

No. 19-974

In The
Supreme Court of the United States

WILLIAM T. SCHMITT, *et al.*,

Petitioners,

v.

FRANK LAROSE, OHIO SECRETARY OF STATE,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

**BRIEF OF DIRECT DEMOCRACY SCHOLARS
AS AMICI CURIAE SUPPORTING PETITIONERS**

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INTEREST OF AMICI CURIAE¹

Amici are leading political science scholars who have devoted much of their careers to studying direct democracy in the United States:

- Todd Donovan is a Professor of Political Science at the Western Washington University.²
- Janine Parry is a Professor of Political Science at the University of Arkansas and Director of the University of Arkansas Poll.
- Daniel A. Smith is the Chair of the Department of Political Science at University of Florida.
- Caroline J. Tolbert is a Professor of Political Science at the University of Iowa.

Amici have an established and longstanding interest in understanding the operation of the citizens' initiative process in the United States. Among Amici's areas of expertise is the democratic process for initiating and qualifying for ballot referendum.

¹ No counsel for a party authored this brief in whole or in part; no such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief; and no person or entity, other than the amici curiae or their counsel, made such a monetary contribution. See Sup. Ct. R. 37.6. The parties have been given proper notice of amici's intention to file, and all parties have consented in writing to the filing of this brief.

² Affiliations provided for identification purposes only.

Amici regularly teach, write, and research about direct democracy issues, including the processes of citizens' initiative campaigns, communicating and speaking with voters via face-to-face petitioning and political advertising, as well as the effects the citizens' initiative process has on civic engagement.

Amici submit this brief to highlight the importance of the citizens' initiatives, their widespread and growing use, and the chilling effect subject-matter restrictions have on this important form of political speech.

SUMMARY OF ARGUMENT

The citizen's initiative is a popular tool of direct democracy in this country. The use of initiatives is widespread and frequent. They promote political speech and citizen engagement, and they drive voter turnout.

The subject-matter restrictions the States impose on these initiatives chill important political speech and activity. The Courts of Appeals continue to disagree on whether and to what extent such subject-matter restrictions implicate First Amendment rights. This Court's guidance is needed.

The question the Petition presents is a recurring one both because the use of the citizens' initiative has substantially increased in the past decade and because the subject-matter restrictions imposed by State and local governments are prone to conflicting interpretations. The Court should grant the Petition.

ARGUMENT

I. The Citizens' Initiative Has Become A Common Feature Of The American Political Process.

"Direct democracy" describes processes through which citizens directly participate in policy decision-making. One example is the citizens' initiative, often referred to as "ballot measures" or "propositions." This particular process gives citizens a direct say in which measures are put up for a vote *and*

in how those measures are resolved. Citizens propose initiatives themselves, and if enough of their fellow citizens concur (by providing their signatures), the initiative is put on the ballot; then, the initiative is accepted or rejected by popular vote.

Representative democracy is the form of government the Constitution establishes at the federal level. The States, however, may exercise the powers reserved to them under the Tenth Amendment to employ techniques of direct democracy. In the late-nineteenth century, during a nationwide populist movement, the States began to empower their citizens to legislate directly.

In 1898, South Dakota became the first State to adopt the direct democracy techniques of initiative or referendum. David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the U.S.*, at 39 (1984). In 1902, Oregon followed suit. *Id.* Most of the States that now have these processes adopted them between 1898 and 1918. *Id.* at 38–39. More States joined the fray gradually during the twentieth century—Alaska in 1959 (upon attaining statehood), Wyoming in 1968, Illinois in 1970, Florida in 1978, and Mississippi in 1992. Direct democracy now exists in 24 states. No State has repealed its provisions for initiative or referendum after adoption.

Many eligible local governments have also opted to afford their residents with the right to participate in the referendum process. See, e.g., *City of Tucson v. Arizona*, 273 P.3d 624, 626 (Ariz. 2012). The City

of Los Angeles, for example, did so back in 1903. John Allswang, *The Origins of Direct Democracy in Los Angeles & Cal.*, 78 S. CAL. Q. 175, 179 (1996). And, when new cities are incorporated, the trend is for residents to seek greater local control by retaining the right to enact or prohibit laws through popular referendum.

Today, more than seventy percent of the U.S. population resides in a State or city where they enjoy the right to enact or challenge laws by referendum. John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 186 (2005). That percentage is increasing in tandem with population growth in States that endorse direct democracy, like California and Florida.

