No. 20-

IN THE

Supreme Court of the United States

CHAD THOMPSON, WILLIAM T. SCHMITT, AND DON KEENEY,

Petitioners,

v.

RICHARD MICHAEL DEWINE, GOVERNOR OF OHIO; AMY ACTON, DIRECTOR OF OHIO DEP'T OF HEALTH; AND FRANK LAROSE, OHIO SECRETARY OF STATE,

Respondents.

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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February 2, 2021

QUESTION PRESENTED

Whether and how the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Chad Thompson, William Schmitt, and Don Keeney, Appellees below. Respondents are Richard "Mike" DeWine, Governor of Ohio, Amy Acton, Director of Ohio Department of Health, and Frank LaRose, Ohio Secretary of State, Appellants below. No parties are a corporation.

RULE 14.3(b)(iii) STATEMENT

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

Thompson v. *DeWine*, No. 20-3526 (6th Cir. Sept. 16, 2020)

Thompson v. *DeWine*, No. 19A1054 (U.S. June 25, 2020)

Thompson v. *DeWine*, No. 2:20-cv-02129-EAS-CMV (S.D. Ohio April 27, 2020)

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

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Chad Thompson, William T. Schmitt, and Don Keeney, 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 976 F.3d 610 (Sept. 16, 2020) and is reproduced in the appendix to this Petition at Pet. App. 1a–12a. The denial of the appellees' application to vacate stay issued by the United States Supreme Court is available at 2020 WL 3456705, No. 19A1054 (June 25, 2020) and is reproduced at Pet. App. 13a. The order granting appellants' motion for a stay pending appeal by the United States Court of Appeals for the Sixth Circuit is reported at 959 F.3d 804 (May 26, 2020) and is reproduced at Pet. App. 14a–35a. The preliminary injunction issued by the trial court below is reported at 461 F. Supp. 3d 712 (2020) and is reproduced at Pet. App. 26a–66a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on September 16, 2020, Pet. App. 1a–12a. 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 government 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, 420, 422 (1988), and are "basic instrument[s] of democratic government," *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.,* 538 U.S. 188, 196 (2003). See also *Meyer*, 486 U.S. at 425 ("First Amendment protections" are accordingly "at [their] zenith" and "exacting scrutiny" is required.). Yet the Courts of Appeals and state supreme courts are divided over how to apply this Court's precedents to ballot initiatives. Recently, Chief Justice Roberts confirmed that "the Court is reasonably likely to grant certiorari to resolve [this split] on an important issue of election administration." *Little* v. *Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring).

The question in this case is at the heart of that split. The Sixth Circuit's opinion highlights persistent

confusion in the lower courts as to whether and how the First Amendment applies to ballot initiatives. Petitioners sought to ensure First Amendment protection for the initiative process in a society transformed by a global pandemic. Pet. App. 85a. Here, petition circulators and citizens who seek to sign such petitions faced, and continue to face, a severe burden under Ohio's In-Person Collection Laws because it has been unsafe, imprudent and—for a significant period—illegal to come into close contact with strangers. *Id.* at 88a–90a, 116a–118a. A panel of the Sixth Circuit followed circuit precedent and applied the First Amendment to Petitioners' case, but ultimately concluded that strict scrutiny did not apply. *Id.* at 88a–91a. Even with First Amendment application, ballot initiative circulators in Ohio find themselves with little to no First Amendment protection, while citizens in other states enjoy full First Amendment rights.

Six Circuits do not apply the First Amendment to ballot initiatives; five Circuits do. And the Circuits that do apply the First Amendment disagree about the level of scrutiny that applies. See *Little*, 140 S. Ct. at 2616–17 ("Since the onset of the pandemic, the Circuits have applied their conflicting frameworks to reach predictably contrary conclusions as to whether and to what extent States must adapt the initiative process to account for new obstacles to collect signatures.") The result is uneven constitutional protection for core political speech in an arena where "the States depend on clear and administrable guidelines from the courts." *Id.* at 2616.

STATEMENT OF THE CASE

A. Ohio's In-Person Collection Laws

Ohio's Constitution reserves to the people the right to legislate by initiative. Ohio Const. art. II, § 1f. To qualify for access to the ballot, ballot initiative petitioners are required to garner signatures reflecting 10% of the municipality's gubernatorial votes. Ohio Rev. Code Ann. § 731.28.

Signatures must be original, "affixed in ink," and personally witnessed by circulators—a combination of conditions that amounts to the requirement of in-person signature collection. Ohio Rev. Code Ann. § 3501.38(B), (E). Circulators of initiatives may not begin collecting signatures until they start the clock by filing a proposed initiative with the municipality. See Ohio Rev. Code Ann. § 731.32. Signatures for the November 3, 2020 general election were due by July 16, 2020. See Ohio Rev. Code Ann. § 731.28.

B. Case Background

Petitioners Chad Thompson, William Schmitt, and Don Keeney are Ohio residents who attempted to circulate petitions throughout their state to get an initiative on the ballot for the November 3, 2020 general election. Pet. App. 86a–87a.

