No. 19-

IN THE

Supreme Court of the United States

WILLIAM T. SCHMITT, CHAD THOMPSON, AND DEBBIE BLEWITT,

Petitioners,

v.

FRANK LAROSE, OHIO SECRETARY OF STATE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment and strict scrutiny apply to subject matter restrictions on ballot initiatives.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are William T. Schmitt, Chad Thompson, and Debbie Blewitt, Appellees below. Respondent is Frank LaRose, Ohio Secretary of State, Appellant below. No parties are a corporation.

RULE 14(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Southern District of Ohio, and the United States Court of Appeals for the Sixth Circuit:

Schmitt v. *LaRose*, No. 19-3196 (6th Cir. Aug. 7, 2019)

Schmitt v. *Husted*, No. 2:18-cv-966 (S.D. Ohio Feb. 11, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

CONSTITUTIONS AND STATUTES

COURT DOCUMENTS

TABLE OF AUTHORITIES—continued

SCHOLARY ARTICLES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, William T. Schmitt, Chad Thompson, and Debbie Blewitt, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 933 F.3d 628 (2019) and is reproduced in the appendix to this Petition at Pet. App. 1a–37a. The permanent injunction issued by the trial court below is reported at 363 F. Supp. 3d 842 (2019) and is reproduced at Pet. App. 38a–49a. The temporary restraining order issued by the trial court below is reported at 341 F. Supp. 3d 784 (2018) and is reproduced at Pet. App. 50a–61a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on August 7, 2019, Pet. App. 1a, and the Sixth Circuit denied Petitioners' petition for rehearing en banc on September 4, 2019, Pet. App. 62a. On November 13, 2019, Justice Sotomayor extended the time within which to file this Petition to and including February 3, 2020. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the govern-

ment for a redress of grievances." U.S. Const. amend. I.

Section 1 of the Fourteenth Amendment makes the provisions of the First Amendment applicable to the states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

Ballot initiatives implicate "core political speech." *Meyer* v. *Grant*, 486 U.S. 414, 22 (1988); "First Amendment protections" are accordingly "at [their] zenith" and "exacting scrutiny" is required. *Id.* at 425, 420. For citizens in nearly half the states in the Union, ballot initiatives are "basic instruments of democratic government." *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003). Yet the Courts of Appeals are in disarray over how to apply this Court's precedents to subject-matter restrictions on ballot initiatives. As a result, citizens in the Ninth Circuit exercising their right to participate in direct democracy enjoy full First Amendment protection under a strict scrutiny standard while those in the Tenth Circuit are afforded no First Amendment protection at all. This inconsistent application of the First Amendment is constitutionally intolerable.

The decision below highlights persistent confusion in the lower courts as to whether and how the First

Amendment applies to subject matter restrictions on ballot initiatives. The underlying case involves two ballot initiatives rejected by a local elections board under Ohio's "gatekeeper" law. Officials in Portage County, Ohio refused to put Petitioners' proposal on the ballots in two municipalities, on the ground that the initiatives were "administrative" and not "legislative" in nature, even though identical proposals in other localities were approved under the very same law. A panel of the Sixth Circuit divided over the proper analysis. The majority applied the First Amendment but refused to apply strict scrutiny and the doctrine against prior restraints. The concurring judge did not agree that the First Amendment applied at all. Under either analysis, those pursuing direct democracy in Ohio find themselves with little to no First Amendment protection, while citizens in other states enjoy full First Amendment rights.

The decision below highlights intractable Circuit splits over whether and how the First Amendment applies to subject matter restrictions on ballot initiatives. Three Circuits do not apply the First Amendment at all; four Circuits do. And the four Circuits that do disagree about the level of scrutiny that applies. The result is uneven constitutional protection for core political speech.

This Petition offers the Court an excellent opportunity to clarify application of the First Amendment in a case challenging subject matter restrictions on ballot initiatives. The question presented is a recurring one of great importance to citizens of the many states witnessing a dramatic increase in the role initiatives play in the democratic process. Between the majority and concurring opinions, the published decision below provides a robust analysis of both whether and how the First Amendment applies. It is an excel-

lent vehicle for settling those intertwined issues in a single opinion.

