No.

IN THE

Supreme Court of the United States

SAN BERNARDINO COUNTY BOARD OF SUPERVISORS,
Petitioner,

v.

LYNNA MONELL, IN HER OFFICIAL CAPACITY AS CLERK OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SAN BERNARDINO; NADIA RENNER,
Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

THOMAS D. BUNTON
County Counsel
SAN BERNARDINO COUNTY
385 N. Arrowhead Ave.
San Bernardino, CA 92415
(909) 387-4600

THEODORE J. BOUTROUS, JR.
Counsel of Record
KAHN A. SCOLNICK
JONATHAN N. SOLEIMANI
DANIEL R. ADLER
EITAN AROM
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
TBoutrous@gibsondunn.com

Counsel for Petitioner

QUESTION PRESENTED

Term limits restrict the rights of voters to choose their preferred candidates and to associate with other like-minded individuals to support the candidates of their choice. Here, the members of the San Bernardino County Board of Supervisors became subject to what may be the nation's most stringent term limit—a lifetime limit of a single four-year term that categorically prohibits incumbents from ever appearing on the ballot.

This Court has made clear that laws effectively barring certain categories of candidates from appearing on the ballot—like bans on independent candidates and onerous filing-fee requirements—merit heightened scrutiny. But this Court has never addressed what level of scrutiny applies to constitutional challenges to term limits for state and local offices. Absent this Court's guidance, federal and state courts have fractured into three irreconcilable camps on the appropriate test. The California Court of Appeal applied one of the three divergent tests in upholding the San Bernardino term limit primarily on the theory that this drastic restriction doesn't discriminate against any protected class.

The question presented is:

Does a term limit that bans incumbents from ever running for reelection merit heightened scrutiny?

RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *San Bernardino Cnty. Bd. of Supervisors v. Monell*, No. S280838 (Cal.) (order issued August 16, 2023);
- *San Bernardino Cnty. Bd. of Supervisors v. Monell*, No. E077772 (Cal. Ct. App.) (opinion issued May 25, 2023, and modified on June 16, 2023); and
- *San Bernardino Cnty. Bd. of Supervisors v. Monell*, No. CIVSB2025319 (Cal. Super. Ct.) (opinion issued August 31, 2021).

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rule

IN THE

Supreme Court of the United States

No.

SAN BERNARDINO COUNTY BOARD OF SUPERVISORS,

Petitioner,

v.

LYNNA MONELL, IN HER OFFICIAL CAPACITY AS CLERK OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SAN BERNARDINO; NADIA RENNER,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

The San Bernardino County Board of Supervisors respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The California Supreme Court's order denying a petition for review and request for depublication, App., *infra*, 1a, is not reported. The California Court of Appeal's amended opinion reversing the superior court's order granting a petition for a writ of mandate, *id.* at 2a–61a, is reported at 91 Cal. App. 5th 1248. The superior court's order granting the petition for a

writ of mandate, App., *infra*, 69a–96a, is not reported but is available at 2021 WL 5296486.

JURISDICTION

The California Supreme Court denied the San Bernardino County Board of Supervisors' petition for review of the Court of Appeal's published opinion on August 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides that no state shall "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."

The relevant amendments to the Charter of the County of San Bernardino are reproduced in the appendix to the petition. App., *infra*, 97a–116a.

INTRODUCTION

In 2020, voters in San Bernardino County passed Measure K, a wholesale ban on incumbency for members of the County's Board of Supervisors. The measure imposes what appears to be the nation's most extreme term limit for any elective office: a lifetime limit of a single four-year stint. Although the trial court held that this limitation on voters' and candidates' rights could not survive strict scrutiny, the California Court of Appeal reversed, upholding the limit primarily on the grounds that a lifetime ban doesn't

discriminate against a particular class or political party. The adoption of this discrimination-focused approach has entrenched widespread confusion among lower courts about how to assess the constitutionality of term limits on state and local offices. And the Court of Appeal reached the wrong answer because it asked the wrong question: the First Amendment does not simply rubber-stamp all nondiscriminatory ballot-access restrictions. Instead, it requires restrictions that create wholesale bars to ballot access—even those that apply across the board, like Measure K—to withstand heightened scrutiny.