On February 27, 2020—before the COVID-19 crisis fully hit Ohio—Petitioners diligently filed their proposed initiatives with several Ohio cities in order to begin collecting signatures. *Id.* at 87a. Just eleven days later, Ohio's governor declared a state of emergency as the global pandemic reached Ohio. *Id.*

Ohio was one of the first states in the nation to declare a state of emergency and issue an order prohibiting mass gatherings. *Id.* The orders initiated a se-

ries of events that severely burdened Thompson's signature collection efforts. The orders banned, with limited exceptions, all gatherings of 50 or more persons, which are exactly the kind of events that circulators rely on to gather signatures. *Id.* at 88a. Subsequent orders also included criminal penalties and directed all Ohioans to "stay at home or at their place of residence," to maintain at least a six-foot social distance between themselves and others, and to avoid altogether gatherings of ten or more people. *Id.* at 88a–89a. The initial orders did not exempt circulators. *Id.* at 89a.

In the District Court, Respondents admitted—by failing to answer the complaint—that:

> [B]ecause of the presence of the pandemic in Ohio, the restrictions on businesses, the prohibitions on gatherings, the requirements of distancing, and the mandatory stay at home order*, it is literally impossible for people outside the same family unit to solicit others for signatures needed to support the initiative petitions needed to place initiatives and referenda on Ohio's November 2020 election ballot.*

Id. at 89a–90a (emphasis added). See *Burlington N. R.R. Co.* v. *Huddleston*, 94 F.3d 1413, 1415 (10th Cir. 1996) ("By failing to submit an answer or other pleading denying the factual allegations of Plaintiff's complaint, Defendant admitted those allegations, thus placing no further burden upon Plaintiff to prove its case factually."). Respondents also admitted that at least prior to April 30, 2020, "[g]athering in-person signatures in Ohio under the current circumstances is *not only illegal* under Ohio law but risks spreading COVID-19." Pet. App. 90a (emphasis added).

On April 30, 2020, after this litigation commenced, Respondents updated the shutdown order, creating a purported exception for "petition or referendum circulators." *Id.* at 91a. However, this order further extended Ohio's prior restrictions for businesses, prohibited all public gatherings of ten or more people, and did not relax physical distancing requirements. *Id.* Even though circulators after April 30, 2020 could attempt to gather signatures without risk of criminal prosecution, they and those they could legally approach still were required to maintain six-foot separation and other extraordinary precautions to stay safe. *Id.* 91a–92a.

Despite Petitioners' best efforts to collect signatures while complying with both Ohio's shutdown orders and In-Person Collection Laws, Petitioners succeeded only in qualifying petitions in four small villages for the November 3, 2020 ballot. The qualifying petitions each required only a few dozen signatures because the population of each village was small, whereas a successful petition in larger cities like Akron would require approximately 10,000 signatures—a virtually impossible task amidst Ohio's shutdown orders. *Id.* at 122a.

The pandemic continues to worsen. Ohioans are still under a statewide curfew, implemented on November 17, 2020, extending through February 11, 2021. The underlying contagiousness and severity of the COVID-19 virus remains a threat and will impose a severe burden on future signature gathering efforts for the next election.

C. Proceedings Below

On April 27, 2020, Petitioners filed their action in the Southern District of Ohio, requesting a temporary restraining order and preliminary injunction against

strict enforcement of Ohio's In-Person Collection Laws. Pet. App. 91a.

On May 19, 2020, the District Court, applying the First Amendment and the *Anderson-Burdick* framework and the then-recent Sixth Circuit decision in *Esshaki* v. *Whitmer*, 813 F. App'x 170 (6th Cir. 2020), found that the combination of Ohio's strict enforcement of its signature collection laws and the pandemic "severely burden [Petitioners'] First Amendment rights as applied here. . . ." Pet. App. 44a. Accordingly, the District Court "entered a preliminary injunction in [Petitioners'] favor (1) prohibiting enforcement of the in-person, 'wet,' witnessed signature collection requirements, (2) prohibiting enforcement of the July 16, 2020 deadline for the submission of signatures, and (3) direct[ing] 'Defendants to update the Court by 12:00 pm on Tuesday, May 26, 2020 regarding adjustments to the enjoined requirements.'" *Id.* at 92a.

On May 26, 2020, the Sixth Circuit stayed the injunction and applied the *Anderson-Burdick* framework to develop a novel litmus test only warranting strict scrutiny if Ohio's laws amounted to "virtual exclusion" from the ballot. *Id.* at 18a. It held that Ohio's In-Person Collection Laws did not amount to virtual exclusion of the initiative constituting a severe burden warranting strict scrutiny and concluded that the laws were likely constitutional as applied under an intermediate scrutiny framework. *Id.* The panel relied on the new test and a vague First Amendment exception in Ohio's shutdown orders to distinguish between the severe burden found in *Esshaki* and the intermediate burden it found in this case. *Id.* at 18a–19a.

