No. 21-

IN THE
Supreme Court of the United States

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

Petitioners,

v.

RICHARD MICHAEL DEWINE, GOVERNOR OF OHIO; BRUCE VANDERHOFF, 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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QUESTIONS PRESENTED

1. Whether ever-changing and ongoing government-issued COVID-19 restrictions moot First Amendment challenges to ballot access restrictions.

2. 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, Appellants below. Respondents are Richard "Mike" DeWine, Governor of Ohio, Bruce Vanderhoff, Director of Ohio Department of Health, and Frank LaRose, Ohio Secretary of State, Appellees below. No parties are a corporation.

RULE 14.1(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. 21-3514 (6th Cir. Aug. 6, 2021)

Thompson v. *DeWine*, No. 21-3514 (6th Cir. July 28, 2021)

Thompson v. *DeWine*, No. 2:20-cv-02129 (S.D. Ohio June 3, 2021)

Thompson v. *DeWine*, No. 20-1072 (U.S. Apr. 19, 2021)

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. 20-3526 (6th Cir. May 26, 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.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

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 amended opinion of the United States Court of Appeals for the Sixth Circuit instructing the district court to dismiss plaintiffs' case as moot is reported at 7 F.4th 521 (Aug. 6, 2021) and is reproduced in the appendix to this petition at Pet. App. 1a. The order of the United States Court of Appeals for the Sixth Circuit granting in part and denying in part appellants' motion to amend the Court's July 28, 2021 opinion is reproduced at Pet. App. 13a. The unamended opinion of the United States Court of Appeals for the Sixth Circuit is available at 2021 WL 3183692, No. 21-3514 (July 28, 2021) and is reproduced at Pet. App. 14a. The opinion issued by the district court below granting defendants' motion to dismiss is available at 2021 WL 2264449, No. 2:20-cv-2129 (June 3, 2021) and is reproduced at Pet. App. 25a. This Court's denial of petitioners' first petition for writ of certiorari is available at 141 S.Ct. 2512 (April 19, 2021). The order of the United States Court of Appeals for the Sixth Circuit reversing the district court's grant of preliminary injunction is reported at 976 F.3d 610 (Sept. 16, 2020) and is reproduced at Pet. App. 47a. The denial of appellees' application to vacate stay issued by this Court is available at 2020 WL 3456705, No. 19A1054 (June 25, 2020) and is reproduced at Pet. App. 64a. 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 repro-

duced at Pet. App. 65a. The preliminary injunction issued by the district court below is reported at 461 F. Supp. 3d 712 (2020) and is reproduced at Pet. App. 82a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on August 6, 2021, Pet. App. 13a. 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

Petitioners seek resolution of two deepening circuit splits with significant and immediate effect on state ballot initiatives.

First, the lower courts are intractably split on how mootness exceptions apply to First Amendment cases arising from COVID-19 regulations.

The Third, Sixth and Eighth Circuits have held that cases challenging COVID-19 restrictions are moot if the policy has been rescinded or changed. The First and Second Circuits have also implicitly adopted this view. On the other side, the Seventh and Ninth Circuits have said that these cases are not moot because the ever-changing nature of the pandemic makes the harm likely to recur. This split persists despite guidance from this Court. See *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam order) (reasoning that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case"); *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam order) (stating that it "is clear that this matter is not moot . . . because the applicants remain under a constant threat that" regulations will be reimposed). The Court should grant the petition to ensure that COVID-19 restrictions cannot continue to evade judicial scrutiny. See *S. Bay Pentecostal Church* v. *Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.) ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner").

Second, this petition presents a circuit split as to whether and how the First Amendment applies to

regulations, like Ohio's In-Person Collection Laws, that impede ballot initiatives. This Court has specifically identified this issue as requiring resolution. See *Little* v. *Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring) ("[T]he Court is reasonably likely to grant certiorari to resolve [this split] on an important issue of election administration.").

Six Circuits do not apply the First Amendment to ballot initiatives; five Circuits and two state supreme courts do. What is more, the Circuits that do apply the First Amendment employ disparate tests and levels of scrutiny. See *Reclaim Idaho*, 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 collecting 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; *Meyer* v. *Grant*, 486 U.S. 414, 421 (1988) (Ballot initiatives implicate "core political speech").