STATEMENT OF THE CASE

A. Ohio's Gatekeeper Law

Ohio's Constitution reserves to the people the right to legislate by initiative. Ohio Const. art. II, § 1f. But under Ohio's "gatekeeper" law, Ohio Rev. Code § 3501.11(K), county election boards exercise discretion to determine whether the subject matter of a proposed initiative is "legislative" and proper, or "administrative" and improper. See *id.* § 3501.11(K)(2). Only "legislative" initiatives can be placed on the ballot. *Id.*

This statutory scheme has faced extensive criticism. See, *e.g.*, *State ex rel. McGinn* v. *Walker*, 87 N.E.3d 204, 206–07 (Ohio 2017) (Fischer, J., dissenting) (characterizing the legislative/administrative distinction as "unnecessarily confusing," "without meaning," and "unworkable"); *State ex rel. Khumprakob* v. *Mahoning Cty. Bd. of Elections*, 109 N.E.3d 1184, 1193 (Ohio 2018) (Fischer, J., concurring) (same); Terry Smith, *State Law Adds Another Obstacle to Local Charter Efforts*, Athens News (Jan. 8, 2017), https://www.athensnews.com/news/local/state-law-adds-another-obstacle-to-local-charter-efforts/article_156bb4ca-d5c9-11e6-8a9b-4f7a9bc31b08.html; Thomas Suddes, *Constitutionally Questionable Slap at Medina and Portage Counties, Other Anti-Fracking Localities, Signed into Ohio Law*, Cleveland.com (Jan. 7, 2017), https://www.cleveland.com/opinion/2017/01/constitutionally_questionable.html. As the Ohio Supreme Court recognized, it vests broad subject matter discretion in local officials, see*, e.g., State ex rel. Walker* v. *Husted*, 43 N.E.3d 419 (Ohio 2015)

(per curiam), with only limited, deferential mandamus review in Ohio's courts. *Id.* at 424–25.

B. Case Background

Petitioners William Schmitt and Chad Thompson submitted two identical ballot initiatives seeking to abolish various penalties for marijuana possession in the Villages of Garrettsville and Windham in Portage County, Ohio. Pet. App. 5a. Their initiatives satisfied all the procedures required under state law. Nevertheless, the Portage County Board of Elections determined that the proposed initiatives could not be placed on the ballot because they were "administrative" in nature.

The Portage County Board of Elections explained to Petitioner Thompson on August 28, 2018 that because the "petitions deal with subject matter that is not subject to the initiative process, the Board of Elections, in its discretion, has chosen not to certify these issues to the ballot." *Id.* at 6a. Meanwhile, local election boards in neighboring municipalities of Norwood, Ohio, Fremont, and Oregon concluded that the exact same initiative was "legal" and therefore permissible. *Id.* at 105a, 177a–78a.

At oral argument before the Sixth Circuit, Respondent conceded that the Portage County Board of Elections had incorrectly determined the initiative was invalid. See *id.* at 71a, 105a[1] ("This was a legis-

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[1] The District Court denied Petitioners' motion for attorney's fees on December 4, 2019 based on Respondent's successful appeal to the Sixth Circuit. Order Den. Pl.'s Mot. for Att'ys' Fees, *Schmitt* v. *LaRose*, No. 2:18-cv-966 (S.D. Ohio Dec. 4, 2019), ECF No. 71; s*ee generally Sole* v. *Wyner*, 551 U.S. 74 (2007) (holding that fees not proper where final judgment undone). Petitioners' March 15, 2019 motion, Mot. for Att'ys' Fees, *Schmitt* v. *LaRose,* No. 2:18-cv-966 (S.D. Ohio Mar. 15, 2019), ECF No.

lative ballot initiative, in all likelihood, it should have been placed on the ballot.").[2]

C. Proceedings Below

On August 28, 2018, Petitioners filed their action in the Southern District of Ohio, bringing facial and as-applied challenges to the gatekeeping statutes under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution. Pet. App. 169a–87a. Petitioners "sought a temporary restraining order and preliminary injunction" against the Portage County Board of Elections and then-Ohio Secretary of State Jon Husted. *Id.* at 6a.

45; Mot. to Alter J. on Att'y's Fees, *Schmitt* v. *LaRose,* No. 2:18-cv-966 (S.D. Ohio Dec. 18, 2019), ECF No. 72, for attorney's fees from the Portage County Board of Elections (which chose not to appeal) remains pending in the District Court.

[2] Ohio's prohibition on initiatives containing "administrative" content and bureaucratic pre-enactment review for such legality is plainly a subject matter restriction. As admitted by the Portage County Board of Elections, its decision to remove the initiatives from the ballot was expressly based on subject matter. *See* Pet. App. 5a–6a. ("Accordingly, as the Garrettsville Village and Windham Village petitions *deal with subject matter* that is not subject to the initiative process . . . .") (emphasis added). Controlling the subject matter of an initiative limits voters' options, and is inherently based on the content, the words, of that initiative. *See also* Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 Mich. L. Rev. 1305, 1305 n. 51 (2009) (summarizing categories of limitations on initiatives' subject matter); Elizabeth Bircher, Election Law Program, *Chapter 4: State Regulation of Ballot Measures, in* Election Law Manual 4-9 to 10 (2008), http://www.electionlawissues.org/Resources/~/media/Microsites/Files/election/Chapter%20Four%20-%20Proofed2.pdf (contrasting *procedural* requirements for ballot initiative such as circulator and signature requirements with *substantive* requirements which imposing boundaries on ballot measure's topic or function).

