No. 19-974

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**

## REPLY BRIEF OF PETITIONERS


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## INTRODUCTION

Respondent concedes that the Court "should decide" the important Question Presented in the Petition of "whether, and how, the First Amendment applies to subject-matter limitations on ballot initiatives." Respondent contends, however, that Petitioners failed to preserve the Question Presented in their briefing below. This contention is demonstrably false.

Petitioners' core theory has always been that Ohio's "Gatekeeper Law," Ohio Rev. Code § 3501.11(K), impermissibly restricts speech and cannot pass strict First Amendment scrutiny. Petitioners presented this argument at every stage of this case—from complaint through appeal—and the Sixth Circuit's majority and concurrence expressly "passed on" the issue.

Respondent also suggests that Ohio's Gatekeeper Law is not a subject-matter restriction. This theory is flawed for a variety of reasons, not the least of which is that the Portage County Board of Elections specifically informed Petitioners that their initiative was denied as improper "subject matter."

Respondent mischaracterizes the circuit split to deemphasize strict scrutiny as an applicable standard for subject-matter restrictions on initiatives. Two tests courts employ—*Meyer-Grant* and *Anderson-Burdick*—can trigger strict scrutiny that would invalidate Ohio's Gatekeeper Law and others like it across the country.

Finally, Respondent's Brief in Opposition confirms the important and recurring nature of the Question Presented.

## ARGUMENT

### I. PETITIONERS PRESERVED THE QUESTION PRESENTED AT EVERY STAGE OF THIS CASE

Respondent suggests that Petitioners "affirmatively waived" their First Amendment challenge to the legislative-administrative distinction by presenting only a prior restraint theory in the briefing below. Br. in Opposition ("Opp.") at 10–11. That is wrong. Petitioners repeatedly argued that Ohio's Gatekeeper Law not only operated as a prior restraint but also could not survive strict scrutiny. In all events, a grant of certiorari is precluded only when "the question presented [is] not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). This rule operates in the disjunctive, permitting review of an issue "not pressed so long as it is passed upon." *Id.*

#### A. Petitioners repeatedly challenged the Gatekeeper Law as subject to strict scrutiny in the proceedings below.

1. Petitioners pled a strict-scrutiny challenge to the Gatekeeper Law in their complaint separate and apart from their prior restraint theory. See Pet. App. at 172a (complaint allegation that because the Gatekeeper Law authorized "content-based decisions, it is subject to strict scrutiny under the First Amendment to the United States Constitution."); *id.* at 180a–81a ("Claim One (Facial First Amendment Challenge . . . for Enforcing Content-Based Restrictions)" and "Claim Two (Facial First Amendment Challenge . . . for Enforcing Prior Restraint)").

2. Petitioners' TRO application similarly presented these distinct arguments. See Mot. for Preliminary

Injunction and/or Temporary Restraining Order at 2, *Schmitt* v. *Husted*, No. 18-cv-00966 (S.D. Ohio Aug. 28, 2018), ECF No. 3 ("Ohio's law is facially unconstitutional under the First Amendment for two *separate* reasons: (1) it is a content-based restriction on speech that cannot pass strict scrutiny; and (2) it is an impermissible prior restraint that fails to abide by the First Amendment's established procedural safeguards.") (emphasis added).

3. Petitioners' Sixth Circuit brief further preserved the issue.[1] Petitioners' "Statement of the Issue" in its brief to the Sixth Circuit stated the singular question in the case:

> Whether Ohio's gatekeeper law in O.R.C. § 3501.11(K), which delegates *executive discretion to elections officials to determine whether the content and subject matter of initiatives is lawful*, and which affords judicial review only by extraordinary writ of mandamus for fraud, abuse of discretion or clear error, violates the *First* and Fourteenth Amendments.

Pet. App. at 95a (emphasis added). Sections I and III of the brief expressly raised the two primary issues in this Petition: (1) whether and (2) how the First Amendment applies to subject-matter restrictions. See, *e.g., id*. at 117a ("The First Amendment Protects Initiatives and Applies to the Initiative Process."); *id*.

