No. 20-1072

In the Supreme Court of the United States

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

Petitioners,

v.

MIKE DEWINE, GOVERNOR OF OHIO; STEPHANIE MCCLOUD, DIRECTOR OF OHIO DEPARTMENT 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

BRIEF IN OPPOSITION

DAVE YOST
Attorney General of Ohio
BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
Deputy Solicitor General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for Respondents

QUESTION PRESENTED

Does the right to free speech include the right to have a voter initiative placed on the ballot without undue burden?

LIST OF PARTIES

The petitioners are Chad Thompson, William T. Schmitt, and Don Keeney.

The respondents are Ohio Governor Mike DeWine, Ohio Secretary of State Frank LaRose, and Director of the Ohio Department of Health Stephanie McCloud, all of whom are being sued in their official capacities. The petition for a writ of *certiorari* lists Dr. Amy Acton, former Director of the Ohio Department of Health, as a defendant. Dr. Acton stepped down before the Sixth Circuit issued its merits decision, and has since been replaced by McCloud.

LIST OF DIRECTLY RELATED PROCEEDINGS

The petitioners' list of directly related proceedings is complete and correct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

The petitioners ask this Court to decide "[w]hether and how the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot." Pet.i. That important question is the subject of an entrenched circuit split. This Court should answer the question soon. For two reasons, however, this is not the case in which to do so. First, it is unclear whether the Court has jurisdiction, because the case is at least arguably moot. Second, the petitioners lose on the merits regardless of the answer to the circuit split; every circuit's approach to the question presented requires upholding Ohio's ballot-access laws. As such, the Court could affirm without resolving the circuit split. Thus, the question on which the circuits have divided is not cleanly presented.

The Court should deny the petition for a writ of *certiorari* and await a better vehicle for deciding the important question presented.

STATEMENT

1. The Ohio Constitution reserves to the People the right to make law by initiative. Ohio Const. art. II, §§1, 1a, 1f. Relevant here, Ohioans may, by initiative, enact municipal legislation "on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action." Ohio Const. art. II, §1f.

Ohio's Constitution and Revised Code guide the initiative process, setting forth a variety of eligibility requirements that initiatives must satisfy before being placed on the ballot. Ohio Const. art. II, §§1a–1b, 1g; Ohio Rev. Code §3501.38(B), (E)(1). Among other things, Ohio law requires initiative proponents to

gather enough signatures to establish the public's interest in turning the proposed initiative into law. In the case of municipal initiatives, proponents must collect signatures equal in number to at least ten percent of the total votes cast by the municipality in the most recent governor's race. Ohio Rev. Code §731.28.

Three rules governing the signature-collection process are especially relevant to this case.

First, Ohio law imposes an "ink requirement." That is, initiative proponents must gather a sufficient number of signatures hand-signed in ink. Ohio Rev. Code §3501.38(B). To be counted, each signature must match the signature that is on file with election officials. *See* Ohio Rev. Code §§731.31, 3519.01(B)(2)(a), 3519.15; *State ex rel. Mann v. Del. Cnty. Bd. of Elections*, 143 Ohio St. 3d 45, 47 (2015); *State ex rel. Yiamouyiannis v. Taft*, 65 Ohio St. 3d 205, 208–09 (1992).

Second, Ohio law imposes a "witness requirement." To meet this requirement, petition circulators must attest that they "witnessed the affixing of every signature." Ohio Rev. Code §3501.38(E)(1).

Third, Ohio law sets deadlines by which initiative proponents must submit valid signatures. Proponents of municipal initiatives must gather the required signatures at least 110 days before the election. *See* Ohio Rev. Code §731.28. Thus, for the November 2020 election, supporting signatures had to be submitted by July 16, 2020.

County boards of elections have just ten days to verify the authenticity of signatures submitted in support of a municipal initiative. Ohio Rev. Code

§731.28. Any party aggrieved by that verification process may then challenge the results in the Supreme Court of Ohio. *See State ex rel. N. Main St. Coal. v. Webb*, 106 Ohio St. 3d 437, 441–46 (2005). The signature review and any related litigation must be completed in time for the boards of elections to finalize and print ballots. And those ballots must be ready at least forty-six days before an election, which is when overseas and military voting begins. *See* Ohio Rev. Code §3509.01(B)(1).