On September 16, 2020, in its order on the merits, the Sixth Circuit fully embraced the logic of its stay

and once again found that while the First Amendment applied, the burden was not severe. *Id.* at 3a–4a.[1] As a preliminary matter, the panel questioned its own circuit precedent requiring application of the First Amendment to ballot initiatives. *Id.* at 4a ("Although Ohio recognizes [circuit precedent], it also argues that '[l]aws regulating ballot access for state initiatives do not implicate the First Amendment at all.' But as Ohio admits, that's not the law in this circuit. And 'until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this.'") (internal citations omitted)). Then, the panel concluded that it saw "no reason to depart from [its] previous holding that Ohio's ballot-access restrictions impose, at most, only an intermediate burden on [Petitioners'] First Amendment rights, even during COVID-19." *Id.* at 5a. In doing so, the Sixth Circuit reiterated its distinction from *Esshaki* and its novel virtual exclusion test, concluding that "Michigan's restrictions 'effectively excluded' the [*Esshaki*] plaintiffs from ballot access," while petitioners in Ohio were not so excluded. *Id.* at 7a.

[1] On September 17, 2020, Respondents moved to publish the Sixth Circuit's originally unpublished order on the merits. The Sixth Circuit granted Respondents' motion on September 18, 2020.

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 Ballot Initiatives.

1. Five Circuits have recognized First Amendment protection for ballot initiatives.[2]

The Sixth Circuit acknowledges that "although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution . . . ." *Taxpayers United for Assessment Cuts* v. *Austin*, 994 F.2d 291, 295 (6th Cir. 1993). The Sixth Circuit regularly applies the First Amendment to ballot initiative regulations such as the In-Person Collection Laws here and in analogous situations such as candidate signature collection. Pet App. 4a (applying the First Amendment to "nondiscriminatory, content-neutral ballot initiative requirements"); *Esshaki*, 813 F. App'x at 171, 177; *Schmitt* v. *LaRose*, 933 F.3d 628, 639 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2803 (2019).

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[2] The Fourth Circuit has not squarely addressed the question but considered the Sixth Circuit's analysis "instructive" in a case addressing referenda signature regulations. *See Kendall* v. *Balcerzak*, 650 F.3d 515, 523 (4th Cir. 2011). The Fourth Circuit will apply strict scrutiny First Amendment analysis to residency requirements for petition circulators. *Libertarian Party of Virginia* v. *Judd*, 718 F.3d 308, 311–12, 317 (4th Cir. 2013). Likewise, the Third Circuit applies strict scrutiny to residency requirements for nomination petition circulators as restrictions on "core political speech." *See Wilmoth* v. *Sec'y of New Jersey*, 731 F. App'x 97, 102–03 (3d Cir. 2018).

Similarly, the Ninth Circuit applies the First Amendment to ballot initiative restrictions such as a geographic distribution requirement for signature collection. *Angle* v. *Miller*, 673 F.3d 1122, 1126–27, 1133–34 (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.").

In *Wirzburger*, the First Circuit addressed a prohibition on using ballot initiatives to advocate for public funding of religious academic institutions. *Wirzburger* v. *Galvin*, 412 F.3d 271, 274–75 (1st Cir. 2005). And even though the underlying limitation was one involving subject matter (funding for religious schools), the First Circuit determined that plaintiffs' signature gathering activities "implicat[ed] the First Amendment," as "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 276. In doing so, the First Circuit explicitly rejected the D.C. Circuit's conclusion in *Marijuana Policy Project* v. *United States*, 304 F.3d 82 (D.C. Cir. 2002) that regulations on the subject matter of ballot initiatives "restrict[ ] no speech" and "implicate[] no First Amendment concerns." *Wirzburger*, 412 F.3d at 278.

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).

Finally, two remaining Circuits—the Eighth and the Tenth—have inconsistently applied the First Amendment to ballot initiatives. The Eighth Circuit—like the Sixth Circuit—has at times applied First Amendment scrutiny to in-person signature requirements during the pandemic. *Miller* v. *Thurston*, 967 F.3d 727, 738 (8th Cir. 2020). The *Miller* Court reasoned that in-person signature requirements affect the communication of ideas associated with circulation of a petition, which burdens circulators' "core political speech." See *id.* at 738 (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 195–96 (2010) (explaining that "[a]n individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure" and that the "expression of a political view implicates a First Amendment right."). The Eighth Circuit, however, has also fallen on the other side of the circuit split. See, *e.g.*, *id.* at 738 (holding that the First Amendment did not apply to an in-person notarization requirement in the same case); *infra* Section I.B.2.

Similarly, in *Yes on Term Limits, Inc.* v. *Savage*, 550 F.3d 1023 (10th Cir. 2008), the Tenth Circuit applied the First Amendment to invalidate Oklahoma's ban on non-resident circulators, which was not sufficiently narrowly tailored to serve Oklahoma's compelling interest of policing the integrity and reliability of its initiative process. See *id.* at 1028 ("Plaintiffs here seek to participate in petition circulation, which involves core political speech . . . we agree with the district court that under our precedent, strict scrutiny is the correct legal standard under which to analyze Oklahoma's ban on non-resident circulators."). But see

infra Section I.B.2 (discussing *Initiative & Referendum Inst.* v. *Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006), which held that a subject matter restriction on ballot initiative did not "implicate the First Amendment at all.").