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. There is no formal restriction on when signatures can be used. Signatures collected in 2020 can still be used for ballot initiatives in 2022. Ohio Rev. Code Ann. § 3501.38.[1]

B. 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. Appellee Br. at 3–4, *Thompson* v. *DeWine*, Case No. 20-3526 (6th Cir. Aug. 26, 2020), ECF No. 94.

On February 27, 2020—before the COVID-19 crisis fully hit Ohio—petitioners diligently filed their proposed initiatives with several Ohio cities to begin collecting signatures. *Id*. at 4. 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 started a series 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 5. Later orders al-

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[1]This petition refers to the Ohio's statutory scheme at issue collectively as the "In-Person Collection Laws." *See also* Appellee Br. at 2 n.1, *Thompson* v. *DeWine*, Case No. 20-3526 (6th Cir. Aug. 26, 2020), ECF No. 94.

so 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 5–6. The initial orders did not exempt circulators. *Id.* at 6.

On April 30, 2020, after this litigation commenced, respondents updated the shutdown order, creating a purported exception for "petition or referendum circulators." *Id.* at 8. 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 needed to maintain six-foot separation and other extraordinary precautions to stay safe. *Id.* at 8–9.

As a result of these limitations, petitioners were only able to qualify 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, while a successful petition in larger cities like Akron would require about 10,000 signatures—a virtually impossible task amid Ohio's shutdown orders. *Id.* at 39.

Nearly two years have passed since petitioners were first denied the ability to collect signatures, and there is still no end in sight to this global pandemic. petitioners have continued to circulate petitions in an effort to have their initiatives placed on local election ballots but new variants threaten any sense of predictability. Ohio has lifted or modified several of its COVID-19 restrictions but the risk of new restrictions remains constant.

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. *Id.* at 8.

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. 98a. 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.'" Appellee Br. at 9, *Thompson* v. *DeWine*, Case No. 20-3526 (6th Cir. Aug. 26, 2020), ECF No. 94 .

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. Pet. App. at 71a. 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 76a–78a.

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 52a–53a. To begin, the panel questioned its own circuit precedent requiring application of the First Amendment to ballot initiatives. *Id.* 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 54a.

On February 2, 2021, petitioners petitioned for a writ of certiorari, requesting that this Court decide whether and how the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot. *Thompson* v. *DeWine*, (2020), (No. 20-3526), *cert. denied*. This Court denied the interlocutory petition on April 19, 2021. But see *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring) ("the Court is reasonably likely to grant certiorari to resolve [this split] . . . on an important issue of election administration.").

Following this Court's denial of the petition, respondents moved to dismiss petitioners' complaint in the district court. Pet. App. at 25a. The district court granted respondents' motion, after finding that the case was not moot, based on the Sixth Circuit's prior decisions finding that petitioners' claims failed as a matter of law. *Id.* at 32a–36a. Petitioners appealed the decision to the Sixth Circuit, which found that the case was moot and affirmed the decision of the district court. *Id.* at 23a.

Shortly after the Sixth Circuit's decision, petitioners moved the Sixth Circuit to vacate or reverse the district court's judgment consistent with this Court's

precedent in *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950), as well as its prior orders, and remand with a direction to dismiss. Pet. App. at 130a. On August 6, 2021, in an amended opinion, the Sixth Circuit vacated the district court's order dismissing petitioners' complaint and remanded with instructions that the case be dismissed as moot. Pet. App. at 1a. The Sixth Circuit refused, however, to vacate its prior published interlocutory decisions on the merits of the controversy, leaving them in place to serve as continuing persuasive and binding precedent in the Sixth Circuit and beyond. See*, e.g.*, *Hawkins* v. *DeWine*, 968 F.3d 603, 606 (6th Cir. 2020) (stating that *Thompson* answers "this precise question" concerning "how to classify the burden imposed on plaintiffs by Ohio's ballot-access laws").