On September 19, 2018, the District Court issued a temporary restraining order directing the Ohio Secretary of State and Portage County Board of Elections to place both initiatives on the November 2018 ballot. *Id.* at 50a. The District Court, applying the *Anderson-Burdick* framework, found no legitimate state interest in denying ballot access while affording only mandamus review, "an extraordinary remedy" that was not a sufficient and effective substitute for de novo First Amendment review.[3] *Id.* at 54a.

On Election Day in 2018, the Windham initiative passed by a vote of 237 to 206 and the Garrettsville initiative failed 471 to 515. *Id.* at 7a.

Following the 2018 election and after briefing from both sides, the District Court found that Petitioners were entitled to de novo review of the denial of their ballot initiative and issued a permanent injunction barring the Ohio Secretary of State "from enforcing the gatekeeper function in any manner that fails to provide a constitutionally sufficient review process to a party aggrieved by the rejection of an initiative petition." *Id.* at 8a.

On appeal, the Sixth Circuit concluded that the election mooted Petitioners' as-applied challenge to the Portage County Board's removal of the two initia-

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[3] Ohio's statutory scheme does not provide a remedy for an aggrieved petitioner whose petition has been rejected on grounds that the subject matter is administrative and not legislative. Pet. App. 53a. A party aggrieved by such a rejection—such as Petitioners—has no statutory right to an appeal and may only seek a "writ of mandamus" which requires "(1) a clear legal right to the requested relief; (2) a clear legal duty on the part of the board to provide it; and (3) the lack of an adequate remedy in the ordinary course of the law." *Id.* at 53a–54a. The District Court characterized the mandamus writ as an "extraordinary remedy" that was discretionary. *Id.* at 54a.

tives and the resulting preliminary order restoring them to the ballot, *id.* at 7a, but their facial challenge and the permanent injunction against Respondent's enforcement of Ohio's gatekeeper law remained live. *Id.* The majority conceded that the First Amendment applies to ballot initiative subject matter restrictions, but then ruled that it only applies in a "second-order" manner. *Id.* at 11a. In particular, it ruled that the doctrine against prior restraints was inapplicable, as was strict scrutiny. *Id.* at 9a–15a. The majority instead applied the Supreme Court's *Anderson-Burdick* framework, finding that the burden imposed by the gatekeeping law was not severe, that some level of flexible scrutiny lower than strict scrutiny applied, and that the state's interest in avoiding ballot overcrowding did not impose a significant or unjustified burden on a proponent's First Amendment rights. *Id.* at 12a–18a.

Concurring in the opinion, Judge Bush raised an issue the majority had not addressed. He emphasized that the Circuits are currently split on whether subject matter restrictions on ballot initiatives implicate the First Amendment *at all*. *Id.* at 20a–23a. Because Judge Bush agrees with Circuits that afford no First Amendment protection in this context, he would have applied rational basis review to find no violation. *Id.* at 33a.

On August 13, 2019, Petitioners filed a petition for rehearing en banc before the Sixth Circuit. *Id.* at 63a. Petitioners' application for rehearing en banc was denied on September 4, 2019.

REASONS FOR GRANTING THE PETITION

I. CIRCUIT COURTS ARE DIVIDED ON THE QUESTION PRESENTED.

A. The Circuits Are Intractably Split Over Whether the First Amendment Applies to Subject Matter Restrictions on Ballot Initiatives.

The question presented has split Circuits for more than decade. See, *e.g.*, *Initiative & Referendum Inst.* v. *Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006) (en banc) ("[W]e disagree with *Wirzburger's* premise that a state constitutional restriction on the permissible subject matter of citizen initiatives implicates the First Amendment in any way."); *Wirzburger* v. *Galvin*, 412 F.3d 271, 278 (1st Cir. 2005) ("We cannot agree with the D.C. Circuit's finding that subject matter exclusions from the initiative process 'restrict[] no speech.'"); Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 Mich. L. Rev. 1305, 1314 (2009) (describing "Circuit Split on First Amendment Implications").