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[1] Petitioners' Petition for Rehearing before the Sixth Circuit similarly presented Petitioners' First Amendment challenge to subject-matter restrictions based on strict scrutiny. *See, e.g.*, Pet. App. at 64a, 78a ("Concluding that Initiatives are Not Subject to Full First Amendment Protection Contradicts This Court's and the Supreme Court's Precedents" and "Refusing to Apply Strict Scrutiny to Content-Based Decisions Contradicts Supreme Court and Sixth Circuit Precedent.").

at 135a ("Because Ohio's discretionary gatekeeper mechanism restricts speech based on subject matter and content, it is subject to strict scrutiny.").

Respondent's cherry-picked quotations purportedly limiting the scope of Petitioners' arguments to prior restraint are drawn entirely from Section II of the brief which addresses the procedural safeguards required under that doctrine. See Opp. at 11–12.

Finally, Respondent's characterization of Petitioners' prior restraint argument as "frivolous" (Opp. at 24) might come as a surprise to the two federal judges who found the theory sufficient to grant preliminary injunctions. See *Hyman* v. *City of Salem*, 396 F. Supp. 3d 666, 675 (N.D. W. Va. 2019) (Kleeh, J.) (preliminarily enjoining City's exercise of discretion to exclude initiative from ballot as an impermissible prior restraint); Pet. App. at 59a (Sargus, J.) ("While the availability of mandamus relief is essentially a judicially imposed remedy when the law does not otherwise provide one, the high burden on petitioners to prove entitlement to an extraordinary remedy is no substitute for *de novo* review of the denial of a First Amendment right.").

### B. The Sixth Circuit majority and concurrence passed on the Question Presented.

As Respondent points out, even if Petitioners had not pressed the issue, Supreme Court practice "permit[s] review of an issue not pressed so long as it has been passed upon." Opp. at 12 (quoting *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)).

1. The Sixth Circuit majority "passed on" the Question Presented by applying the First Amendment and expressly ruling under *Anderson-Burdick* that the burden imposed by the Gatekeeper Law did not trigger strict scrutiny, but rather warranted a "flexible

analysis" weighing the burden of the restriction against the state's interest and means of pursuing them.[2] Pet. App. at 15a–17a.

2. If there were any doubt, Judge Bush's concurrence placed the Question Presented front and center. Judge Bush reviewed the existing circuit split, opined that the First Amendment was inapplicable, and advocated for rational basis review. See, *e.g.*, *id.* at 20a–37a (Bush, J., concurring) ("[T]he First Amendment is either not implicated at all or, if it is, imposes no heightened scrutiny here.").

## II. THE GATEKEEPER LAW IS A SUBJECT-MATTER RESTRICTION

In a single paragraph, Respondent attempts to transmute Ohio's Gatekeeper Law into something other than "a subject-matter restriction." Opp. at 13. According to Respondent, the statute governs only the "*manner*" in which people may wield the initiative power. *Id.* That is wrong. Ohio's Gatekeeper Law is a subject-matter restriction on speech because the law regulates voters' options based on the content—the words—of an initiative.

1. The plain language of the Portage County Board of Elections' statement to Petitioners makes this clear:

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[2] The Sixth Circuit Opinion incorrectly states that "Plaintiffs have never challenged the legitimacy of the legislative-administrative distinction or the state's right to vest in county boards of elections the authority to apply that distinction." Pet. App. at 13a. This was incorrect, of course, since Petitioners' whole case, as the Record makes clear, was that Ohio's Gatekeeper Law vested county boards of elections with unconstitutional discretion to apply the legislative-administrative distinction.

> Accordingly, as the Garrettsville Village and Windham Village 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.

Pet. App. at 5a–6a (emphasis added).

2. Even Judge Bush's concurrence evaluates Ohio's Gatekeeper Law as a subject-matter restriction. See *id*. at 32a (expressing concern over courts wading into state laws "limiting the subject-matter of [state] initiative petitions.").