REASONS FOR GRANTING THE PETITION

I. CIRCUIT COURTS ARE DIVIDED ON WHETHER CASES CHALLENGING COVID-19 REGULATIONS ARE MOOT.

A. Despite this Court's Recent Decisions on Mootness and COVID-19, a 2-5 Circuit Split Persists.

In *Tandon* v. *Newsom*, this Court instructed that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 141 S. Ct. 1294, 1297 (2021) (per curiam order). Instead, "so long as a case is not moot, litigants . . . remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (quoting *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020)). *Tandon* echoed *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020)

(per curiam order), which explained that a case involving COVID-19 restrictions is not necessarily rendered moot when the restrictions are amended. *Id.* (stating that it "is clear that this matter is not moot. And injunctive relief is still called for because the applicants remain under a constant threat that" regulations will be reimposed); see also *High Plains Harvest Church* v. *Polis*, 141 S. Ct. 527 (2020). Yet, despite these clear holdings, the Circuit courts remain split on the issue.

1. On one side of the split, the Third, Sixth, and Eighth Circuits have since held that cases challenging COVID-19 restrictions are moot if the policy has been repealed or altered. The First and Second Circuits have also implicitly adopted this view.

Several months after *Tandon*, the Third Circuit reasoned that when "the Governor's orders are no longer in effect and that he has been stripped of his power to unilaterally act in connection with this pandemic," then the "case is moot." *Cnty. of Butler* v. *Governor*, 8 F.4th 226, 230 (3d Cir. 2021); see also *Parker* v. *Governor of Pennsylvania*, No. 20-3518, 2021 WL 5492803, at *4 (3d Cir. Nov. 23, 2021) ("Because the statewide mask mandate expired several months ago, there is no relief the Court could grant the plaintiffs regarding that order.").

The Eighth Circuit likewise held that "[w]here it is absolutely clear that the County's disputed conduct could not reasonably be expected to recur, an action challenging a superseded public health order is moot." *Hawse* v. *Page*, 7 F.4th 685, 692 (8th Cir. 2021). It also said, however, that "[r]esolution of the mootness question requires attention to the particular circumstances of the case," *id.*, thus leaving the door open for some challenges to proceed.

The Second Circuit has dismissed cases as moot because it did not believe "the circumstances under which the [challenged] provision might be reinstated are sufficiently likely to reoccur such that plaintiffs 'remain under a constant threat,' of reinstatement." *36 Apartment Assocs., LLC* v. *Cuomo*, 860 F. App'x 215, 217 (2d Cir. 2021) (quoting *Tandon*, 141 S. Ct. at 1297). Similarly, the First Circuit has held that the argument that the Governor could reinstate COVID-19 restrictions is not compelling because the fact that "the Governor has the power to issue executive orders cannot itself be enough to skirt mootness, because then no suit against the government would ever be moot." *Boston Bit Labs, Inc.* v. *Baker*, 11 F.4th 3, 10 (1st Cir. 2021).

And in the case below, the Sixth Circuit held that the "case is moot" because "Plaintiffs request two types of relief, injunctive and declaratory. But unlike many election cases, plaintiffs do not challenge Ohio's ballot-access laws standing alone." Pet. App. 4a; see also *Memphis A. Philip Randolph Inst.* v. *Hargett*, 2 F.4th 548, 560 (6th Cir. 2021) (case was moot when plaintiff's injury and motion for a preliminary injunction were "inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis"); *Pleasant View Baptist Church* v. *Beshear*, No. 20-6399, 838 Fed. App'x. 936, 937–38 (6th Cir. Dec. 21, 2020) (challenge to COVID-19 executive order limiting social gatherings was moot because it recently expired and governor publicly disavowed any intention to renew it).

2. On the other side of the split, the Ninth and Seventh Circuits have held that cases challenging repealed or amended COVID-19 regulations are not moot because it is reasonably likely that the harms will be repeated. The Ninth Circuit recently held that "a challenge to state restrictions is not moot when 'of-

ficials with a track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time.'" *Brach* v. *Newsom*, 6 F.4th 904, 919 (9th Cir. 2021), *vacated for rehearing en banc*, 18 F. 4th 1031 (2021) (quoting *Tandon*, 141 S. Ct. at 1297). There the court relied on the voluntary cessation exception to mootness, as well as the capable of repetition yet evading review doctrine: "To the extent that the State has now removed its prior . . . order, that is a result of the State's voluntary conduct in repeatedly changing the framework of restrictions." *Brach*, 6 F.4th at 918, 921 ("[U]nder both the voluntary cessation doctrine and the rule concerning disputes that are capable of repetition, yet evading review, . . . Plaintiffs' claims are [not] moot.")