2. Six Circuits hold that the First Amendment does not apply to ballot initiatives so long as the State does not restrict political discussion or petition circulation.

In *Marijuana Policy Project*, the D.C. Circuit concluded that the First Amendment "imposes no restriction on the withdrawal of subject matter from the initiative process." *Marijuana Policy Project*, 304 F.3d at 86.[3] There, in assessing a challenge on a prohibition of initiatives reducing penalties for marijuana possession, the D.C. Circuit found no authority for the suggestion that limits on legislative authority, as opposed to legislative advocacy, violated the First Amendment, concluding that the First Amendment "confers no right to legislate on a particular subject." *Id.* at 85.

The Tenth Circuit reached a similar conclusion when faced with a restriction that required a legislative supermajority for wildlife initiatives. *Initiative & Referendum Inst.*, 450 F.3d at 1099. The Tenth Cir-

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[3] As discussed in prior petitions before this Court, there is a related circuit split on whether and how the First Amendment and strict scrutiny apply to subject matter restrictions on ballot initiatives. *See Schmitt*, 933 F.3d 628, *cert. denied*, 140 S. Ct. 2803 (2019); *Glob. Neighborhood* v. *Respect Washington*, 434 P.3d 1024 (Wash. Ct. App. 2019), *rev. denied*, 448 P.3d 69 (Wash. 2019), *cert. denied*, 140 S. Ct. 638 (2019); *Port of Tacoma* v. *Save Tacoma Water*, 422 P.3d 917 (Wash. Ct. App. 2018), *rev. denied*, 435 P.3d 267 (Wash. 2019), *cert. denied*, 140 S. Ct. 106 (2019).

cuit held that the regulation 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. The Tenth Circuit made 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 explicitly 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."). But see *Yes on Term Limits,* 550 F.3d at 1028 (applying strict scrutiny to petition circulators).

The Eighth Circuit, as discussed *infra*, has not applied the First Amendment to restrictions that make petition circulation process "difficult," but would do so when restrictions affect "the communication of ideas associated with the circulation of petitions." *Dobrovolny* v. *Moore,* 126 F. 3d 1111, 1112 (8th Cir. 1997) (refusing to apply the First Amendment to a ballot initiative signature requirement that "in no way restricted [the] ability to circulate petitions or otherwise engage in political speech."); but cf. *Miller*, 967 F.3d at 737–38 (distinguishing *Dobrovolny*, and applying the First Amendment to an in-person signature collection requirement as applied during the pandemic because the "communication of ideas" through petition circulation was affected.[4]

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[4] In *Miller*, the Eighth Circuit did not apply the First Amendment to the in-person notarization requirement noting that it did not "see how its enforcement affect[ed] the communication of ideas associated with the circulation of [a] petition."). *Miller*, 967 F.3d at 738.

While the Second Circuit has not issued a clear holding on point, it has considered the Tenth Circuit's analysis "instructive" in a case addressing referenda. See *Molinari* v. *Bloomberg*, 564 F.3d 587, 600–01 (2d Cir. 2009) (citing *Initiative & Referendum Inst.* v. *Walker*, 450 F.3d 1082 (10th Cir. 2006) extensively and holding that the plaintiffs' speech was not restricted when "New York State law puts referenda and City Council legislation on equal footing, permitting the latter to supersede the former.").

The Seventh Circuit does not apply the First Amendment if the regulation at issue does not "distinguish by viewpoint or content." *Jones* v. *Markiewicz-Qualkinbush*, 892 F. 3d 935, 936, 938 (7th Cir. 2018) (rejecting First Amendment's application to an Illinois law limiting the number of referenda on any ballot to three). See also *Morgan* v. *White*, 964 F.3d 649, 652 (7th Cir. 2020) (citing *Jones* in rejecting view that federal constitutional protections apply to initiative petitions whose proponents are burdened by social-distancing requirements).

The Eleventh Circuit likewise has held that First Amendment implications do not arise in the context of ballot initiative restrictions except in "certain narrow circumstances"—for example, where the restrictions are content-based or disparately impact certain political viewpoints. *Biddulph* v. *Morham*, 89 F.3d 1491, 1500–01 (11th Cir. 1996) (per curiam) (finding no viable First Amendment claim in challenge to Florida restrictions on ballot initiative substance and title); see also *Delgado* v. *Smith*, 861 F.2d 1489, 1498 (11th Cir. 1988) (declining to rely on First Amendment grounds in holding that a minority language requirement of the Voting Rights Act did not apply to state initiative mechanisms).

3. The applicability of the First Amendment cannot depend upon arbitrary distinctions between regulations that make the ballot initiative process difficult and regulations that affect the communication of ideas associated with the circulation of petitions. This flawed distinction conflicts with this Court's precedent and is not workable in practice.

Meyer and *Buckley* do not make the distinction between regulations that make the ballot initiative process "difficult" and those that affect the communication of ideas associated with the circulation of petitions. They are one and the same. See *Meyer*, 486 U.S. at 424 ("The First Amendment protects [the] right not only to advocate [for a] cause but also to select what [one] believe[s] to be the most effective means for so doing."). Neither *Meyer* nor *Buckley* condone regulations that make the ballot initiative process difficult. To the extent that either case discusses difficulty, they suggest that difficulty indicates the need for a First Amendment analysis. See *id.* at 423 (endorsing the Colorado Supreme Court's view that increased difficulty in circulating petitions "has the inevitable effect of reducing the total quantum of speech on a public issue.").