1. Three Circuits hold that the First Amendment does not apply to subject matter restrictions on ballot initiatives.[4]

In the Eighth Circuit, the First Amendment does not apply to subject matter restrictions that discrimi-

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[4] The Second Circuit has not issued a clear holding on point but considered the Tenth Circuit's analysis "instructive" in a case addressing referenda. *See Molinari* v. *Bloomberg*, 564 F.3d 587 (2d Cir. 2009).

nate against "an issue" as opposed to a protected group seeking to participate in the process. *Wellwood* v. *Johnson*, 172 F.3d 1007, 1010 (8th Cir. 1999). The Eighth Circuit reasoned that, absent an effect on an independently identifiable group of stakeholders, or a burden on citizens' ability to make their views heard, there was no First Amendment violation. *Id.*

Likewise, the D.C. Circuit holds that the First Amendment "confers no right to legislate on a particular subject." *Marijuana Policy Project* v. *United States,* 304 F.3d 82, 85 (D.C. Cir. 2002). In *Marijuana Policy Project*, the plaintiffs challenged a prohibition on initiatives reducing penalties for marijuana possession. *Id.* at 83–84. In rejecting the plaintiffs' challenge, the D.C. Circuit found no authority for the suggestion that limits on legislative authority, as opposed to legislative advocacy, violated the First Amendment. *Id.* at 86. It explicitly concluded that the First Amendment "imposes no restriction on the withdrawal of subject matter from the initiative process." *Id.*

The Tenth Circuit reached a similar conclusion in *Initiative & Referendum Inst.*, 450 F.3d at 1099. In that case, the plaintiffs challenged a subject matter restriction that required a supermajority for wildlife initiatives. *Id.* The Tenth Circuit held that the plaintiffs' challenge did not "implicate the First Amendment at all" because of "a crucial difference between a law that has the 'inevitable effect' of reducing speech because it restricts or regulates speech, and a law that has the 'inevitable effect' of reducing speech because it makes particular speech less likely to succeed." *Id.* at 1100. In reaching that conclusion, the Tenth Circuit was clear it was siding with the D.C. Circuit in what was already a pronounced Circuit split. *Id.* at 1102 n.5 ("The First Circuit explicit-

ly declined to follow the contrary opinion of the D.C. Circuit in *Marijuana Policy Project,* 304 F.3d 82. We find ourselves in agreement with the D.C. Circuit rather than the First.").

2. The First Circuit, along with three other Circuits and the Maine Supreme Judicial Court, recognize First Amendment protection for subject matter restrictions on ballot initiatives.

In *Wirzburger*, the First Circuit explicitly rejected the D.C. Circuit's conclusion that subject matter regulations for ballot initiatives "restrict[] no speech" and "implicate[] no First Amendment concerns." 412 F.3d at 278. Instead, it determined that plaintiffs' activities "implicat[ed] the First Amendment," as the "citizens' use of the initiative process constitutes expressive conduct," with both "speech" and "non-speech elements." *Id.* at 276, 278–79; see *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). In its view, subject matter restrictions on initiatives were therefore within "the bounds of First Amendment protection." *Wirzburger*, 412 F.3d at 476.

The Sixth, Ninth and the Eleventh Circuits also hold that the First Amendment applies to subject matter restrictions on ballot initiatives. See Pet. App. 12a (applying *Anderson-Burdick* framework for First Amendment challenge); *Taxpayers United for Assessment Cuts* v. *Austin*, 994 F.2d 291, 296–97 (6th Cir. 1993) (explaining the First Amendment permits only "nondiscriminatory, content-neutral limitations" on the ballot initiative process); *Angle* v. *Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (recognizing "as applied to the initiative process, . . . ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot."); *Biddulph* v.

Morham, 89 F.3d 1491, 1500 (11th Cir. 1996) (per curiam) (concluding restrictions were permissible only because they were not content-based).

The Maine Supreme Judicial Court has likewise recognized that "[t]he initiative petition process involves political discourse that is protected by the first amendment of the federal constitution." *Wyman* v. *Sec'y of State*, 625 A.2d 307, 311 (Me. 1993).

B. The Circuits That Apply the First Amendment Have Split Over How to Scrutinize Subject Matter Restrictions on Ballot Initiatives.

There is also a split within the split. See Michael J. Levens, Comment, *Silencing the Ballot: Judicial Attempts to Limit Political Movements*, 8 Liberty U. L. Rev. 169, 202 (2013) ("The federal courts of appeal are divided over the review of ballot initiatives and regulations thereof. They disagree as to the nature of the rights implicated when the initiative right is infringed as well as the standard of review to be applied when it occurs."); J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 62 N.Y.U. Ann. Surv. Am. L. 129, 138 (2008) ("The constitutionality of content- and viewpoint based regulations of ballot initiatives is currently disputed among the circuits which have split on two key questions. . . . Second, what type of scrutiny must the courts apply if these regulations do implicate the First Amendment?").