2. The COVID-19 pandemic reached Ohio by mid-March. In the time since, Governor Mike DeWine and the Ohio Department of Health have taken numerous steps to protect the health and safety of Ohioans. Relevant here, they have issued orders restricting certain activities. These orders have always been temporary. And, on the whole, the restrictions in these orders have lessened over time. *See* April 30, 2020 Order, https://tinyurl.com/y7s6cre2; May 20, 2020 Order, https://bit.ly/303A8de; December 10, 2020 Order, https://bit.ly/3tovRNJ; January 27, 2021 Order, https://bit.ly/39MqgJv

Even at their peak, these orders always sought to balance concerns for protecting Ohioans' health with the duty to protect Ohioans' rights. As a result, pandemic-related restrictions have never been absolute. For example, the stay-at-home orders in place during March and April of 2020 exempted a variety of essential activities. March 22, 2020 Order ¶¶7–14, https://tinyurl.com/y8urb7mn; April 2, 2020 Order ¶¶7–14, https://tinyurl.com/vbwpwp2. And *every* order restricting the public's conduct has expressly permitted individuals to engage in activity protected by the First Amendment. *See* April 30, 2020 Order ¶4,

https://tinyurl.com/y7s6cre2; April 2, 2020 Order ¶12g, https://tinyurl.com/vbwpwp2; March 22, 2020 Order ¶12g, https://tinyurl.com/y8urb7mn; March 17, 2020 Order ¶5, https://tinyurl.com/y9zfcnpq. Under well-settled law, the First Amendment protects the right to collect signatures in support of ballot initiatives, because the gathering of signatures is political speech. *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). (The *unsettled* question that this case presents is whether the First Amendment *additionally* confers a right to have one's proposed initiative included on the ballot. *See below* 14–32.) Thus, all initiative proponents seeking ballot access for the 2020 General Election were free to solicit signatures throughout the pandemic. To remove any doubt, the April 30, 2020 Order expressly listed the circulation of "petition[s] or referend[a]" as an example of First Amendment activity exempt from the stay-at-home order. *See* April 30, 2020 Order ¶4, https://tinyurl.com/y7s6cre2. Thus, initiative proponents were unquestionably free between April 30 and the July 16 deadline to gather the needed signatures.

In the months since the November 2020 election, the State has continued to exempt speech protected by the First Amendment from the restraints imposed by its health orders. *See, e.g.*, November 15, 2020 Order ¶5, https://bit.ly/3azEMTQ; December 10, 2020 Order ¶2, https://bit.ly/3tovRNJ; January 27, 2021 Order ¶2, https://bit.ly/39MqgJv. And the restrictions these orders impose are not as stringent as restrictions imposed by the orders in place at the beginning of the pandemic. For a time this winter, the State imposed a curfew (first at 10 P.M., then at 11 P.M.), and forbade gathering in large groups (subject to some exceptions) during the day. *See* November

15, 2020 Order ¶1, https://bit.ly/3azEMTQ; December 10, 2020 Order ¶1, https://bit.ly/3tovRNJ; January 27, 2021 Order ¶1, https://bit.ly/39MqgJv; March 2, 2021 Order ¶1, https://bit.ly/3ek0X44. As of February 11, there is no longer any curfew in place at all. And the State permits reduced-capacity crowds at large events, such as NHL and NBA games. *See* Karen Kasler, *Blue Jackets Fans Return as State Loosens Rules on Sports Venues*, Ohio Public Radio (Mar. 3, 2021), https://www.wcbe.org/post/blue-jackets-fans-return-state-loosens-rules-sports-venues.

3. This case began when various plaintiffs and intervenors sued Governor DeWine, Dr. Amy Acton (who was then the Director of the Ohio Department of Health), and Ohio Secretary of State Frank LaRose. For ease of reference, this brief calls the defendants "Ohio" or "the State."

The plaintiffs included the three petitioners here: Chad Thompson, William Schmitt, and Don Keeney, whom this brief will refer to collectively as "Thompson." Thompson regularly circulates municipal initiatives to change marijuana-possession laws. Thompson Compl. ¶5, Pet.App.140a. He sought to place his initiatives on the November 2020 ballot in localities ranging from the large city of Akron to the small village of Cadiz and the even-smaller village of Adena. Stip. Facts ¶¶3–4, R.35, PageID#469.