This Court has not addressed the appropriate standard for reviewing term limits and should take the opportunity to do so now. Left to guide their own way forward, federal and state courts have created a patchwork of divergent approaches to analyze whether term limits on state and local offices violate the First Amendment. The Ninth Circuit, for example, has followed a discrimination-focused approach mirroring that of the California Court of Appeal here, under which the government's "legitimate interests" effectively justify *any* elective-office term limit, so long as the government doesn't discriminate based on "the content of protected expression, party affiliation, or inherently arbitrary factors" like "race, religion, or gender." *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (en banc). The Sixth Circuit, in contrast, has held that "term limits are not state election laws" at all, but rather "candidate qualifications" to which rational-basis review applies. *Kowall v. Benson*, 18 F.4th 542, 547, 549 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 88 (2022). Still other courts, including the Nevada Supreme Court and the Florida Supreme Court, have held that the "test for determining the constitutionality of [such] state restrictions on elections," *Nev.*

Judges Ass'n v. Lau, 910 P.2d 898, 900 (Nev. 1996), lies in a three-factor framework derived from this Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which addressed a filing-deadline requirement. *Nev. Judges Ass'n*, 910 P.2d at 900; *accord Ray v. Mortham*, 742 So. 2d 1276, 1285 (Fla. 1999).

Despite their differences, all of these approaches share one thing in common: they conflict with this Court's constitutional precedents on *other* (non-term-limit) restrictions on ballot access. Those ballot-access cases apply *heightened* scrutiny to laws that, like the ban on incumbency here, effectively bar candidates *completely* from appearing on the ballot. For example, this Court has applied heightened scrutiny and invalidated evenhanded laws setting filing fees that "precluded" indigent candidates "in every practical sense," *Bullock v. Carter*, 405 U.S. 134, 143 (1972); measures rendering it "virtually impossible" for new parties to gain ballot placement, *Williams v. Rhodes*, 393 U.S. 23, 25, 32 (1968); and requirements that operate as "absolute" grounds for "disqualification from . . . office," *Lubin v. Panish*, 415 U.S. 709, 718 (1974). This Court's more recent ballot-access cases continue that trend, making clear that "severe" barriers to ballot placement "must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Because the lower courts have strayed from these foundational First Amendment principles, this Court should intervene to articulate a standard for assessing the constitutionality of state- and local-office term limits. Absent this Court's guidance, such term limits across the country will continue to be judged under different standards, even though the First Amendment promises the same protections to all

elected officials and their supporters. The Court of Appeal's approach shortchanges voters' and candidates' constitutional rights and should not escape review.

STATEMENT

The five members of the San Bernardino County Board of Supervisors serve the two million-plus residents of the geographically largest county in the continental United States. Until 2020, supervisors could serve up to three consecutive four-year terms. App., *infra*, 98a. But on November 3, 2020, County voters passed Measure K, which limits supervisors to serving only *one* four-year term—for life. *Id.* at 3a.

A month after the measure passed, the Board filed a petition for a writ of mandate and complaint for injunctive and declaratory relief against the Clerk of the Board of Supervisors, seeking to enjoin Measure K. App., *infra*, 6a. The trial court allowed Nadia Renner, as the official proponent of Measure K, to intervene. *Id.* at 5a–6a. It then held that Measure K's ban on incumbency violates the First and Fourteenth Amendments of the U.S. Constitution and granted the petition. *Id.* at 83a–84a, 96a.

The California Court of Appeal reversed. App., *infra*, 3a–4a. To evaluate the constitutionality of Measure K's ban on incumbency, the court held that the threshold inquiry derives from this Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992), and the Ninth Circuit's interpretation of it in *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc). App., *infra*, 11a–29a.

In *Burdick*, a voter argued that Hawaii's prohibition on write-in voting violated his rights of expression and association under the First and Fourteenth

Amendments. 504 U.S. at 430. This Court set forth a two-tier framework for scrutinizing laws "burden[ing]" these rights: "important regulatory interests" are "generally sufficient" to justify restrictions that are both "reasonable" and "nondiscriminatory," while restrictions that are "severe" must be "narrowly drawn to advance a state interest of compelling importance." *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); *accord Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204–05 (2008) (Scalia, J., concurring in the judgment) (*Burdick* is a "two-track approach" that treats as severe those burdens that "go beyond the merely inconvenient"). Because the "burden imposed by Hawaii's write-in vote prohibition [was] a very limited one," it could be justified as a "[r]easonable regulation" of electoral procedures. *Burdick*, 504 U.S. at 437–38.