The present case demonstrates that laws that make the ballot initiative process difficult inherently also affect the communication of ideas. The enforcement of a wet and witnessed signature requirement during a pandemic creates an additional hurdle that makes the ballot initiative process more difficult for petition circulators. The requirement burdens petition circulators' core political speech by preventing them from effectively communicating their political message to fellow voters and significantly affecting the number of individuals a canvasser can solicit. And it burdens

the ability of those who intend to sign petitions from "express[ing] their position on a political matter by signing [the] initiative petition." See *Miller*, 967 F.3d at 738.

B. The Circuits That Apply the First Amendment Have Split Over the Appropriate Standard of Review to Scrutinize Ballot Access Restrictions.

There is a split within the split.

Courts of Appeals that afford First Amendment protection to ballot initiatives employ at least three different analytical frameworks—*Meyer-Buckley*, *O'Brien*,[5] and *Anderson-Burdick*[6]—that result in at least four different levels of scrutiny—strict, intermediate, flexible, or rational basis. See Trane J. Robinson, *Speaking of Direct Democracy, Judicial Review of State Ballot Initiative Laws Under the First Amendment*, 89 U. Cin. L. Rev. 176, 194, (2020)

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[5] 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 an 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).

[6] 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. *Schmitt*, 933 F.3d at 639. Laws imposing "severe burdens" are subject to strict scrutiny but "lesser burdens trigger less exacting review." *Id.*

("[T]he circuit conflict around the appropriate level of scrutiny to apply to First Amendment challenges to State ballot initiative laws creates disparate analyses of like challenges across jurisdictions. Such disparities are disfavored"); Michael J. Levens, *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.").

1. Four Circuits and the Supreme Judicial Court of Maine apply strict scrutiny to laws regulating ballot initiatives.

The Ninth Circuit considers restrictions on initiatives a severe burden on "core political speech." *Angle*, 673 F.3d at 1133 (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").

The Sixth Circuit has also recently chosen to apply strict scrutiny. See *SawariMedia, LLC* v. *Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020) (affirming finding that initiative proponents burden on plaintiffs' access to the ballot was "severe"); *Esshaki,* 813 F. App'x at 171 ("The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders

imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied.")

The Tenth Circuit considers petition circulation "core political speech" that warrants strict scrutiny. *Yes on Term Limits,* 550 F.3d at 1028 ("[T]he state government here is limiting the quantum of this speech through its residency requirements for petition circulators. . . . Thus, we agree with the district court that under our precedent, strict scrutiny is the correct legal standard."); *Chandler* v. *City of Arvada, Colorado*, 292 F.3d 1236, 1241 (10th Cir. 2002) ("[P]etition circulation is 'core political speech,' because it involves 'interactive communication concerning political change . . . We recognize 'securing . . . sufficient signatures to place an initiative measure on the ballot is no small undertaking.' . . . Strict scrutiny is applicable 'where the government restricts the overall quantum of speech available to the election or voting process.'")

The Eighth Circuit, although inconsistent on First Amendment protection, has applied strict scrutiny to regulations that "limit the ability of citizens to have initiative petitions circulated." See *Bernbeck* v. *Moore*, 126 F.3d 1114, 1115–16 (8th Cir. 1997) ("The *Meyer* Court expressly concluded that 'the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'").

2. The First Circuit applies intermediate scrutiny to regulation of ballot initiatives under *United States* v. *O'Brien*, 391 U.S. 367 (1968). *Wirzburger*, 412 F.3d at 279; see also *Initiative & 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 test, concluding that Ohio's in-person signature collection laws imposed an "intermediate" burden. Pet. App. 8a ("Ohio's ballot access laws place an intermediate burden on Plaintiffs' First and Fourteenth Amendment rights. So the next step in the *Anderson-Burdick* framework is "a flexible analysis in which we weigh the 'burden of the restriction' against the 'state's interests and chosen means of pursuing them.'"). See also *Detroit Unity Fund* v. *Whitmer*, 819 F. App'x 421, 422 (6th Cir. 2020) (affirming district court's denial of injunctive relief to initiative petition circulators based on application of "an intermediate level of review and weighing [of] the competing interests"); *Schmitt*, 933 F.3d at 639.

The Fourth Circuit has held that the *Anderson-Burdick* framework can also result in strict scrutiny in ballot access and related election law cases. See *Fusaro* v. *Cogan*, 930 F.3d 241, 261 (4th Cir. 2019) (applying *Anderson-Burdick* to conclude that strict scrutiny applies to statute limiting access to registered voters list as "an election regulation that plausibly burdens First Amendment rights . . . ."); See also *Wilmoth* v. *Sec'y of New Jersey*, 731 F. App'x 97, 102 (3d Cir. 2018) (applying *Anderson-Burdick* to conclude that restriction imposed on nomination petition circulators was subject to strict scrutiny); *Pérez-Guzmán* v. *Garcia*, 346 F.3d 229, 239 (1st Cir. 2003) (applying *Anderson-Burdick* to conclude that lawyer-notarization requirement for new political party registration's petition signatures is severe restriction that should be afforded exacting scrutiny).