Similarly, the Seventh Circuit has reasoned that "[g]iven the uncertainty about the future course of the pandemic, we are not convinced that these developments have definitively rendered it moot." *Cassell* v. *Snyders*, 990 F.3d 539, 546 (7th Cir. 2021). The Seventh Circuit explained that "because the ongoing pandemic makes it reasonably likely that stricter measures could be reinstated, we have thus far declined to treat challenges to superseded COVID-19 orders as moot." *Williams* v. *Pritzker*, No. 20-3231, 2021 WL 4955683, at *1 (7th Cir. Oct. 26, 2021).

B. This Case is Not Moot Because it is Capable of Repetition and the Voluntary Cessation Exception Applies.

1. Petitioners' Harm is Capable of Repetition.

Like other challenges to election procedures, this case raises issues that are "capable of repetition, yet evading review." *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). This exception to mootness "applies where (1) the challenged action is in its duration

too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.*; see also *Meyer*, 486 U.S. at 417 n.2.

The Sixth Circuit admitted the first prong is satisfied here: "We can assume the first prong is met here, as it commonly is in election cases." Pet. App. 8a.

But it rejected petitioners' reasoning on the second prong, even though the COVID-19 pandemic is ongoing and there is no sign that it will be over by the time of the next election. See Br. of Appellees at 38, *Thompson* v. *DeWine*, No. 20-35256 (6th Cir. Aug. 26, 2020).

Election challenges typically are not concluded by the time the election passes, yet this Court has often entertained those suits. See *Davis*, 554 U.S. at 735 (quoting *Fed. Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007)) ("Although the suit was not resolved before the 2004 election, we rejected the FEC's claim of mootness, finding that the case 'fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review.'"). Furthermore, this Court routinely invokes the capable of repetition exception to preserve election challenges, even when there are no moving goalposts. See*, e.g.*, *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974). That Ohio has repeatedly changed its restrictions over the course of two elections only magnifies the problem rather than moots it. Like all other election cases, this case "fit[s] comfortably" into the capable of repetition exception. See *Wisconsin*, 551 U.S. at 462.

2. The Government Failed to Meet Its Burden Required Under Voluntary Cessation.

Ohio has voluntarily changed its COVID-19 regulations but its actions fall far short of making "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). This standard applicable to voluntary cessation of challenged conduct is "stringent," and the "heavy burden" of meeting it falls on "the party asserting mootness." *Id.*; see also *Brach*, 6 F.4th at 918 (the "defendants bear the heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated").

Here, the Ohio legislature has limited the Governor's ability to act unilaterally for longer than 30 days, but the Governor remains free to implement new regulations at any moment. Ohio S.B. 22, 134th General Assembly (2021).[2]

Moreover, this Court has been skeptical of government claims that regulations will not be re-enacted or that new policies will not be implemented that place new burdens on in-person activities. See *S. Bay Pentecostal Church* v. *Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.) ("Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner"); *Tandon*, 141 S. Ct. at 1297 (emphasizing that although government "officials changed the challenged policy shortly after this application was filed," the Court remained skeptical because officials "retain authority to reinstate those heightened restrictions at any time"). With new spikes in cases and hospitaliza-

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[2]https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb22/EN/05/sb22_05_EN?format=pdfNo

tions in the wake of the Omicron variant, the potential for new restrictions remains high. See Peter Sullivan, *Omicron fuels unprecedented spike in COVID-19 cases*, The Hill (January 8, 2022). The Court should therefore be wary of voluntary cessation arguments based on the claim that COVID-19 is over. See*, e.g.*, Pet. App. 7a (rejecting the argument that "because COVID-19 persists," there is still a "threat that Ohio will again implement" new restrictions). If the volatile and ever-changing circumstances of the past two years have taught us anything, it is that we are not out of the woods yet.