In *Bates*, the Ninth Circuit applied *Burdick* in a challenge to lifetime two- and three-term limits for certain California statewide offices. 131 F.3d at 845. Under *Burdick*, the Ninth Circuit reiterated, "strict scrutiny" governs term limits that "severely burden[] the plaintiffs' rights," while "reasonable, nondiscriminatory restrictions" could "generally" be justified merely by "important" regulatory interests. *Id.* at 846 (citing *Burdick*, 504 U.S. at 434) (quotation marks omitted). Applying this standard, the court held the two- and three-term limits there did not "severe[ly]" impact either "the right to vote for the candidate of one's choice" or an incumbent's right "to again run for his or her office." *Id.* at 847. The restrictions allowed candidates to "enjoy the incumbency of a single office for a number of years," the court emphasized, and didn't "preclude[] [candidates] from running for some other state office." *Id.* They were merely "neutral candidacy qualification[s]," like age or residency

requirements, that states "certainly ha[ve] the right to impose." *Id.*

But "[m]ost important" to the Ninth Circuit's decision was the fact that "the lifetime term limits" were "not . . . a discriminatory restriction." 131 F.3d at 847. That is, they made "no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender." *Id.* The court reasoned that strict scrutiny therefore didn't apply, and that the term limits could be "justified by the State's legitimate interests" in protecting against "[l]ong-term entrenched legislators" who "may obtain excessive power" and "unfair advantage[s] in winning reelection." *Id.*

The California Court of Appeal here held that Measure K's lifetime single-term limit was "no different." App., *infra*, 15a–16a (citing *Bates*, 131 F.3d at 847). Echoing *Bates*, the court asserted that a restriction generally "is not 'severe' within the meaning of the *Anderson-Burdick* test" if it's "generally applicable, even-handed, politically neutral, and . . . protect[s] the reliability and integrity of the election process." *Id.* at 65a–66a (alterations in original) (citation omitted). The one-term limit here, the court said, "passes these criteria with flying colors." *Id.* at 66a.

Having held that strict scrutiny didn't apply under its conception of *Burdick*, the court turned to whether the state's regulatory interests were "sufficient to justify the one-term limit." App., *infra*, 17a (capitalization removed). To do so, the court invoked a "deferential" "three-part . . . framework" that it said derives from this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick*. App., *infra*, 20a–21a. This required considering: (1) the "nature of the injury to the rights" affected, (2) the

"interests asserted by the state as justifications for the injury," and (3) the "necessity for imposing the burden." *Id.* at 21a–29a (citing *Legislature v. Eu*, 816 P.2d 1309, 1324 (Cal. 1991)); *see also Anderson*, 460 U.S. at 789–90.

First, as to the nature of the injury, the court said Measure K minimally impacts voters because they retain the "fundamental right to cast their ballots for the *qualified* candidate of their choice." App., *infra*, 22a. And the term limit's impact on incumbents' right to run is "mitigated" because four years is a "significant period" and incumbents aren't barred from running for other unrelated offices afterward. *Id.* at 25a–26a (alteration omitted). Second, as to the state's asserted interest for the injury, the court maintained that "limitations on continuous tenure" enhance "the over-all health of the body politic." *Id.* at 26a. And third, as to the necessity for imposing the burden, the court said a wholesale ban on incumbency was "the only solution" to the problem of "personal empire-building by entrenched incumbents." *Id.* at 28a. In the court's view, the County's existing "three-term limit could never accomplish th[e] goal" of sufficiently insulating the supervisors from "distract[ion]" or "compromis[e] by the prospect of a future term." *Id.* at 29a.

Finally, the court rejected the Board's argument that the appeal had been mooted by a 2022 San Bernardino voter initiative, Measure D, which permitted supervisors to serve up to three terms and is being challenged in a separate suit. App., *infra*, 10a–11a. According to the court, even "if Measure D is . . . struck down, any relief [the court] grant[s] as to Measure K would still be effective." *Id.* One member of the panel, Justice Menetrez, disagreed with that

conclusion in a short dissent. He explained that Measure D, not Measure K, is currently in effect, though he acknowledged that Measure K will "go back into effect" if Measure D is overturned on appeal. *Id.* at 60a–61a. He would have stayed this appeal pending final resolution of the separate litigation concerning Measure D. *Id.* at 61a.