4. Finally, the Second, Fourth, D.C. Circuit, and the Tenth Circuit have applied rational basis review, of-

ten in conjunction with a finding that the First Amendment is not implicated by challenged regulations. See *Kendall* v. *Balcerzak*, 650 F.3d 515, 525 (4th Cir. 2011) (applying rational basis review to signature matching requirement for ballot initiative petitions); *Molinari*, 564 F.3d at 608 (referendum statutes subject to rational basis review); *Marijuana Policy Project*, 304 F.3d at 86 (content restriction on ballot initiative subject to rational basis review because they do not apply the First Amendment); *Initiative & Referendum Inst.*, 450 F.3d at 1099–1100[7] ("The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not.").

C. There is Tremendous Confusion in the Lower Courts About What Constitutes a "Severe Burden" That Triggers Strict Scrutiny Under the *Anderson-Burdick* Test.

Finally, Courts across the country that do apply the First Amendment and *Anderson-Burdick* have disagreed as to whether the coronavirus pandemic, in combination with governmental shutdown orders, poses a "severe burden." *Arizonans for Fair Elections* v. *Hobbs*, 454 F. Supp. 3d 910, 915 (D. Ariz. 2020) ("[I]t is undeniable that the COVID-19 pandemic is currently wreaking havoc on initiative committees' ability to gather signatures . . ."); *Fair Maps Nevada*

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[7] The Tenth Circuit applies either strict scrutiny or rational basis review to ballot initiatives by drawing a confusing distinction between different components of the ballot initiative process. Compare *Initiative & Referendum Inst.*, 450 F.3d at 1099–1100, with *Yes on Term Limits,* 550 F.3d at 1028.

v. *Cegavske*, 463 F. Supp. 3d 1123, 1143 (D. Nev. 2020) ("Forcing circulators to go out to collect signatures during the COVID-19 pandemic is unreasonable and unwise.").

> Signature collection that is usually not burdensome in ordinary times has become extremely burdensome during the pandemic when states put in place orders confining people to their homes except for essential activities. Even in areas without formal orders, signature collection can be very difficult as health experts have cautioned against unnecessary close contact with other people and with shared surfaces such as the pens and clipboards that are typically used to collect signatures.

Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative During a Pandemic*, 2020 U. Chi. L. Rev. Online (June 26, 2020).

1. The Sixth Circuit below created a novel "virtual exclusion" test for severe burden that is contrary to this Court's jurisprudence.[8] Pet. App 8a, 19a ("To be sure, it may be harder for Plaintiffs to obtain signatures given the conditions. But 'just because procuring signatures is now harder. . . doesn't mean that Plaintiffs are *excluded* from the ballot.' The burden Plaintiffs face here is thus an intermediate one. . . .

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[8] In evaluating burdens under *Anderson-Burdick*, Justice Scalia observed that "[o]rdinary and widespread burdens, such as those requiring 'nominal effort' of everyone are not severe. [citations omitted] Burdens are severe if they go beyond the merely inconvenient." *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J. concurring). "Exclusion" or "virtual exclusion" does not appear in *Crawford*, nor do these purportedly applicable tests appear in the foundational cases of *Anderson* and *Burdick*.

At bottom, a severe burden excludes or virtually excludes electors or initiatives from the ballot.") (citations omitted).

2. This novel test is a "litmus test" in direct violation of this Court's precedents. *Buckley* v. *American Constitutional Law Found.*, 525 U.S. 182, 183 (1999) ("[N]o litmus-paper test" will separate valid ballot-access provisions from invalid interactive speech restrictions, and this Court has come upon "no substitute for the hard judgments that must be made." (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974))).

Applying this novel test, the Sixth Circuit drew an arbitrary distinction between this case and an earlier signature collection case, despite analyzing substantially similar stay-at-home orders. Pet. App. 20a ("Unlike the Ohio orders, the Michigan executive orders in *Esshaki* did not specifically exempt First Amendment protected activity."); Hasen, *supra* ("The Sixth Circuit panel distinguished the Circuit's earlier *Esshaki* case, which had eased ballot access rules for party and candidate qualification in Michigan, on grounds that Ohio's stay-at-home order did not formally ban First Amendment activity like petition circulation. It noted that Ohio was beginning to lift its stay-at-home order, suggesting without evidence that petition circulators would have an easier time collecting signatures in Ohio than in Michigan as the pandemic spread in both states.").

3. By contrast, the Seventh Circuit applies a "reasonable diligence" test. *Stone* v. *Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 682 (7th Cir. 2014) ("What is ultimately important [in evaluating severe burden] is not the absolute or relative number of signatures required but whether a 'reasonably diligent candidate could be expected to be

able to meet the requirements and gain a place on the ballot'" (citation omitted)).