As the number of State and local governments to adopt initiative or referendum has grown, so too has the prevalence of citizen-driven propositions being put up for vote. Between 1990 and 2009, for example, more than 700 statewide initiatives reached the ballot. See Todd Donovan, *N. Am. & the Caribbean*, in *Referendums Around the World: The Continued Growth of Direct Democracy*, at 138 (M. Qvortup ed., 2014). Hundreds more citizen initiatives have appeared at the local level.

Still, as happened in this case, subject-matter restrictions have kept many initiatives—supported by the requisite number of signatures—off the ballot. See *infra* Part IV.

II. The Citizens' Initiative Is And Promotes Political Speech.

Citizens' initiatives stimulate political dialogue. "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting). The laboratory of democracy, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting), often operates at the ballot box.

This Court has long recognized that the circulation of a ballot initiative involves core political speech. *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). "The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *First Nat. Bank v. Bellotti*, 435 U.S. 765, 791–92 (1978). Those arguments are often presented to the electorate through television and radio broadcasts, pamphlets, social media, and town hall debates. "The First Amendment protects [such] political speech." *Citizens United v. F.E.C.*, 558 U.S. 310, 371 (2010).

Campaign spending on advertisements generally provides "a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Accord *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 369 (E.D. Pa. 1992). The volume of political

speech in the arena of citizen initiatives is substantial and consequential. Thomas Stratmann, *Is Spending More Potent for or Against a Proposition? Evidence From Ballot Measures*, 50 AM. J. POL. SCI. 788, 792 (2006). In the 2008 and 2012 general election cycles, more money was spent on communicating with voters about state-level ballot measures than was spent on all 7,382 state legislative races in the country combined. Donovan, *N. Am. & the Caribbean*, *supra*, at 141–44. And more money was spent on state-level ballot measures than the winning 2008 U.S. presidential campaign. *Id.*

In 2002, registered issue committees spent more than \$173 million nationwide on promoting or fighting certain ballot measures; in 1998, that amount exceeded \$400 million. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors & Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L. J. 295, 238 (2005). Such spending for initiatives is not new; it was common even when direct democracy was used in the early-twentieth century. Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL'Y HIST. 349, 368 (2002).

Though campaign speech is not perfect (sometimes inaccurate), this was a “danger contemplated by the Framers of the First Amendment.” *Bellotti*, 435 U.S. at 792. The electorate must deliberate by weighing “the source and credibility of the advocate.” *Id.* The First Amendment promotes this political discourse.

III. The Citizens' Initiative Drives Voter Engagement.

Given the amount of time and money spent on initiative campaigning, it is no surprise that citizens become attentive and responsive to political communication in the arena of direct democracy. The presence of initiatives on ballots often corresponds with increased voter turnout at both the state and local level. See, *e.g.*, Caroline J. Tolbert, Ramona S. McNeal & Daniel A. Smith, *Enhancing Civic Engagement: The Effect of Direct Democracy on Political Participation & Knowledge*, 3 ST. POL. & POL'Y Q. 23, 29 (2003); Zoltan L. Hajnal & Paul G. Lewis, *Municipal Insts. & Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 657–58 (2003).

When certain measures appear on the ballot, the electorate is more likely to actively seek out information on the topic. Informed citizens are more likely to turn out to vote. Shauna Reilly, Sean Richey & J. Benjamin Taylor, *Using Google Search Data for State Politics Research: An Empirical Validity Test Using Roll-off Data*, 12 ST. POL. & POL'Y Q. 146, 154–56 (2012). Relatedly, campaign spending for ballot measures—most of which is directed at political communication and advertising—corresponds with increased voter turnout. Caroline J. Tolbert, Daniel C. Bowen & Todd Donovan, *Initiative Campaigns: Direct Democracy & Voter Mobilization*, 37 AM. POL. RES. 155, 160–62 (2009).

Amici's analyses of voter-roll data and signatures on initiative petitions show that political

speech—at the petition phase of initiative campaigns—mobilizes citizens to participate in politics. That is, a prospective voter’s interaction with an initiative canvasser, and any endorsement of that petition, have a substantial effect on voter turnout—particularly in municipal elections. Janine A. Parry, Daniel A. Smith & Shayne Henry, *The Impact of Petition Signing on Voter Turnout*, 34 POL. BEHAV. 117, 119–20, 127–29 (2012).