The Board petitioned for rehearing. The Court of Appeal denied the petition and issued an amended opinion on denial of rehearing. App., *infra*, 63a–68a.

The Board petitioned the California Supreme Court for review of the Court of Appeal's decision. The court denied the petition on August 16. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

The right to elect legislators at every level of government—federal, state, and local—is a right without which all others would be meaningless, "a bedrock of our political system." *Lubin v. Panish*, 415 U.S. 709, 714 (1974). This Court has decided many cases brought to vindicate that right. It has developed standards for reviewing efforts to restrict certain candidates' access to the ballot—through, for example, signature-gathering requirements or exclusionary filing fees. But one issue on which the Court hasn't provided guidance is the standard for evaluating state- and local-office term limits, including outright bans on incumbency. Without that guidance, lower courts have issued decisions, including the one in this case, that are confusing, inconsistent, and insufficiently protective of voters' First and Fourteenth Amendment rights.

These decisions also conflict with this Court's decisions examining other election-access restrictions

and requirements. In these other contexts, restrictions imposing near-absolute bars to candidacy—like inflexible filing fees for indigent candidates and labyrinthine requirements that effectively preclude independent candidates from running—warrant heightened scrutiny. The same should be true for bans on incumbency, which likewise pose permanent and insurmountable barriers to candidacy.

This Court should grant the petition to articulate, for the first time, what level of scrutiny applies to term limits for state and local offices. That standard should recognize that wholesale bars to ballot access—like the total ban on seeking reelection here—require more searching judicial review. Absent a clear standard, the lower courts will be left without direction on "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

I. COURTS HAVE TAKEN DIVERGENT APPROACHES TO REVIEWING THE CONSTITUTIONALITY OF STATE-OFFICE TERM LIMITS

Laws restricting who can serve in a legislative body potentially threaten a "fundamental principle of our representative democracy"—that "the people should choose whom they please to govern them." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 819 (1995). Term limits are one category of such laws. They "unquestionably restrict the ability of voters to vote for whom they wish." *Id.* at 837. And although this Court has decided that states lack the authority to impose term limits on *federal* officeholders, *id.*, it has never assessed the constitutionality of term limits on state and local officeholders. Because the lower courts lack guidance from this Court about how to

evaluate constitutional challenges to such term limits, they have developed three different approaches.

A. First, a number of courts have determined that this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), prescribe a three-factor framework for assessing the constitutionality of term limits, although neither case involved term limits.

The Nevada Supreme Court's decision in *Nevada Judges Association v. Lau*, 910 P.2d 898 (Nev. 1996), illustrates this approach. There, a voter-passed initiative precluded state judges from being elected "more than twice for the same court," among other restrictions. *Id.* at 900. According to the court, the "test for determining the constitutionality of [such] state restrictions on elections" lies in *Anderson*'s three factors, which the court applied. *Id.* First, in one sentence, the court held that the "nature of the asserted injury" was not "unconstitutionally severe" because the "right to run for office" is not "fundamental," and because term limits do not "hinder the equal participation of all citizens to vote in an election." *Id.* at 901. Second, the court said the state "can claim" an interest in broadening the judiciary's composition, "eliminating unfair incumbent advantages," and "discouraging entrenched power bases." *Id.* at 902. Finally, in the court's view, a "lifetime ban" may be necessary to further the state's interests because the judiciary's composition "might not change as drastically" otherwise. *Id.* The court "also note[d]" briefly that the restriction was "nondiscriminatory," but this did not drive its decision. *Id.*

Other courts have similarly understood *Anderson* (along with *Burdick*) to have created a multipronged standard requiring broad, ad hoc weighing of

individual interests against state authority, each time concluding that the challenged term limits satisfied this nebulous rubric. *E.g.*, *Legislature v. Eu*, 816 P.2d 1309, 1324 (Cal. 1991); *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 819 (S.D. Ohio 1993), *aff'd*, 45 F.3d 126 (6th Cir. 1995); *Cawdrey v. City of Redondo Beach*, 15 Cal. App. 4th 1212, 1228–29 (1993); *Ray v. Mortham*, 742 So. 2d 1276, 1285 (Fla. 1999).