4. The Second Circuit applies a combination of both the "virtual exclusion" test from the Sixth Circuit and the "reasonable diligence" test from the Seventh Circuit. *Libertarian Party of Connecticut* v. *Lamont*, 977 F.3d 173, 177–78 (2d Cir. 2020) ("As the Sixth Circuit has held, [t]he hallmark of a severe burden is exclusion or virtual exclusion from the ballot. Accordingly, we ask whether Connecticut's petitioning laws effectively prevent . . . candidates from appearing on the ballot. What is ultimately important is not the absolute or relative number of signatures required but whether a 'reasonably diligent candidate could be expected to be able to meet the requirements and gain a place on the ballot.'") (internal citations omitted).

5. The Eighth Circuit acknowledged the "real burdens" imposed by the pandemic, yet concluded, without further discussion, that the extraordinary precautions that petition circulators must take to stay safe are not a "severe burden."

> [O]ne can imagine relatively simple ways for [petition circulators] to safely comply with the in-person signature requirement during the COVID-19 pandemic . . . for example, [petition circulators] can advertise [their] petition using traditional and social media and bring the sterilized petition to [petition signers'] homes where it can be safely transferred with little to no contact. No doubt, the in-person signature requirement imposes real burdens. We are just not persuaded it imposes severe burdens.

Miller, 967 F.3d at 740.

6. Similar confusion about the test for burden has persisted amongst the district courts since the beginning of the pandemic. District courts in the Ninth Circuit employ the "reasonable diligence" test from the Second and Seventh Circuits, and sometimes, add a new "significant inhibition" prong. See, *e.g.*, *Arizonans for Fair Elections*, 454 F. Supp. 3d at 915 ("[A] challenger must show that the law creates a 'severe burden' on the ability to successfully place an initiative on the ballot, and burdensomeness is gauged in part by assessing whether a 'reasonably diligent' initiative committee could have succeeded despite the law."); *Fair Maps Nevada*, 463 F. Supp. 3d at 1142 ("[T]he Ninth Circuit in *Angle* laid out a test for when to apply strict scrutiny to restrictions on Nevada ballot initiatives proposing constitutional amendments, like those at issue here. *Angle* requires application of strict scrutiny when: (1) the proponents of the initiative have been 'reasonably diligent' as compared to other initiative proponents; and (2) when the restrictions significantly inhibit the proponents' ability to place an initiative on the ballot.").

7. Although the pandemic has exacerbated the confusion, lower courts have long struggled with analyzing levels of burden even before the current emergency. See Robinson, *supra* at 186 ("[The Sixth Circuit] admitted it took 'some legal gymnastics to quantify the burden' of the State law pursuant to *Anderson-Burdick*.") (quoting *Mays* v. *LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020)); *Republican Party of Arkansas* v. *Faulkner Cty., Ark.*, 49 F.3d 1289, 1296 (8th Cir. 1995) ("The Supreme Court has not spoken with unmistakable clarity on the proper standard of review for challenges to provisions of election codes"); *Hatten* v. *Rains*, 854 F.2d 687, 693 (5th Cir. 1988) ("The Supreme Court has never stated the level of

scrutiny applicable to ballot access restrictions with crystal clarity"); *Stone*, 750 F.3d at 681 (observing that the *Anderson-Burdick* analysis "can only take us so far," because "there is no 'litmus test for measuring the severity of a burden that a state law imposes,' either." (quoting *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008))). In the absence of clear and administrable standards for assessing burden, one noted scholar has opined that this Court's ballot access jurisprudence, "as a pronouncement of doctrine . . . is positively Delphic." Laurence H. Tribe, *American Constitutional Law* § 13-20 (2d Ed. 1988).

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

1. This Court has already recognized that the question this case presents involves "an important issue of election administration." *Little*, 140 S. Ct. at 2616. Residents of twenty-six states and the Virgin Islands[9] hoping to sponsor or sign ballot initiatives are impacted by circuits that "diverge in fundamental respects when presented with challenges to the sort of state laws at issue here." *Id.* Ballot initiatives are invaluable avenues for minority view-holders and members of minority political parties to express their views—views that warrant First Amendment protection—and attempt to persuade the majority. See, *e.g.*, *Wirzburger*, 412 F.3d at 274 (seeking to amend the Massachusetts Constitution by initiative to eliminate a prohibition that prevented private schools, including religious schools, from receiving public funds.).

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

2. With ballot initiatives increasing in popularity,[10] it is no surprise that the Court has been asked to clarify First Amendment protection for ballot initiatives seven times in just two years. See *Clarno* v. *People Not Politicians Oregon*, No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020) (granting stay); Emergency Application to Stay the Preliminary Injunction Pending a Merits Decision by the Court of Appeals, *Whitmer* v. *SawariMedia, LLC*, No. 20A1 (U.S. July 10, 2020) (application withdrawn on July 23, 2020); *Little*, 140 S. Ct. 2616 (granting stay); Pet. App. 13a; *Schmitt*, 933 F.3d 628, *cert. denied*, 140 S. Ct. 2803 (2019); *Glob. Neighborhood* v. *Respect Washington*, 434 P.3d 1024 (Wash. Ct. App. 2019), *rev. denied*, 448 P.3d 69 (Wash. 2019), *cert. denied*, 140 S. Ct. 638 (2019); *Port of Tacoma* v. *Save Tacoma Water*, 422 P.3d 917 (Wash. Ct. App. 2018), *rev. denied*, 435 P3d 267 (Wash. 2019), *cert. denied*, 140 S. Ct. 106 (2019).