## III. PETITIONERS' CHALLENGE TO THE GATEKEEPER LAW WILL SUCCEED UNDER STRICT SCRUTINY OR OTHER APPLICABLE STANDARDS

Respondent contends that the Question Presented is not dispositive in this case because Petitioners would not succeed under "any conceivable test," including strict scrutiny. Opp. at 13. Not so.[3] At least two of the potentially-applicable tests discussed in the Petition—*Meyer-Grant* and *Anderson-Burdick*—lead to a strict scrutiny analysis that Ohio's Gatekeeper Law cannot survive. Pet. at 12–13.

1. *Wyman* v. *Secretary of State*, 625 A.2d 307, 311 (Me. 1993) proves the point. In that case, the Supreme Judicial Court of Maine applied the *Meyer-Grant* framework to the initiative process, finding "core political speech" warranting strict scrutiny. *Id.* There, Maine did what Ohio does now; it delegated to

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[3] Respondent's argument is also flawed because it conflates the Question Presented to focus only on the applicability of strict scrutiny. The Petition presents a "split within a split" regarding whether (1) the First Amendment applies to subject-matter restrictions and (2) the level of applicable scrutiny.

its secretary of state the authority to decide whether the subject of an initiative was proper before allowing it on the ballot. It is true, of course, that there the secretary refused to provide the necessary papers to initiative proponents, but that is not why the Supreme Judicial Court of Maine decided to apply strict scrutiny. Instead, the court explained:

> Because the petition process is protected by the first amendment and the Secretary has advanced no compelling interest in executive oversight of the *content of the petition* prior to its circulation for signature, his refusal to furnish the petition form based on the *content* of the proposed legislation impermissibly violated Wyman's rights protected by the first amendment.

*Id*. (emphasis added). Respondent's attempt to distinguish *Wyman* is therefore unavailing.

*Angle* v. *Miller*, 673 F.3d 1122 (9th Cir. 2012) is also instructive. There, the court sustained a content-neutral Nevada restriction on initiatives, but was careful to point out under *Meyer* that "as applied to the initiative process, we assume that 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." *Id.* at 1133. It added, "[t]he state's power to ban initiatives thus does not include the lesser power to restrict them in ways that unduly hinder political speech." *Id.* at 1133 n.5.[4]

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[4] The Ninth Circuit understands its distinction this way. In *Pest Comm.* v. *Miller*, 626 F.3d 1097, 1108 (9th Cir. 2010), for example, it upheld the district court's refusal to apply strict scrutiny to "Nevada's single-subject and description-of-effect requirements [because they] are content neutral. . . . Accordingly, the district court did not err in applying the more flexible

Under that same analysis, Ohio's Gatekeeper Law cannot survive. See also Michael J. Levens, Comment, *Silencing the Ballot: Judicial Attempts to Limit Political Movements*, 8 Liberty U. L. Rev. 169, 202 (2013) (citing *Angle* for proposition that "[t]he First and Ninth Circuits recognize the federal interests in the core political speech that are implicated in restrictions on the initiative right."); *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. Respondent's Opposition also ignores that another viable test—*Anderson-Burdick* can be "just another road to strict scrutiny." *League of Women Voters* v. *Hargett*, 400 F. Supp. 3d 706, 725 n.9 (M.D. Tenn. 2019). As noted by the Sixth Circuit below, a "severe burden" warrants strict scrutiny, under which the Gatekeeper Law will be invalidated. See Pet. App. at 12a ("severe burdens . . . are subject to strict scrutiny"); *Fusaro* v. *Cogan*, 930 F.3d 241, 261 (4th Cir.

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balancing test to those requirements and determining that they serve important state interests." In support of its conclusion, the Ninth Circuit cited favorably to language in *Biddulph* v. *Mortham,* 89 F.3d 1491, 1500 (11th Cir. 1996) (per curiam), where the Eleventh Circuit stated that it "obviously would be concerned about free speech and freedom-of-association rights were a state to enact initiative regulations that were content based." *Id*. *See also Arizonans for Fair Elections* v. *Hobbs*, No. CV-20-00658-PHX-DWL, 2020 WL 1905747, at *10 (D. Ariz. Apr. 17, 2020) (relying on *Angle* to find that non-subject matter based "viewpoint-neutral and even handed" restrictions could be subjected to strict scrutiny under *Angle* if "severe burden" were found)*, appeal filed*, No. 20-15719 (9th Cir. Apr. 20, 2020).