B. In a second line of cases, courts have also applied *Anderson* and *Burdick* to term limits, but have done so in a way that focuses on whether the challenged restriction is content-neutral and nondiscriminatory. If it is, the term limit will likely be ruled constitutional. The Ninth Circuit's en banc decision in *Bates v. Jones* is the leading example of this approach.

"Most important" to the determination in *Bates* that the two- and three-term limits there were not "severe" was the fact that they were not a "discriminatory restriction." 131 F.3d 843, 847 (9th Cir. 1997). Specifically, they made "no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender." *Id.* They likewise did not limit political participation of an "'identifiable political group whose members share a particular viewpoint, associational preference, or economic status.'" *Id.* (quoting *Anderson,* 460 U.S. at 793).

Other courts have taken a similar discrimination-centric approach, concluding that as long as term limits don't "creat[e] an invidious class distinction" or "adversely or uniquely" impact an "identifiable group," they are not subject to heightened scrutiny. *Dutmer v. City of San Antonio*, 937 F. Supp. 587, 592 (W.D. Tex. 1996); *League of Women Voters v. Diamond*, 965 F. Supp. 96, 103–04 (D. Me. 1997) (citing

Bates); *Rudeen v. Cenarrusa*, 38 P.3d 598, 608 (Idaho 2001) (same).

C. Third, in a category of its own is *Kowall v. Benson*, 18 F.4th 542, 545 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 88 (2022), where the Sixth Circuit held that neither *Anderson* nor *Burdick* governed a challenge to Michigan's two- and three-term limits for state legislators. Those authorities were "inapposite" because they "should be used by courts 'considering a challenge to a state election law,'" and "term limits," according to the Sixth Circuit, "are not state election laws" at all. *Id.* at 547 (quoting *Burdick*, 504 U.S. at 434). Rather, they're "the state's attempt to set qualifications for its officeholders." *Id.* In the Sixth Circuit's view, term limits don't "keep[] eligible candidates off the ballot—like the prototypical ballot-access or freedom-of-association case"—but rather "restrict eligibility for office . . . [l]ike any other qualification." *Id.* (citing *Bates*, 131 F.3d at 859 (Rymer, J., concurring in the result)).

The Sixth Circuit thus concluded that term limits should be reviewed only for a rational basis—becoming the only court to do so—and upheld the term limits at issue. *Kowall*, 18 F.4th at 547–48.

D. The California Court of Appeal's opinion in this case falls squarely into the *Bates* camp. The court held that so long as a term limit is "generally applicable, even-handed, [and] politically neutral," it should be analyzed under a relaxed standard. App., *infra*, 65a–66a.

In effect, this approach means the only term limits meriting close scrutiny are those that discriminate based on suspect class or protected speech. But the upshot of that test is that *no* generally applicable term

limit—however stringent—will be vulnerable to challenge. Term limits are, by their nature, nondiscriminatory and content-neutral. The approach adopted by the Ninth Circuit and the Court of Appeal here thus amounts to a rubber stamp for *any* term limit whatsoever, no matter how short. Members of the California State Assembly, for example, could permissibly be limited to a single two-year term.

In short, when it comes to how to analyze the constitutionality of term limits, courts can't agree on much of anything. Some root their analysis mostly in *Anderson*'s three-part balancing test. Others look principally for discrimination against suspect classes—a curious approach, given that term-limit laws typically have nothing to say about such classes. And one has said such laws are always subject to rational-basis review. As things stand, therefore, materially identical term-limit laws challenged in different jurisdictions will be subject to different tests.

II. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS APPLYING HEIGHTENED SCRUTINY TO OUTRIGHT BANS ON CANDIDACY

The California Court of Appeal's decision not only entrenches an existing conflict but also departs from this Court's framework for electoral laws that bar candidates from accessing the ballot. In fact, all three approaches that have taken hold in the lower courts—an amorphous application of *Anderson*, a discrimination-focused application of *Burdick*, and a wholesale sidestepping of ballot-access cases in favor of rational-basis review—conflict with this Court's precedents. Only this Court's review can get the lower courts' review of term limits back on track.