3. Since March 2020, after the onset of the COVID-19 pandemic and corresponding emergency restrictions, over seventy cases have been filed in state and federal courts on access to ballot initiatives or similar election issues. See, *e.g., Esshaki* v. *Whitmer*, 455 F. Supp. 3d 367, 372 (E.D. Mich. 2020), *motion for relief from judgment denied*, 456 F. Supp. 3d 897 (E.D. Mich. 2020) ("Plaintiff contends that the combination of the State's strict enforcement of statutory signature gathering requirements with the Gover-

[10] 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.

nor's Stay-at-Home Order has placed a severe burden on his ability to run for elected office—in violation of the freedom of speech . . . ."); *Arizonans for Second Chances, Rehab., & Pub. Safety* v. *Hobbs*, 471 P.3d 607, 620 (Ariz. 2020) (applying the *Anderson-Burdick* First Amendment analysis to ballot initiative regulations during the pandemic); *COVID-Related Election Litigation Tracker*, Stanford-MIT Healthy Elections Project, https://healthyelections-casetracker.stanford.edu (98 cases designated 'Petition Signature Requirement', 'Candidate Signature Requirement', or 'Petition Defect' were filed between March 17, 2020 and February 1, 2021).

The pace of litigation reflects the severe burden of the pandemic on the initiative process. Ballot initiatives were down more than 25% this year because of the pandemic. Nathaniel Rakich, *The 21 Ballot Measures We're Watching This Election*, FiveThirtyEight (Oct. 31, 2020), https://fivethirtyeight.com/features/the-21-ballot-measures-were-watching-this-election/ ("[T]he pandemic has made it difficult for ballot-measure campaigns to collect enough signatures to make the ballot. According to the National Conference of State Legislatures, there are only 121 statewide ballot measures being decided in the 2020 general election — the fewest in a presidential or midterm year since 1986." (citing *Statewide Ballot Measures Database*, Nat'l Conf. of State Legislatures (Nov. 12, 2020), https://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx)).[11] Ballot access cases will continue to be filed and courts across the country will continue to

[11] Petitioners were only able to get their ballot initiative on ballots in four small villages requiring a few dozen signatures each. Pet. App. 122a. The initiative passed in all four of those villages.

apply disparate, conflicting, and confusing standards until the Court resolves this split and issues administrable guidelines.

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

The question presented is well preserved in published decisions below and the corresponding briefing. See Pet. App. 100a ("Laws Regulating Ballot Access for Initiatives Implicate the First Amendment in the Sixth Circuit and In Courts Across the Country"); *Id.* at 103a ("The Sixth Circuit is on the Correct Side of an Emerging Circuit Split"); *Id.* at 4a ("[Ohio] also argues that '[l]aws regulating ballot access for state initiatives do not implicate the First Amendment at all.' . . . But as Ohio admits, that's not the law in this Circuit.").

With the global pandemic likely to affect the next few election cycles, too, the severe burden is ongoing to Petitioners. On November 17, 2020, Ohio announced another stay-at-home order through December 10, 2020, and was later extended through February 11, 2021.[12] Against this backdrop, the next elec-

[12] *See* Ohio Dep't of Health, Dir.'s Revised Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio, with Exceptions, Nov. 15, 2020, https://coronavirus.ohio.gov/static/publicorders/limit-prohibit-mass-gatherings-ohio-rev-order.pdf; Ohio Dep't of Health, Dir.'s Amended Order that All Persons Stay Home During Specified Hours Unless Engaged in Work or Essential Activity, Dec. 10, 2020, https://coronavirus.ohio.gov/static/publicorders/all-pers-stay-at-home-specified-hours.pdf; Ohio Dep't of Health, Dir.'s Second Amended Order that All Persons Stay at Home During Specified Hours Unless Engaged in Work or Essential Activity, Dec. 30, 2020, https://coronavirus.ohio.gov/static/publicorders/stay-home-tonight-second-amended.pdf; Ohio Dep't of Health, Dir.'s Fourth Amended Order that All Persons Stay at Home During Specified

tion date for local initiatives is May 4, 2021, and local initiatives must be certified by February 3, 2021. See Ohio Rev. Code Ann. § 731.28. After that, the next election date is November 2, 2021 with a local initiative certification deadline of August 4, 2021. *Id.* Although some vaccines have been approved, it is still unclear whether they will be mass distributed in a timely manner. There is no indication that the COVID-19 crisis will be completely over by upcoming certification deadlines, and no indication that Ohio will relax its emergency orders as the pandemic continues.

Hours Unless Engaged in Work or Essential Activity, Jan. 27, 2021, https://coronavirus.ohio.gov/static/publicorders/fourth-amended-stay-safe-tonight-order.pdf.

CONCLUSION

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

Respectfully submitted,

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