Thompson alleged that the ink requirement, the witness requirement, and the July 16 signature-gathering deadline all violated the First Amendment's Free Speech Clause. According to him, the pandemic made it too difficult to gather signatures in person, and thus too difficult to obtain and witness enough signatures by the July 16 deadline. *See, e.g.*,

Thompson Compl. ¶52, Pet.App.152a. Critically, Thompson challenged the constitutionality of the signature-gathering rules only in connection with the November 3, 2020 election. He did not argue that the rules were invalid on their face. And he did not seek relief in connection with any other elections. Rather, his demand for relief asked for injunctive and declaratory relief that would either order his proposed initiatives to be placed on the "November 3, 2020 election ballots," or else make it easier to gather a sufficient number of signatures for the "November 3, 2020 election ballots." *Id.*, Pet.App.156a–157a.

In moving for preliminary relief, Thompson relied on a sparse record. The parties stipulated to some background facts, many of which simply summarized Ohio's pandemic response. *See* Stip. Facts, R.35, PageID#469–75. Thompson never supplied any evidence about his efforts to collect signatures while the stay-at-home orders were in effect or at any time thereafter.

4. On May 19, the District Court granted the request for a preliminary injunction as to the ink requirement, the witness requirement, and the July 16 signature deadline. Pet.App.65a. On the merits, the District Court held that the requirements and the deadline likely violated the First Amendment by unduly restricting ballot access "during a global pandemic." Pet.App.39a. To reach that holding, the court applied the *Anderson-Burdick* test—a flexible test that requires weighing the burdens a state law imposes against the state interest it furthers. Pet.App.45a. Under *Anderson-Burdick*, severe burdens on First Amendment interests are strictly scrutinized, while lesser burdens are reviewed more def-

erentially. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019).

The District Court acknowledged that, "[i]n ordinary times," Ohio would have "considerable leeway" to set the requirements for its ballot-initiative process. Pet.App.49a (quotations omitted). But the "unique historical circumstances of a global pandemic" diminished the leeway afforded. Pet.App.50a. Those unique circumstances elevated the standard of review, the District Court held, transforming Ohio's signature requirements into a severe burden deserving of strict scrutiny. Pet.App.52a. And the court held that the challenged laws all failed strict scrutiny. The court said that the ink and witness requirements were not narrowly tailored to promoting state interests because other approaches—such as allowing signatories to electronically "sign" petitions online using the last four digits of their social security numbers, instead of making them physically sign a petitions by hand—*might* work to verify the identities of the signatories. Pet.App.55a–56a. And the court suggested that the State did not need pre-election review to further its interest in stopping fraud; it could further that interest with after-the-fact criminal prosecutions. *Id.* Finally, with respect to the signature-gathering deadline, the court concluded the deadline was not "narrowly tailored in light of Plaintiffs' inability to safely circulate petitions" during the pandemic. Pet.App.59a.

The District Court enjoined the ink and witness requirements. Pet.App.65a–66a. In place of those requirements, it ordered the State to "accept electronically-signed and witnessed petitions."

Pet.App.65a. The District Court further ordered the parties to meet and confer to iron out the many unspecified "technical" and "security" issues that its injunction left unresolved. *Id.* The District Court also enjoined enforcement of Ohio's July 16 signature-gathering deadline, though without setting any alternative deadline. *See id.*

5. Ohio immediately appealed and sought a stay pending appeal. The Sixth Circuit granted a stay the next week. Pet.App.14a–25a. It initially noted a circuit split over the applicable standard; it recognized that the Tenth and D.C. Circuits had held that laws governing the mechanics of the initiative process do not implicate the Free Speech Clause *at all*. Pet.App.17a–18a n.2. The court signaled openness to this view. *Id.* But, based on binding panel precedent, the court accepted the applicability of the First Amendment and proceeded to assess the challenged provisions' constitutionality using the *Anderson-Burdick* test. *Id.*

The Sixth Circuit began by rejecting the lower court's determination that Ohio's signature requirements imposed a severe burden. It held the burden was instead "intermediate." Pet.App.19a–22a. In reaching this conclusion, it credited, as "vitally important," the fact that Ohio's pandemic-related restrictions permitted First Amendment activity, including signature gathering. Pet.App.20a. Ohio's actions, therefore, did not "exclude[] or virtually exclude[]" the plaintiffs' initiatives from the ballot. Pet.App.19a. The plaintiffs could have adapted their behavior "within the bounds of our current situation, such as through social or traditional media inviting interested electors to contact them." Pet.App.20a–

21a. What is more, the panel explained, the State could not be held liable for "private citizens' decisions to stay home for their own safety." Pet.App.21a.