This Court has held that limitations on who can run for office affect "two different, although overlapping, kinds of rights," both of which "rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968).

One is the First Amendment right of voters "to associate for the advancement of political beliefs" by supporting the candidates of their choice. *Williams*, 393 U.S. at 30–31. Excluding candidates from the ballot burdens this right of association "because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson*, 460 U.S. at 787–88. In *Anderson*, for example, the Court held that an early filing deadline for independent candidates impermissibly "limit[ed] the opportunit[y] of independent-minded voters to associate in the electoral arena." *Id.* at 794.

The other precious freedom is the fundamental right of voters "to cast their votes effectively." *Williams*, 393 U.S. at 30–31. Voters have an interest in "find[ing] on the ballot a candidate who comes near to reflecting [their] policy preferences." *Lubin*, 415 U.S. at 716. "[V]oters," after all, "can assert their preferences only through candidates or parties." *Id.* These interests are implicated where particular candidates are excluded—for example, in *Lubin*, where filing fees kept indigent candidates off the ballot. *Id.* at 717. The exclusion of a candidate eliminates voters' ability to express their preference through that candidate. "The right of a party or an individual to a place on a ballot is [thus] . . . intertwined with the rights of voters." *Id.* at 716.

This Court has repeatedly addressed how the First and Fourteenth Amendments regulate states'

ability to restrict these rights by placing obstacles between candidates and the ballot. These ballot-access cases recognize, first and foremost, that *all* laws governing "the selection and eligibility of candidates" burden "at least to some degree" both individual voting rights and the "right to associate with others for political ends." *Anderson*, 460 U.S. at 788. The Court has repeatedly declined to provide a "litmus-paper test" to "separate valid from invalid restrictions." *Id.* at 789. But there is nevertheless a clear through-line in these cases: restrictions that amount to *complete* bars on candidacy trigger more searching scrutiny.

Two of this Court's precedents reviewing laws limiting nonparty candidates' ballot access illustrate that regulations of the same kind but differing degree can merit different scrutiny; where one poses an *absolute* bar to candidacy, it demands a closer look.

The first is *Williams*, where this Court considered Ohio signature-gathering requirements that "made it virtually impossible" for third parties or independents to get on the ballot. 393 U.S. at 24. Because these restrictions were *insurmountable*—they created a "complete monopoly" for Republicans and Democrats—Ohio had the burden of showing a "compelling interest" to "justif[y] imposing such heavy burdens on the right to vote and to associate." *Id.* at 31–32. And it failed to do so. *Id.* at 31.

The second is *Jenness v. Fortson*, 403 U.S. 431 (1971), where Georgia laws merited lesser scrutiny because they didn't completely bar candidates from the ballot. Specifically, the Court held that while a 5% signature-gathering requirement for getting a third-party or independent candidate's "name printed on the ballot" made it harder to reach voters, the system still allowed write-in candidates, unlike the regime in

Williams. *Id.* at 432, 438. Thus, because the laws in *Jenness* still offered a path for third-party candidacy and imposed reasonable filing deadlines, they could be justified by "an important state interest." *Id.* at 438, 442.

What separated *Jenness* from *Williams*, in short, was the "open quality" of Georgia's scheme. *Jenness*, 403 U.S. at 439. It left reasonable means for third-party candidates to reach voters, *id.*, unlike the law in *Williams*, which effectively made it "impossible" to do so, 393 U.S. at 24. *See Bullock v. Carter*, 405 U.S. 134, 143 (1972) (distinguishing *Jenness* and *Williams* based on a "realistic" assessment of "the extent and nature of [the law's] impact on voters").

The decision in *Storer v. Brown*, 415 U.S. 724 (1974), illustrates the same principle. There, this Court considered a pair of California laws—one barring candidates from running as independents if they'd been registered with a party within one year of the last primary, and another imposing on independents a 5% signature-gathering requirement. *Id.* at 726–27.

This Court held the first law was justified by the state's "compelling" interest in the "stability of its political system," which "outweigh[ed] the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." *Storer*, 415 U.S. at 736.