Courts of Appeals that afford First Amendment protection to ballot initiatives employ at least three different analytical frameworks—*Meyer-Buckley*,[5]

[5] In *Meyer*, 486 U.S. at 422, the Court not only described popular democracy as involving "core political speech," it added that

O'Brien,[6] and *Anderson-Burdick*[7]—that result in at least four different levels of scrutiny—strict, intermediate, flexible, or rational basis.

1. The Ninth Circuit and the Supreme Judicial Court of Maine apply strict scrutiny[8] to content re-

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"the importance of First Amendment protections is 'at its zenith'" when citizens attempt to directly pass legislation and thus required "exacting scrutiny." *Id.* at 425, 420; *see also Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999) (affirming invalidation of restrictions on initiative process based on *Meyer* and warning courts to be "vigilant" and "guard against undue hindrances to political conversations and the exchange of ideas.").

[6] Under the *O'Brien* intermediate scrutiny standard, conduct combining "speech" and "non-speech" elements is regulated if "(1) the regulation 'is within the constitutional power of the Government'; (2) 'it furthers and important or substantial governmental interest;' (3) 'the governmental interest is unrelated to the suppression of free expression;' and (4) 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Wirzburger*, 412 F.3d at 279 (citing *O'Brien*, 391 U.S. at 377).

[7] Under the framework established in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), and *Burdick* v. *Takushi*, 504 U.S. 428 (1992), the Court engages in a three-step process that (1) considers the severity of the restriction; (2) identifies and evaluates the state's interest in and justifications for the regulation and (3) assesses the legitimacy and strength of those interests. Pet. App. 12a–13a. Laws imposing "severe burdens" are subject to strict scrutiny but "lesser burdens trigger less exacting review." *Id.*

[8] Strict scrutiny is the default standard for content-based speech. *See United States* v. *Alvarez*, 567 U.S. 709, 715 (2012) (plurality opinion) ("When [restrictions on] content-based speech regulation is in question . . . exacting scrutiny is required."). This standard has been applied in the polling place to protect candidates, political parties, and voters, but its application in the initiative context remains unclear. *See, e.g.*, *Fusaro* v. *Cogan*, 930 F.3d 241, 261 (4th Cir. 2019) ("[A]n election regula-

strictions on ballot initiatives under *Meyer-Buckley*. In particular, the Ninth Circuit considers restrictions on initiatives a severe burden on "core political speech." *Angle*, 673 F.3d at 1134 (determining under *Meyer* that strict scrutiny applies to all restrictions on "the initiative process" that "significantly inhibit the ability of initiative proponents to place initiatives on the ballot"). The Supreme Judicial Court of Maine expressed a similar view in a case addressing gatekeeping laws analogous to those in Ohio. *Wyman*, 625 A.2d at 309, 311 (applying strict scrutiny to the "executive oversight of the content of the [initiative] petition"); see also *Marijuana Policy Project* v. *D.C. Bd. of Elections & Ethics*, 191 F. Supp. 2d 196, 214 (D.D.C. 2002) (Sullivan, J.), *rev'd sub nom. Marijuana Policy Project* v. *United States*, 304 F.3d 82 (D.C. Cir. 2002) (District Court finding that "viewpoint discriminatory regulation . . . implicates plaintiffs' core political speech and is thus subject to strict scrutiny").

2. The First Circuit applies intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968), because it views ballot initiatives as expressive conduct. *Wirzburger*, 412 F.3d at 279; see also *Initiative*

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tion that plausibly burdens First Amendment rights on the basis of viewpoint, political affiliation, or class should be subject to strict scrutiny."); *Anderson* v. *Celebrezze*, 460 U.S. 780, 793–94 (1983); *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972). Strict scrutiny has been applied to procedural restrictions placed on initiatives. Yet its application to subject matter remains unclear. *See, e.g.*, *League of Women Voters of Michigan* v. *Sec'y of State*, No. 350938, slip op. at 7 (Mich. Ct. App. Jan. 27, 2020) ("*Meyer* and *Buckley* instruct that exacting scrutiny is applied to the core political speech at issue in this case . . . . When a law burdens core political speech, exacting scrutiny applies and the restriction is upheld only if 'it is narrowly tailored to serve an overriding state interest.'") (quoting *John Doe I* v. *Reed*, 561 U.S. 186, 196 (2010)).

& Referendum Inst., 450 F.3d at 1112 (Lucero, J., dissenting) ("In my judgment, a better approach would be to follow the First Circuit's decision in *Wirzburger*[.]").