II. CIRCUIT COURTS DISAGREE ON APPLYING THE FIRST AMENDMENT TO REGULATIONS IMPEDING BALLOT INITIATIVES.

This petition raises a second intractable split among the Circuits that has only deepened as the pandemic wears on. As Chief Justice Roberts observed in *Little* v. *Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020):

> [T]he Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here. According to the Sixth and Ninth Circuits, the First Amendment requires scrutiny of the interests of the State whenever a neutral, procedural regulation inhibits a person's ability to place an initiative on the ballot. See *Thompson* v. *DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) (*per curiam*); *Angle* v. *Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). Other Circuits, by contrast, have held that regulations that may make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation. See, *e.g., Jones* v.

Markiewicz-Qualkinbush, 892 F.3d 935, 938 (7th Cir. 2018); *Initiative and Referendum Institute* v. *Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (en banc); *Dobrovolny* v. *Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997).

Further, as the Chief Justice explained, "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 collecting signatures." *Reclaim Idaho*, 140 S. Ct. at 2616–17 (citing *Miller* v. *Thurston*, 967 F.3d 727, 740-41 (8th Cir. 2020); *Morgan* v. *White*, 964 F.3d 649, 652 (7th Cir. 2020); *SawariMedia, LLC* v. *Whitmer*, 963 F.3d 595, 597 (6th Cir. 2020)). The Court's intervention is urgently needed to bring uniformity to this critical area of constitutional law. See *Reclaim Idaho*, 140 S. Ct. at 2616 (describing need for "clear and administrable guidelines from the courts.").

A. The Circuits are Split Over Whether and How the First Amendment Applies to Ballot Initiatives.

1. Five Circuits and two state supreme courts apply the First Amendment to ballot initiatives. In *Reclaim Idaho*, Chief Justice Roberts observed that the Sixth and Ninth Circuits require "scrutiny of the interests of the State whenever a neutral, procedural regulation inhibits a person's ability to place an initiative on the ballot." 140 S. Ct. at 2616 (citing *Thompson* v. *DeWine*, 959 F.3d 804, 808 (6th Cir. 2020)[3] (*per curiam*) and *Angle* v. *Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012)). Other Circuits and two state supreme courts also apply the First Amendment to regulations

[3] *See also SawariMedia, LLC*, 963 F.3d at 597; *Schmitt* v. *LaRose*, 933 F.3d 628, 639 (6th Cir. 2019).

implicating ballot initiatives. See *Wirzburger* v. *Galvin*, 412 F.3d 271, 276 (1st Cir. 2005) (viewing subject matter restrictions on initiatives as within "the bounds of First Amendment protection.") (citation omitted); *Miller* v. *Thurston*, 967 F.3d 727, 738 (8th Cir. 2020) ("we find no error in subjecting Arkansas's in-person signature requirement to First Amendment scrutiny. As applied to the plaintiffs, that requirement burdens their ability to engage in core political speech."); *Yes on Term Limits, Inc.* v. *Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008) (applying First Amendment and strict scrutiny to analyze ban on non-resident circulators); *League of Women Voters of Michigan* v. *Sec'y of State*, __ N.W. 2d __, 2022 WL 211736, at *15 (Mich. Jan. 24, 2022) (applying First Amendment and exacting scrutiny to checkbox requirement); *Wyman* v. *Sec'y of State*, 625 A.2d 307, 311 (Me. 1993) ("the initiative petition process involves political discourse that is protected by the first amendment of the federal constitution.").

Further, the Circuits that do apply the First Amendment to ballot initiatives employ disparate standards of review. See *Angle*, 673 F.3d at 1133 (applying strict scrutiny "as applied to the initiative process" where "ballot access restrictions place a severe burden on core political speech"); *Yes on Term Limits*, 550 F.3d at 1025 (strict scrutiny); *Miller*, 967 F.3d at 740 (declining to apply strict scrutiny and instead requiring regulation be "reasonable, nondiscriminatory, and further[] an important regulatory interest"); *Thompson*, 959 F.3d at 811 (intermediate scrutiny under *Anderson-Burdick*); *Wirzburger*, 412 F.3d at 278 (intermediate scrutiny under *United States* v. *O'Brien*); See also *League of Women Voters*, 2022 WL 211736, at *15–17 (exacting scrutiny); *Wyman*, 625 A.2d at 311 (same).