The court next concluded that the intermediate burden was justified by the important state interests advanced by the July 16 deadline, the ink requirement, and the witness requirement. The ink and witness requirements advanced Ohio's "compelling and well-established interests in administering its ballot initiative regulations" in a manner that ensures signatures are authentic and verified in an orderly fashion. Pet.App.22a. The July 16 deadline played a critical role in this process, too, as it allowed time for verification and judicial review before printing was to begin. And moving one deadline would necessarily interfere with all these downstream tasks. Pet.App.24a.

Lastly, the Sixth Circuit stressed that the District Court "exceeded its authority" by entering an injunction forcing Ohio to accept electronic signatures through some yet-to-be-determined process on which the District Court provided no guidance. Pet.App.23a–24a. The Sixth Circuit explained that the District Court was not "free to amend the Ohio Constitution," particularly not in a way that forced the State to experiment on the fly with new ballot-access processes mere months before a Presidential election. Pet.App.23a.

6. Thompson applied to this Court for an order vacating the Sixth Circuit's stay order. The Court denied the request without any noted dissents. *See* Pet.App.13a.

Back in the Sixth Circuit, Thompson never moved to expedite the resolution of his case. And in the absence of any such request, the Sixth Circuit set a non-expedited briefing schedule. It eventually resolved the case in mid-September, relying primarily on the same analysis it had used in its stay-stage opinion. *See* Pet.App.1a–12a. (In his merit brief to the Sixth Circuit, Thompson included a new procedural argument. He argued that, by failing to file an answer before appealing the preliminary injunction, Ohio had admitted it was "impossible" to gather signatures during the pandemic. Pet.App.89a–90a; *accord* Pet.5. The Sixth Circuit disagreed, in part because Ohio "consistently argued, both before the district court and" on appeal, "that it wasn't impossible … to collect signatures." Pet.App.5a n.5.) Thompson did not seek any further relief from this Court before the November 3 election.

Nearly six months later, on February 2, 2021, Thompson filed his petition for a writ of *certiorari*.

REASONS FOR DENYING THE PETITION

The Court should deny the petition for a writ of *certiorari*. The case now presents a serious jurisdictional question. Even if jurisdiction were clear, this case would be a bad vehicle for addressing the question of whether and how "the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot," Pet.i, because Thompson loses no matter how the Court answers that question.

I. This is a bad vehicle for addressing the question presented because it is unclear whether the Court has jurisdiction.

Thompson brought this case so that he could secure ballot access for his initiatives in connection with the November 3, 2020 election. That election ended months ago. As a result, the case is at least arguably moot. The antecedent jurisdictional question is serious enough that it counsels against granting review of the merits question that Thompson asks this Court to consider.

A. "Article III of the Constitution limits federal-court jurisdiction to 'cases' and 'controversies.'" *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016) (quoting U.S. Const. art. III, §2). If there *ceases* to be a case or controversy between the parties at any time, the case is "moot" and the federal courts lack jurisdiction to hear it. *Id.* at 160–61. There ceases to be a case or controversy, this Court has said, when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* at 160 (quoting *Knox v. Serv. Emps.*, 567 U.S. 298, 307 (2012)).

There is one "exception to the mootness doctrine" that may be important here: cases that are "capable of repetition, yet evading review," may be decided even after they become moot. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (quotation omitted). This exception applies "only if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* (quotations omitted).

B. These principles support a mootness finding in this case. Thompson's complaint alleges that the signature-gathering requirements were too burdensome *as applied to* the November 3, 2020 election. For example, he alleged: "Under present circumstances, Ohio's ballot-access requirements for popular measures proposed for Ohio's November 3, 2020 election violate rights guaranteed to [the plaintiffs] by the First and Fourteenth Amendments." Thompson Compl. ¶65, Pet.App.154a; *accord id.*, Pet.App.155a–56a. Thompson's demand for injunctive and declaratory relief similarly focused exclusively on the November 3, 2020 election, asking the District Court to either:

> (1) order the "Defendants to immediately place Plaintiffs' marijuana decriminalization initiatives on local *November 3, 2020 election* ballots without the need for supporting signatures …"
>
> (2) issue an injunction altering or prohibiting the enforcement of the signature-gathering rules for the "November 3, 2020 election"; or
>
> (3) issue a "declaratory judgment … stating that, in light of the current public health emergency," Ohio's signature requirements "for local November 3, 2020 elections" violate the First Amendment.