3. The Sixth Circuit in the decision below opted for a "flexible analysis" under the *Anderson-Burdick* balancing formula, finding that Ohio's gatekeeping statutes imposed a burden "somewhere between minimal and severe." See Pet. App. 11a–13a ("Ohio's ballot-initiative laws . . . do not directly restrict core expressive conduct."); see also *Comm. to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Status for Members & Emps. of the Ohio Gen. Assembly* v. *Ohio Ballot Bd.*, 885 F.3d 443, 448 (6th Cir. 2018) ("Because Ohio's single-subject rule is content neutral, we apply the more flexible *Anderson–Burdick* framework[.]").

Notably, the *Anderson-Burdick* framework can result in strict scrutiny as seen in related election law cases.[9] See *Fusaro* v. *Cogan*, 930 F.3d 241, 261 (4th Cir. 2019) (applying *Anderson-Burdick* to conclude that "an election regulation that plausibly burdens First Amendment rights on the basis of viewpoint, political affiliation, or class should be subject to strict scrutiny."); *Citizens for Legislative Choice* v. *Miller*, 144 F.3d 916, 921 (6th Cir. 1998) ("First, and most importantly, a law severely burdens voting rights if it discriminates based on content . . . if a regulation burdens voting rights severely, the regulation is reviewed under the compelling interest standard.").

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[9] One District Court has commented that "[t]he distance between the *Meyer-Buckley* framework and the *Anderson-Burdick* framework is not, however, necessarily far . . . if the burden is 'severe' then *Anderson-Burdick* is just another road to strict scrutiny." *League of Women Voters* v. *Hargett*, 400 F. Supp. 3d 706, 725 n.9 (M.D. Tenn. 2019).

Still, the Sixth Circuit below refused to apply strict scrutiny to Ohio's subject matter restriction on initiatives.

4. In contrast to all the decisions above, the Second, Tenth and D.C. Circuits apply only rational basis review to initiative restrictions. See *Molinari* v. *Bloomberg*, 564 F.3d 587 (2d Cir. 2009) (referendum statutes subject to rational-basis review); *Initiative & Referendum Inst.*, 450 F.3d 1082; *Marijuana Policy Project*, 304 F.3d 82. That approach is consistent with Judge Bush's concurring opinion in the decision below. See Pet. App. 34a (Bush, J., concurring) ("[T]hese provisions survive rational-basis review because they are content-neutral and non-discriminatory.").

5. Similar confusion has persisted amongst the District Courts for more than twenty years. For example, in 1997, then-Judge Sotomayor issued an order requesting additional briefing on New York's subject matter restrictions on referenda. See *Herrington* v. *Cuevas*, 1997 WL 703392, at *9 (S.D.N.Y. 1997) (Sotomayor, J.) ("Should the Court view § 40's subject matter restriction as a content-based restriction on speech? Is § 40 a 'politically neutral regulation,' as that term is used in *Burdick* . . . ? . . . Should this case be judged under the standard for evaluating claims that a state law burdens the right to vote, as set forth in *Anderson* . . . ? If not, what standard should apply?"). See also *Hyman* v. *City of Salem*, 396 F. Supp. 3d 666, 672 (N.D. W. Va. 2019) (preliminarily enjoining City's subject matter exclusion of initiative and stating "[w]here a restriction on speech is content-based, the Supreme Court has stated that it must pass strict judicial scrutiny"); *Marijuana Policy Project,* 191 F. Supp. 2d at 208 (District Court decision finding subject matter restriction to constitute

"core political speech" requiring strict scrutiny); cf. *SD Voice* v. *Noem*, No. 1:19-cv-01017-CBK, 2020 WL 109515, at *4 (D.S.D. Jan. 9, 2020) (applying strict scrutiny under First Amendment to law restricting how signatures are collected); *Miracle* v. *Hobbs*, No. CV-19-04694-PHX-SRB, 2019 WL 7631153, at *8 (D. Ariz. Dec. 16, 2019) (denying dismissal of a First Amendment challenge to restrictions on initiatives, saying the First Amendment plausibly applied but refusing to decide on the "legitimate dispute between the parties as to the appropriate standard of scrutiny"); *League of Women Voters* v. *Hargett*, 400 F. Supp. 3d 706, 722 (M.D. Tenn. 2019) (describing the "sometimes bewildering array of standards to choose from" in ballot cases).

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

1. This is not an academic exercise; the question presented affects the constitutional rights of citizens in twenty-four states and the Virgin Islands.[10] Protection of those rights is now more critical than ever. In 2016, the number of ballot initiatives was already more than double the number in 2014. See Van R. Newkirk II, *American Voters Are Turning to Direct Democracy*, The Atlantic (Apr. 18, 2018), https://www.theatlantic.com/politics/archive/2018/04/citizen-ballot-initiatives-2018-elections/558098.

