief like a preliminary injunction, a plaintiff must show "an actual, concrete, particularized, and imminent threat of harm." *Memphis A. Philip Randolph Inst.* v. *Hargett*, 978 F.3d 378, 387 (6th Cir. 2020). In other words, Kohler must show that the future enforcement of the Federal Consent Decree presents a real and immediate threat of future injury to him. "Past exposure to illegal conduct does not in itself show a present case or controversy *regarding injunctive relief*." *Waskul*, 900 F.3d at 257 (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974)) (emphasis in *Waskul*) (alteration omitted). Rather, Kohler needs to show *continuing* adverse effects that present a case or controversy. *Ibid.* This he cannot do.

As Kohler's own allegations show, his purported harm all occurred in the past. He asserts that the City's double-filling practice delayed his ability to take the sergeant's exam (Amended Complaint, RE 26 ¶ 18, Page ID # 291), and that the City improperly promoted a Black officer ahead of him (Amended Complaint, RE 26 ¶ 38, Page ID # 295). This past alleged harm, however, does nothing to show a "*certainly impending*" future injury, which is required to establish standing to seek a preliminary injunction. *Hargett*, 978 F.3d at 386 (citation omitted). Indeed, because Kohler has now been promoted to sergeant, and because the Federal Consent Decree does not govern promotions to ranks higher than sergeant, Kohler can never again be harmed by the Federal Consent Decree.

Kohler also cannot establish the requisite injury by pointing to "lingering and ongoing effects" of his past harm, which he describes as "impacting his ability to compete for future promotions." Motion 13. These vague harms represent the very type of "conjectural or hypothetical" allegations that the Supreme Court has found insufficient to establish standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation and internal quotation marks omitted). As the magistrate judge pointed out, "[Kohler's] theory of standing is not supported by any evidence" showing how his past delayed promotion adversely affects his ability to compete for future promotions. (R&R, RE 40, Page ID # 422). Indeed, any future promotion depends on Kohler's ability to pass an exam with a qualifying score.

(R&R, RE 40, Page ID # 422). Not only is it "highly conjectural" whether Kohler would pass that future exam, but connecting that potential future harm to potential future hires and promotions under the Federal Consent Decree "rest[s] on a string of actions the occurrence of which is merely speculative." *Grendell* v. *Ohio Sup. Ct.*, 252 F.3d 828, 833 (6th Cir.), cert. denied, 534 U.S. 955 (2001).

Although Kohler cites cases in which this Court has found standing to challenge consent decrees (Motion 14-15), none of those cases analyzed standing to seek a preliminary injunction. While Kohler contends that this difference does not legally matter (Motion 15), the Supreme Court and this Court have said that it does. For example, the Supreme Court in *Lyons* held that although the plaintiff likely had standing to claim damages for *past unconstitutional conduct*, that past illegal conduct "does nothing to establish a real and immediate threat" of *future injury* required to seek an injunction. 461 U.S. at 105. Likewise, this Court in *Waskul* held that even though the plaintiff could establish standing for its due process *claim*, it did not have standing for *injunctive relief* related to that claim. 900 F.3d at 257.

The same analyses and conclusions apply here. Kohler may have standing to assert a constitutional claim against the City for his loss of seniority. See *Brunet* v. *City of Columbus*, 1 F.3d 390, 400-403 (6th Cir. 1993) (holding that loss of seniority is a concrete injury for standing purposes), cert. denied, 510 U.S. 1164

(1994). And like the plaintiffs in *Brunet*, who eventually obtained an order adjusting the seniority of employees hired under a consent decree, so too will Kohler be able to seek equitable relief concerning his seniority if he proves his claim. *Id.* at 413. But Kohler has not shown "an actual and imminent injury" to provide him with standing to enjoin the *future use* of the Federal Consent Decree, and he thus fails to meet the first element of standing. *Waskul*, 900 F.3d at 257.

*B. Kohler Fails To Show That An Injunction Would Redress His Alleged Harm*

Second, Kohler cannot meet the redressability element of standing because an injunction would not alleviate any past harm or prevent future harm. As the Supreme Court has emphasized, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Likewise, this Court requires plaintiffs to show that they "personally would benefit in a tangible way from the court's intervention." *ACLU* v. *National Sec. Agency*, 493 F.3d 644, 670 (6th Cir. 2007) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975)), cert. denied, 552 U.S. 1179 (2008). As the magistrate judge determined, Kohler cannot meet this standard. (R&R, RE 40, Page ID ## 419-423).