2019) (applying *Anderson-Burdick* in election law context 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").[5]

3. Any question about whether Petitioners could succeed under another test only underscores the need for this Court to intervene and provide clarity about what test applies. Respondent points to four potential standards: (1) rational basis review in the Tenth and D.C. Circuits; (2) *Anderson-Burdick* in the Sixth Circuit and Ninth Circuits; (3) intermediate scrutiny under *O'Brien* in the First Circuit; and although Respondent discounts the applicability of the test, (4) *Meyer-Grant* strict scrutiny in *Wyman* and *Angle* as discussed above. Opp. at 13–24. Respondent also cites a recent Sixth Circuit concurrence emphasizing the need for clarity. See *Daunt* v. *Benson*, Nos. 19-2377 & 19-2420, 2020 WL 1875175, at *19 (6th Cir. Apr. 15, 2020) (discussing the advantage of "bright-line rule[s]" compared to the "subjective determination" inherent in *Anderson-Burdick* review).

## IV. RESPONDENT'S BRIEF IN OPPOSITION CONFIRMS THAT THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

Finally, Respondent does not deny the recurring nature of the Question Presented. Again, this is the third time in seven months that this same question

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[5] The Court could also adopt the First Circuit's *O'Brien* intermediate scrutiny standard for expressive conduct, another potential pathway to Petitioners' success on the merits. No Court has ever evaluated Ohio's Gatekeeper Law under this standard and, if provided the opportunity on the merits, Petitioners will brief why the Gatekeeper Law cannot stand under that test.

has been before the Court and Petitioners expect that the Question Presented will continue to appear before the Court until resolved.

Subject-matter experts on direct democracy have advocated for the Court to grant certiorari to clarify the law given increasing numbers of ballot initiatives, and increasing numbers of subject-matter restrictions. See Initiative & Referendum Institute & Center for Competitive Democracy Amici Br. at 13 ("While direct democracy has seen a resurgence over the past 50 years, 'subject matter restrictions' in ballot initiatives are also 'on the rise, and may become even more popular in the future.'"); Direct Democracy Scholars Amici Br. at 10 ("Too often, after hours of canvassing and gathering enough signatures to qualify, engaged citizens find their ballot initiatives rejected before they ever get to the ballot based on subject-matter restrictions.").[6]

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[6] In the last few months alone, particularly in the wake of the coronavirus crisis, lower courts have continued to grapple with the applicability of the First Amendment and the myriad of potential applicable standards and tests in the direct democracy context. *See Swart* v. *City of Chicago*, No. 19-cv-6213, 2020 WL 832362, at *10 (N.D. Ill. Feb. 20, 2020) (holding that municipal restrictions on any conduct, such as the circulation of initiatives for signature, that objectively interfered with park visitors' ability to enjoy artistic displays in municipal park, while ostensibly content-neutral, were subject to strict scrutiny); *Arizonans for Fair Elections*, 2020 WL 1905747, at *10 ("viewpoint-neutral and even handed" restrictions can even be subjected to strict scrutiny under *Angle* if "severe burden" is found); *see also* Complaint, *Thompson* v. *DeWine*, No. 2:20-cv-2129 (S.D. Ohio Apr. 27, 2020), ECF No. 1 (complaint requesting temporary restraining order in challenge to Ohio's in-person signature collection statutes in light of COVID-19); Complaint, *Bambenek* v. *Althoff,* No. 3:20-cv-3107 (C.D. Ill. Apr. 27, 2020), ECF No. 1 (complaint seeking to enjoin Illinois petition collection requirements in light of COVID-19); Complaint, *Miller* v. *Thurston*, No. 5:20-cv-05070-

## CONCLUSION

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

Respectfully submitted,

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PKH (W.D. Ark. Apr. 22, 2020), ECF No. 2 (complaint seeking to enjoin Arkansas petition collection requirements in light of COVID-19); Complaint, *Morgan* v. *White*, No. 1:20-cv-02189 (N.D. Ill. Apr. 7, 2020), ECF No. 1 (complaint seeking to enjoin Illinois petition collection requirements in light of COVID-19).