2. Given the increasing popularity of initiatives throughout the country, it is no surprise that this is the third time in just seven months that the Court has been asked to clarify First Amendment protection for subject matter restrictions for ballot initiatives,

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[10] *See Initiative and Referendum States*, Nat'l Conference of State Legislatures, https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx.

though the other recent petitions sought certiorari from the opinions of state courts of appeal that did not delve into the federal Circuit split. See *Glob. Neighborhood* v. *Respect Washington*, 434 P.3d 1024 (Wash. Ct. App.), *review denied*, 448 P.3d 69 (Wash. 2019), and *cert. denied*, No. 19-474, 2019 WL 6689692 (U.S. Dec. 9, 2019) (judicial pre-enactment veto over administrative subject); *Port of Tacoma* v. *Save Tacoma Water*, 422 P.3d 917 (Wash. Ct. App. 2018), *review denied*, 435 P.3d 267 (Wash. 2019), and *cert. denied*, 140 S. Ct. 106 (2019) (broad judicial pre-enactment veto power over subjects that were allegedly outside local initiative's power).

3. The pace of petitions on this issue has quickened with increased use of the initiative process and petitioners have long sought resolution of the question presented. See *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637 (Okla. 2012) (pre-enactment judicial review over constitutionality of proposed initiatives);[11] *Initiative & Referendum Inst.*, 450 F.3d at 1082 (Utah's constitutional provision imposing a supermajority requirement for enactment of initiatives relating to wildlife);[12] *Wirzburger*, 412 F.3d at 275 (Massachusetts constitution provision prohibiting initiatives relating to public financing for private, religiously affiliated schools).

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[11] This petition raised significant vehicle issues including petitioner's failure to preserve claims and questions about this Court's authority to review the Oklahoma Supreme Court's interpretation of state law. *See* Brief in Opposition to Petition for Writ of Certiorari at 11–14, *Personhood Oklahoma* v. *Barber*, 568 U.S. 978 (2012) (No. 12-145).

[12] Similar to *In re Initiative Petition*, the opposition in *Walker* presented multiple issues, including the petitioners' lack of standing. *See* Brief in Opposition at 4–8, *Initiative & Referendum Inst.* v. *Herbert*, 549 U.S. 1245 (2007) (No. 06-534).

4. Courts of Appeals and state courts of last resort have encountered the question presented many times in the last two decades. Since 1993, four Circuits have extensively reviewed, and three Circuits have commented on, subject matter restrictions on initiatives. See, *e.g.*, Pet. App. 2a; *Angle*, 673 F.3d at 1133; *Initiative & Referendum Inst.*, 450 F.3d 1082; *Wirzburger*, 412 F.3d at 271; *Marijuana Policy Project,* 304 F.3d at 85; *Biddulph*, 89 F.3d at 1500; *Wyman*, 625 A.2d at 310–11.

5. Today, voters increasingly turn to direct democracy to advance issues important to the general population that are impeded in the legislature by gridlock or lack of political will. See Newkirk II, *supra*. Ohio provides a case in point. Direct democracy has been a tool for change and experimentation in Ohio since 1912. Jefferson B. Fordham & J. Russell Leach, *The Initiative and Referendum in Ohio*, 11 Ohio St. L.J. 495, 497 (1912); *Initiative*, Ohio History Central, https://ohiohistorycentral.org/w/Initiative. Ohio citizens have used the initiative process to impose term limits and abolish single-party voting—two issues legislators were not as eager to embrace as the populace. *Ohio*, Initiative & Referendum Institute, http://www.iandrinstitute.org/states/state.cfm?id=21. Ohio voters also used referendum power to remove a state Senate bill that curtailed public employee union collective bargaining rights. And the threat of a popular initiative helped break legislative gridlock on other issues, forcing lawmakers to act on medical marijuana and redistricting.[13]

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[13] Laura A. Bischoff, *Ohio may make it harder for public to put issues on statewide ballot*, Dayton Daily News (Dec. 4, 2018), https://www.daytondailynews.com/news/ohio-may-make-harder-for-public-put-issues-statewide-ballot/CGHxGNsZx3tXpejus Kp68O/; s*ee also* Phillip A. Wallach, *What Ohio's rejection of ma-*