Id., Pet.App.156a–57a.

Thompson still has not sought relief in connection with any future elections. The closest he came was in one recent filing with the District Court, where he suggested that the pandemic continues to make signature gathering difficult. Response, R.62, PageID#794. But in the many months since the Sixth

Circuit's decision and the election, Thompson has not taken any action to amend his pleadings to seek relief for future elections. Thus, as the record currently stands, this case involves a dispute about the constitutionality of Ohio law in its application to an election that ended months ago. It is *only* in connection with that election that Thompson seeks relief, and *only* in connection with that election that he alleged any constitutional violations. So it is now "impossible for a court to grant any effectual relief whatever" to Thompson in connection with the claims that he brought or the relief he sought. *Campbell-Ewald*, 577 U.S. at 161 (quotations omitted). The end of that election, and Thompson's delay in prosecuting this case, "dooms to mootness" his "First Amendment claims." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2619 (2020) (Sotomayor, J., dissenting from the grant of stay).

The exception for cases capable of repetition yet evading review does not apply here. Again, that exception applies "only if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Sanchez-Gomez*, 138 S. Ct. at 1540 (quotation omitted). Thompson can perhaps satisfy the second requirement. But it does not appear that he can satisfy the first requirement. The time in which to challenge the constitutionality of ballot-access rules is not "always so short as to evade review" in this Court. *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). Indeed, Thompson himself, since he often proposes marijuana-decriminalization initiatives, could have avoided the mootness problem by challenging the constitutionality of the signature-

gathering rules as applied to all elections occurring during the COVID-19 pandemic. Alternatively, Thompson could have sought review in this Court in the month and a half between the Sixth Circuit's decision and Election Day. Finally, there is no reason to think that the question presented—"[w]hether and how the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot," Pet.i—will always evade review. Every individual or entity that frequently promotes ballot initiatives can challenge the legality of their States' ballot-eligibility rules, and thus litigate the question presented, on a non-rushed timeline. Indeed, at this very moment, Ohio is litigating another case fitting that description. *See Beiersdorfer v. LaRose*, Case No. 20-3557 (6th Cir.).

* * *

The merits question presented will arise in cases free of jurisdictional doubt. *See, e.g.*, *id.* (briefing complete); *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012); *Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009); *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005); *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002); *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997). The Court should await such a case, and deny the petition for *certiorari* in this case where jurisdiction is at least debatable.

II. Thompson loses under every arguably applicable standard of review.

The question of whether and how the First Amendment applies to laws regulating ballot access for voter initiatives is the subject of an entrenched circuit split that this Court should one day decide. It

is quite possible that Ohio will at some point ask the Court to do so. This, however, is not the right vehicle for answering the question because Thompson loses under every conceivable approach. Thus, the Court could simply *assume* the First Amendment's application to Thompson and rule against him. The Court should decide the important question presented in a case where its answer makes a difference.

A. Thompson's claim fails because, as the D.C. and Tenth Circuits have held, the Free Speech Clause does not apply to laws regulating ballot access for initiatives.

1. The First Amendment's Free Speech Clause prohibits laws "abridging the freedom of speech." U.S. Const. Am. 1. But the First Amendment confers no positive "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). And the First Amendment makes no promise that States will even have an initiative process. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018). Rather, it is "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring).