2. Six Circuits do not apply the First Amendment to ballot initiatives. See*, e.g.*, *Reclaim Idaho*, at 140 S. Ct. at 2616 ("Other Circuits, by contrast, have held that regulations that make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation.") (citing *Jones* v. *Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018); *Initiative and Referendum Institute* v. *Walker*, 450 F.3d 1082, 1099-1100 (10th Cir. 2006) (en banc); *Dobrovolny* v. *Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997)); See also *Marijuana Pol'y Project* v. *United States*, 304 F.3d 82, 86 (D.C. Cir. 2002); *Morgan* v. *White*, 964 F.3d 649, 652 (7th Cir. 2020); *Biddulph* v. *Morham*, 89 F.3d 1491, 1500–01 (11th Cir. 1996) (per curiam); *Molinari* v. *Bloomberg*, 564 F.3d 587, 600–01 (2d Cir. 2009). Because these Circuits do not apply the First Amendment to ballot initiatives, they review such regulations under a rational basis test. See, *e.g.*, *Jones*, 892 F.3d at 938.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

This Court has already recognized that the second question involves "an important issue of election administration" on which "the Court is reasonably likely to grant certiorari." *Reclaim Idaho*, 140 S. Ct. at 2616. Residents of twenty-six states and the Virgin Islands[4] 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.*

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

Since this Court's statement in *Reclaim Idaho*, additional courts have weighed in on both sides of the question. Compare *League of Women Voters*, 2022 WL 211736, at *15 (applying exacting scrutiny) with *Beirsdorfer* v. *LaRose*, 2021 WL 3702211 at *17 (6th Cir. 2021) (Readler, J., concurring) (citing *Reclaim Idaho* to assert that "Supreme Court tea leaves suggest we have charted the wrong course [on the First Amendment's applicability to ballot initiatives], both in *Schmitt* and elsewhere."); *People Not Politicians Oregon* v. *Clarno*, 826 F. App'x 581, 584 (9th Cir. 2020) (Nelson, J., dissenting) ("I write separately to highlight our circuit's decision in *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), and its potential incongruity with established First Amendment principles as recently signaled by four justices of the Supreme Court.").

Because the global pandemic is likely to affect the next few election cycles, the severe burden placed on petitioners will recur. And with ballot initiatives increasing in popularity,[5] it is no surprise that the Court has been asked to clarify First Amendment protection for ballot initiatives eight times in just four years. See *Thompson* v. *DeWine*, 141 S. Ct. 2512, *cert. denied* (Apr. 19, 2021); *Clarno* v. *People Not Politicians Oregon*, No. 20A21, 2020 WL 4589742 (Aug. 11, 2020) (granting stay); Emergency Application to Stay the Preliminary Injunction Pending a Merits Decision by the Court of Appeals, *Whitmer* v. *Sawar-*

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[5]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.

iMedia, LLC, No. 20A1 (July 10, 2020) (application withdrawn on July 23, 2020); *Reclaim Idaho*, 140 S. Ct. at 2616 (granting stay); *Thompson* v. *DeWine*, No. 19A1054, 2020 WL 3456705, *cert denied* (June 25, 2020), *Schmitt*, 933 F.3d at 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).

Mootness also presents an important and recurring issue. By permitting mootness in COVID-19 cases, the Government can evade judicial scrutiny at a time when the fervor for regulation is at an apex. See, *e.g.*, *NFIB* v. *OSHA*, 595 U.S. __ (2022), and *Alabama Ass'n of Realtors* v. *HHS*, 594 U.S. __ (2021). Mootness should not be a shield allowing government regulations to go unexamined on the merits.

IV. THIS IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The questions presented are well preserved in published decisions below and the corresponding briefing. See Pet. App. 1a–12a (addressing mootness); Pet. App. 32a–37a(addressing mootness and First Amendment issues); Br. for Appellants at 34, *Thompson* v. *DeWine*, No. 21-3514 ("The Case is Not Moot"); (7/5/2021); Br. for Appellees at 20, *Thompson* v. *DeWine*, No. 20-3526 (6th Cir. Aug. 26, 2020) ("The Sixth Circuit is on the Correct Side of an Emerging Circuit Split").

The petition offers the Court the opportunity to clarify important and recurring areas of both moot-

ness and First Amendment law in a single petition. Not only does this case give the Court the opportunity to settle confusion over the issue of mootness, but it also implicates a multi-level circuit split over the applicability of the First Amendment to ballot initiatives and the proper standard of review.

CONCLUSION

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

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