3. Against this backdrop, numerous law review articles have called on the Court to resolve the persistent Circuit split on the question presented. See, *e.g.*, John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment*, 107 Colum. L. Rev. 1437, 1462 (2007) ("*Marijuana Policy Project, Wirzburger,* and *Walker* amount to a circuit split on a straightforward question: Do restrictions on the subject matter open to a state initiative process burden political expression protected by the First Amendment."); see also Jessica A. Levinson, *Taking the Initiative: How to Save Direct Democracy*, 18 Lewis & Clark L. Rev. 1019, 1042 (2014) ("Circuits are divided on the question of whether a limit on the subject matter that ballot initiatives can address raises First Amendment concerns."); Connolly, *supra*, at 138 ("The constitutionality of content-and viewpoint based regulations of ballot initiatives is currently disputed among the circuits which have split on two key questions. First, do content- and viewpoint-based regulations of ballot initiatives implicate speech protected under the First Amendment? Second, what type of scrutiny must the courts apply if these regulations do implicate the First Amend-ment?"); Levens, *supra*, at 202 ("The federal courts of appeal are divided over the review of ballot initiatives and regulations thereof. They disagree as to the nature of the rights implicated when the initiative right is infringed as well as the standard of review to be applied when it occurs."); Skiba-Crafts, *supra*, at 1314

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rijuana legalization tells us about direct democracy, Brookings (Nov. 4, 2015), https://www.brookings.edu/blog/fixgov/2015/11/04/what-ohios-rejection-of-marijuana-legalization-tells-us-about-direct-democracy.

(describing "Circuit Split on First Amendment Implications").

III. THIS IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The published decisions below exemplify the level of judicial confusion on these issues. Judge Bush, writing in concurrence, expressly raised the Circuit split on the First Amendment's applicability. See Pet. App. 20a (Bush, J., concurring) ("It is arguable that Ohio's legislative authority statutes do not regulate "speech" within the meaning of the First Amendment at all because they concern only election mechanics."). Meanwhile, three other federal judges (District Judge Sargus, Circuit Judges White and Clay) applied the First Amendment without extensive analysis of its applicability. See *id.* at 57a–59a; *id.* at 8a–12a.

The judges below also applied wildly varying levels of scrutiny. See *id.* at 58–59a (no legitimate state interest in preventing adequate legal remedy); *id.* at 16a (applying "flexible analysis" based on the burden imposed by the gatekeeping laws being "somewhere between minimal and severe"); *id.* at 34a–37a (Bush, J., concurring) (rational basis review).

Moreover, the question presented has been well preserved in the published decision below and the corresponding briefing. See, *e.g.*, *id.* at 117a ("The First Amendment Protects Initiatives and Applies to the Initiative Process"); *id.* at 72a ("Concluding that Initiatives Are Not Subject to Full First Amendment Protection Contradicts This Court's and The Supreme Court's Precedents."); *id.* at 20a–37a (Bush, J., concurring) (discussing Circuit split regarding First

Amendment applicability and applicable scrutiny level).

Further, the facts of the case are illustrative of the importance of direct democracy in Ohio. Here, Ohio's Constitution has vested the people with the power to choose whether or not proposed initiatives on certain subjects should become law. Because the District Court's Temporary Restraining Order allowed the initiatives to be placed on the 2018 ballot, the people of the Village of Windham *chose* for themselves to decriminalize marijuana. *Id.* at 7a. Perhaps even more importantly, the placement on the ballot afforded the people of the Village of Garrettsville the opportunity to decline the same proposal. *Id.* These facts demonstrate the vital importance of the ballot initiative—a law exists in the Village of Windham and a law does not in the Village of Garrettsville—and underscore that the lower Courts and citizenry benefit from First Amendment clarity on these issues so that future initiatives are not unjustly prevented from being placed on the ballot. Ohio's gatekeeping law—which officials even admitted was improperly applied in this case—vests too arbitrary a power in the hands of officials when the state's constitution has placed this power in the hands of the people. Accordingly, the institution of direct democracy itself benefits extraordinarily from clarity and guidance on the question presented.

In addition, for the reasons presented above, this Petition is a cleaner vehicle than the recent petitions[14] filed before this Court presenting a substantially similar question presented. Neither involved a published federal appellate opinion directly implicating a Circuit split with a federal judge's concurrence

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[14] *See generally Glob. Neighborhood*, 434 P.3d 1024; *Port of Tacoma*, 422 P.3d 917.

expressly raising the question presented. And neither of those petitions fully articulated the question presented or included any reasoning on their adequacy as effective vehicles for deciding these recurring issues. Moreover, counsel for this Petition are experienced before this Court and have subject matter expertise litigating similar issues involving initiatives around the country.

Finally, a decision in this case will also provide clear guidance for the several states with subject matter restrictions on ballot initiatives. See, *e.g.*, Alaska Const. art. XI, § 7; Cal. Const. art. II, § 8(f); Mass. Const. amend. art. XLVIII, pt. II, § 2; Me. Stat. tit. 21-A, §§ 901–06; Mont. Const. art. III, § 4(1); Nev. Rev. Stat. § 295.009; Wyo. Const. art. 3, § 52(d), (g).

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a writ of certiorari.

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