A random sampling of American public opinion data has demonstrated that having citizen initiatives on the ballot during an election cycle corresponds with a more informed electorate—voters who are more capable of answering factual questions about politics correctly. Daniel A. Smith & Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Orgs. in the Am. States*, at 61–63 (2009). Citizen initiatives—and the political activity associated with them—also increase the diversity of groups engaged in the political process. Frederick J. Boehmke, *The Effect of Direct Democracy on the Size and Diversity of State Interest Group Populations*, 64 THE J. POL. 827, 842 (2002).

In short, the initiative process provides more opportunities for political discourse and promotes a more engaged and informed electorate. Frederick J. Boehmke & Daniel C. Bowen, *Direct Democracy & Individual Interest Grp. Membership*, 72 J. POL. 659, 660 (2010).

IV. The Court's Guidance On The First Amendment's Application To Subject-Matter Restrictions Placed On Ballot Initiatives Is Sorely Needed.

Especially in light of the growing and more frequent use of direct democracy techniques nationwide, the Court's clarification on the First Amendment implications of subject-matter restrictions on ballot initiatives is critical. Too often, after hours of canvassing and gathering enough signatures to qualify, engaged citizens find their ballot initiatives rejected before they ever get to the ballot based on subject-matter restrictions. That has an obvious chilling effect not only on civic engagement, but on political speech. The Petition presents the Court with an excellent opportunity to determine the First Amendment implications of such restrictions.

Amici do not question the need for States to perform some gatekeeping functions. But when political speech is implicated, and where initiative proponents satisfy the procedural requirements to qualify for the ballot, subject-matter restrictions should be limited. Cf. *Ill. Bd. of Elecs. v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (“[A]n election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression.”). Initiative proponents “deserv[e] *** the public scrutiny and debate that would attend *** consideration by the whole electorate.” *Meyer*, 486 U.S. at

421. The States subject initiatives to an array subject-matter restrictions that leave citizens uncertain about the permanence of their petitions.

For instance, some states prohibit initiatives that appropriate funds, reverse a decision made by the legislature, or concern the judiciary. Caroline J. Tolbert, Daniel Lowenstein & Todd Donovan, “Election Law and Rules for Initiatives,” *Citizens as Legislatures: Direct Democracy in the U.S.*, at 39 (1998); Magleby, *Direct Legislation: Voting on Ballot Propositions in the U.S.*, at 45. Massachusetts prohibits public financial support for private primary or secondary schools. MASS. CONST. amend. art. 18. And in Illinois, residents may petition only to altering the legislative process. See *Coal. for Political Honesty v. Ill. Bd. of Elecs.*, 65 Ill. 2d 453, 466 (Ill. 1976).

Other subject-matter restrictions for initiatives are much less defined and thus are more subjective. California prohibits initiatives that “amend” the State Constitution, but not those that “revise” it. Tolbert, et al., *Election Law & Rules for Initiatives*, at 40–41. Other States, like Ohio, prohibit initiatives that deal with “administrative” as opposed to “legislative” questions. *Id.* at 39. These vague and ill-defined restrictions give government officials considerable discretion to veto initiative petitions. See Roger W. Caves, *Land Use Planning: The Ballot Box Revolution*, at 66 (1992) (noting no clear-cut distinction between “legislative” and “administrative” matters). Naturally, the results are often conflicting and unpredictable.

That is precisely what happened in this case. Despite satisfying all the procedural requirements to qualify for the ballot, Petitioners' initiatives were rejected by the Portage County Board of Elections because it determined that they were "administrative" in nature. Meanwhile, neighboring counties' election boards deemed that the exact same initiatives "legislative" and put them on the ballot. Such amorphous subject-matter regulations bring disorder to direct democracy by chilling political speech.

Courts continue to struggle with the First Amendment implications of these subject-matter restrictions. The Circuits are split over whether the First Amendment applies to subject-matter restrictions on ballot initiatives at all, and if so, what level of scrutiny applies. See Pet. 9–17. "[A]s the desire to use the initiative and referendum [process] grows," courts will continually be called to resolve such disputes. Caves, *Land Use Planning: The Ballot Box Revolution*, at 71. Without the Court's guidance, this issue will continue to divide the Courts of Appeals, as well as state judicial and administrative bodies.

CONCLUSION

The Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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