First, an injunction would not redress any past harm. Even if this Court halted enforcement of the Federal Consent Decree, "there would be no change to

[Kohler's] promotion date as a result" and "his seniority and benefits would not be impacted." (R&R, RE 40, Page ID # 421). Second, an injunction "would not eliminate any potential future harm." (R&R, RE 40, Page ID # 423). Because Kohler has already been promoted to sergeant—the highest rank governed by the Federal Consent Decree—he will never again be subject to the terms of that decree. He thus cannot personally benefit from an injunction halting enforcement of that decree. See *ACLU*, 493 F.3d at 670.

None of the cases Kohler cites to support his redressability arguments analyze standing. Motion 15-16. For example, Kohler states that "[p]erhaps no case is more relevant than the U.S. Supreme Court's discussion in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976)." Motion 16. But *Franks* does not even mention standing. Rather, *Franks* discusses remedies under Title VII of the Civil Rights Act of 1964. 424 U.S. at 763-770 (holding that courts may adjust seniority levels to redress racial discrimination that violates Title VII). Putting aside that Kohler is not suing under Title VII, nobody disputes that a *past* loss of seniority is a redressable injury. (Order, RE 44, Page ID # 487 ("If the evidence ultimately proves Kohler was treated illegally, the promotion dates can be retroactively adjusted.")). The issue here, though, is whether ceasing *future* enforcement of the Federal Consent Decree will redress any past or ongoing harm to Kohler. Because it will not, Kohler lacks standing to pursue injunctive relief.

## II

## KOHLER DOES NOT MEET THE DEMANDING STANDARDS REQUIRED TO ENJOIN THE FUTURE USE OF THE FEDERAL CONSENT DECREE

Kohler also cannot meet the stringent standards to justify enjoining the Federal Consent Decree pending appeal. The standards this Court applies to a motion for an injunction pending appeal are the same as for a motion for a preliminary injunction. See *Overstreet* v. *Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). Thus, the Court applies the well-known four-part test:

> (1) whether the movant has shown a strong likelihood of success on the merits;
>
> (2) whether the movant would suffer irreparable injury if the injunction is not issued;
>
> (3) whether the issuance of the injunction would cause substantial harm to others; and
>
> (4) whether the public interest would be served by issuing the injunction.

*Id.* at 573.

When, as here, the government is the opposing party, the third and fourth factors merge into consideration of the public interest. See *Nken* v. *Holder*, 556 U.S. 418, 435 (2009). Additionally, although courts use a balancing test to evaluate the above factors, the irreparable-injury element is "indispensable," and "even the strongest showing on the other three factors cannot eliminate the

irreparable harm requirement." *D.T.* v. *Sumner Cnty. Schs.*, 942 F.3d 324, 326-327 (6th Cir. 2019) (citation and internal quotation marks omitted). As discussed below, Kohler has not met his heavy burden to prove that these factors entitle him to an injunction while his appeal is pending.

*A. Kohler Fails To Show Irreparable Harm*

Kohler's motion for an injunction necessarily fails because he has not met the "mandatory" requirement of establishing irreparable harm. *Sumner Cnty. Schs.*, 942 F.3d at 327. As the magistrate judge correctly concluded, Kohler "has not shown it is likely he will suffer irreparable harm if the Court does not enjoin the 1981 and 1987 Consent Decrees during the pendency of this lawsuit." (R&R, RE 40, Page ID # 428). Indeed, because Kohler has already been hired and promoted to sergeant, the Federal Consent Decree will never impact him again. He thus can suffer no injury—much less irreparable injury—if the Federal Consent Decree continues to be enforced.

Likewise, Kohler "has not alleged that he has suffered past or ongoing losses from the Consent Decrees that are irreparable." (R&R, RE 40, Page ID # 429). For example, although Kohler contends there are "tangible long term employment benefits that are determined based on seniority and date of promotion" (Amended Complaint, RE 26 ¶ 19, Page ID # 291), the magistrate judge found that "[t]here is no evidence to suggest that [Kohler] would be unable to recover money damages

for these losses if he were to prevail on the merits of his claims." (R&R, RE 40, Page ID # 429). As the district court summarized, "Kohler's alleged injury is not irreparable" because "the promotion dates can be retroactively adjusted and any lost wages, loss of seniority-related benefits, or delayed promotional or other opportunities can be compensated at that time." (Order, RE 44, Page ID # 487).