The signature-gathering requirement, however, was a different story. Given California's size and the election timeline, that requirement would have forced candidates to gather some 325,000 signatures in 24 days—"in excess, percentagewise, of anything the Court has approved to date as a precondition to an

independent's securing a place on the ballot." *Storer*, 415 U.S. at 739. So the Court remanded that case for a determination whether the law functionally barred independent candidates from running. *Id.* at 741. The determining factor in *Storer*, again, was whether the law created a realistic and surmountable burden, or whether it effectively prevented some would-be candidates from participating in the political process. If the latter, it would be constitutionally suspect. *Id.*

Finally, this Court's cases on filing fees provide another example of nondiscriminatory and content-neutral election laws that still merit close scrutiny because of their prohibitive nature.

In *Bullock*, for example, the Court considered a challenge to Texas laws creating filing-fee requirements for name placement on primary-election ballots. 405 U.S. at 135–36. The "threshold question" was whether the filing-fee system need only withstand rational-basis review or, instead, a "more rigid standard." *Id.* at 142. "[I]n every practical sense," the Court explained, the filing fees' sheer "size" ($1,000 in 1972) precluded non-wealthy candidates from seeking their party's nomination, no matter their "qualifi[cations]" or degree of "popular support." *Id.* at 143. This would deny an "undetermined number of voters the opportunity to vote for candidates of their choice." *Id.* at 149. Because of this "appreciable impact" on the "exercise of the franchise," the Court held the filing fees "must be '*closely scrutinized*' and found reasonably necessary to the accomplishment of legitimate state objectives." *Id.* at 144 (emphasis added). Under that rigorous standard, Texas's "patently exclusionary" filing-fee system was unconstitutional. *Id.* at 143.

Two years later, in *Lubin*, the Court held that requiring a substantial filing fee to run for the Los Angeles County Board of Supervisors "'heavily burdened'" the right to vote, in part because doing so was "exclusionary as to some aspirants" ("indigent," would-be candidates) and provided no "reasonable alternative means of ballot access." 415 U.S. at 716–18. The $701.60 filing fee, the Court noted, was "an absolute, not an alternative, condition, and failure to meet it [meant] disqualification from running for office." *Id.* at 718. It failed constitutional scrutiny, the Court held, because it was not "reasonably necessary" to the accomplishment of "legitimate election interests." *Id.*

As in *Williams*, *Storer*, and *Bullock*, *Lubin*'s application of heightened constitutional scrutiny can't be explained by suspect-class or protected-speech discrimination. Rather, the regulation in *Lubin* was suspect because for those who couldn't afford the filing fee, it acted as an "absolute, not an alternative, condition" and a "disqualification from running for office." 415 U.S. at 718.

Collectively, these cases offer a workable and appropriate standard for challenges to term limits, too. Laws that impose insurmountable bars to candidacy merit heightened judicial scrutiny. That should be true for laws barring incumbency as much as for laws prohibiting third-party candidacy, or laws requiring excessive filing fees or signature counts. As with these other types of laws, a wholesale ban on incumbency like Measure K completely blocks ballot access, leaving candidates with no alternative means of reaching the electorate. This "patently exclusionary character" means that such a stringent term limit should be "'closely scrutinized'" and not merely rubber-stamped. *Bullock*, 405 U.S. at 143–44. But under

decisions like the one below, no term-limit law will be subject to a serious constitutional challenge because the law inevitably won't discriminate against any protected class.

The unusual harshness of Measure K exposes the unsuitability of the discrimination-centric test that the Court of Appeal applied. But it's entirely possible that none of the three tests adopted by lower courts would ever call term limits into constitutional doubt—a result difficult to square with the weight of the voting rights those limits implicate. Whether a term limit is unusually strict, like the one-term limit imposed by Measure K, or run-of-the-mill, like the three-term limit imposed by Measure D, courts should have a workable test for assessing its constitutionality.

The Court should thus grant review to decide the standards courts should apply to constitutional challenges to term limits generally, and to outright bans on incumbency in particular.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS D. BUNTON
County Counsel
SAN BERNARDINO COUNTY
385 N. Arrowhead Ave.
San Bernardino, CA 92415
(909) 387-4600

THEODORE J. BOUTROUS, JR.
Counsel of Record
KAHN A. SCOLNICK
JONATHAN N. SOLEIMANI
DANIEL R. ADLER
EITAN AROM
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
TBoutrous@gibsondunn.com

Counsel for Petitioner

November 14, 2023