This Court has also held that compensable employment harms do not qualify as irreparable injury. For example, in *Overstreet*, the plaintiff sought an injunction to prevent his employer from firing him while he challenged the constitutionality of a policy he refused to follow. 305 F.3d at 579. This Court held that the plaintiff failed to establish irreparable harm because "[t]he loss of a job is quintessentially reparable by money damages." *Ibid.* (citation omitted; brackets in original). As this Court explained, "[t]he fact that an individual may lose his income for some extended period of time does not result in irreparable harm, as income wrongly withheld may be recovered through monetary damages in the form of back pay." *Ibid.* Thus, because Kohler likewise fails to show that "irreparable injury is *likely* in the absence of an injunction," he cannot meet this essential element of standing. *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

*B. Kohler Fails To Show A Likelihood Of Success On The Merits*

Because Kohler cannot show irreparable harm, this Court need not evaluate the merits of Kohler's constitutional arguments (Motion 17-22). As this Court has

explained, when a party fails to show irreparable harm, courts "rightly [leave] the merits of their claims for another day." *Sumner Cnty. Schs.*, 942 F.3d at 328. In any event, Kohler still cannot make the required showing that he is likely to succeed on the merits.

First, Kohler improperly focuses his arguments on the likelihood he will be able to show a constitutional violation. Motion 17-22. But in a Rule 8 motion for an injunction pending appeal, this Court should determine "the likelihood that the district court's preliminary injunction order will be upheld on appeal." *DV Diamond Club of Flint, LLC* v. *Small Bus. Admin*., 960 F.3d 743, 746 (6th Cir. 2020) (citation omitted). That means that Kohler needs to show that the district court likely abused its discretion under a "highly deferential" standard. *Ibid*. (citation omitted). As shown above, Kohler is not likely to succeed in having this Court reverse the district court's preliminary injunction order because he has not established standing or irreparable harm.

Second, "a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek* v. *Lamone*, 138 S. Ct. 1942, 1943-1944 (2018) (per curiam). To be sure, when "a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *Waskul* v. *Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d at 256 n.4 (6th Cir. 2018)

(citation omitted). But as *Waskul* clarifies, an "affirmative burden of showing a likelihood of success on the merits … necessarily includes a likelihood of the court's *reaching* the merits, which in turn depends on a likelihood that plaintiff has standing." *Ibid.* (citation omitted; emphasis in original). Thus, as in *Waskul*, where an association sued on behalf of its members, this Court may assume that Kohler has alleged a constitutional claim actionable by *someone* but still deny *his* motion "to seek the very discrete and preliminary types of relief sought on appeal." *Id.* at 256.

*C. Kohler Fails To Show That An Injunction Is In The Public Interest*

Finally, consideration of the public interest also weighs against granting Kohler's motion for an injunction pending appeal. As the district court noted, the public interest does not favor issuing a preliminary injunction to "upend * * * more than forty years of effort to rebalance the scales of racial and sex based equity in police hiring and promotions." (Order, RE 44, Page ID # 487). Kohler does not even attempt to show otherwise (Motion 22), effectively conceding that this factor weights against him.

***

In sum, Kohler fails to satisfy his demanding burden to prove that this Court should grant him an injunction pending appeal that bars application of the Federal Consent Decree. See *Service Emps. Int'l Union Loc. 1* v. *Husted*, 698 F.3d 341,

343-344 (6th Cir. 2012) (emphasizing that "a preliminary injunction is an extraordinary form of relief," and that the moving party "has the burden of proving that the circumstances clearly demand it") (citation and internal quotation marks omitted). Kohler will not suffer irreparable harm, he is unlikely to obtain reversal of the district court's order, and the public interest does not favor injunctive relief. This Court should thus deny his requested relief.

## CONCLUSION

This Court should deny Kohler's motion for an injunction pending appeal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this response:

(1) complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A), because, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f), this response contains 4377 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman 14-point font.

s/ Brant S. Levine
BRANT S. LEVINE
Attorney

Date: June 17, 2021

## CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically filed the foregoing UNITED STATES' RESPONSE TO PLAINTIFF'S MOTION FOR AN INJUNCTION PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that participants in this case who are registered CM/ECF users will receive service by the appellate CM/ECF system.

s/ Brant S. Levine
BRANT S. LEVINE
Attorney