To be sure, States that adopt an initiative process must run that process without violating rights the Constitution *does* guarantee. For instance, under the First Amendment's Free Speech Clause, States that choose to have an initiative process cannot abridge speech relating to the process. Applying that

principle, this Court invalidated a Colorado law that criminalized the payment of petition circulators. *Meyer v. Grant*, 486 U.S. 414 (1988). A law like that, the Court held, regulated "interactive communication" between petition circulators and potential signatories; it regulated *who* could communicate about an initiative. *Id.* at 421–22. That holding makes sense because "freedom of speech," U.S. Const. Am. 1, "undoubtedly" includes the freedom to engage in political speech in the initiative context, "just as it" includes the freedom to engage in "speech intended to influence other political decisions," *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (*en banc*). It follows that laws "restrict[ing] the communicative conduct of persons advocating a position" on an initiative—for example, laws regulating *who* may advocate for an initiative's passage—implicate the Free Speech Clause. *Id.* at 1100; *see, e.g.*, *Meyer*, 486 U.S. at 415–16; *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 187 (1999).

Although the "freedom of speech" includes the right to communicate during an initiative campaign or circulation drive, it does not include the freedom to ignore rules governing the mechanics of the initiative process. This flows from the fact that the initiative power is a legislative power—the "power of direct legislation by the electorate." *Marijuana Policy Project*, 304 F.3d at 85 (quotation omitted). The nature of the power means that the People act as legislators when they make law by initiative. The First Amendment does not confer on legislators (or anyone else) a "right to use governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127; *see also*

Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283–84 (1984).

Putting all this together, courts must distinguish between laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum," which implicate the First Amendment, and laws "that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1100. Laws within the latter category limit legislative power, not expression, and therefore do not implicate the First Amendment. Thus, while the First Amendment applies to state laws restricting what initiative proponents may say or who may speak in support of an initiative, it does not apply to laws that govern proposed initiatives' ballot eligibility.

In accord with all this, the Tenth and D.C. Circuits have held that the First Amendment does not apply to laws governing the initiative process, as opposed to laws governing speech occurring within that process. *See Walker*, 450 F.3d at 1099–1100; *Marijuana Policy Project*, 304 F.3d at 85. That is the correct rule. After all, if there is no First Amendment right to make law by initiative, laws that regulate the procedural steps one must undertake to turn an initiative into law, or that limit the subjects eligible for lawmaking by initiative, cannot burden free-speech rights. Such laws therefore *never* violate the Free Speech Clause.

2. Under this test, Thompson loses as a matter of law. He does not argue otherwise. *See* Pet.12–14.

Thompson does charge, however, that the Tenth Circuit has since rejected this test. That is not relevant to the question whether there is a circuit split.

But it is wrong, and the State will explain why in the interest of setting the record straight.

As even Thompson recognizes, the Tenth Circuit "made clear" in *Walker* that it was "siding with" the D.C. Circuit's approach in *Marijuana Policy Project*. Pet.13 (citing *Walker*, 450 F.3d at 1102 n.5). In other words, the Tenth Circuit recognized a "distinction … 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." *Walker*, 450 F.3d at 1099–1100.

Thompson says the Tenth Circuit departed from *Walker* in *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008). *See* Pet.11–13. There the Tenth Circuit considered an Oklahoma law that banned non-residents from circulating petitions. 550 F.3d at 1025. Because that law restricted "communication concerning political change," the Court found protection under the First Amendment to be "at its zenith." *Id.* at 1029 (quotations omitted); *accord Meyer*, 486 U.S. at 425. Thus, the court applied strict scrutiny and invalidated the ban on communication. *Id.* at 1029–31. That accords fully with *Walker*'s holding that laws "regulat[ing] or restrict[ing] the communicative conduct of persons advocating a position"—including laws regulating *who* may circulate a petition—are subject to strict scrutiny. *Walker*, 450 F.3d at 1099–1100. So *Yes on Term Limits* is consistent with, not contrary to, *Walker*.

B. Thompson loses as a matter of law under the *Anderson-Burdick* test.

1. "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." *Little*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of a stay). This test, known as the *Anderson-Burdick* test, is a "flexible standard" that requires courts to "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The test operates on a sliding scale. Laws that impose "severe" burdens receive strict scrutiny. *Id.* "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434).

The test suffers from both conceptual and practical problems in its application to the initiative process.

The conceptual problems stem from the fact that the Supreme Court developed the *Anderson-Burdick* test to address a tension that does not arise in the initiative context. The tension is this: On the one

hand, the States have an obligation "to regulate their own elections" because, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). On the other hand, the right to vote is fundamental, and *every* election law "will invariably impose some burden upon individual voters." *Id.* After all, every "provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson*, 460 U.S. at 788). To resolve this inherent tension between state authority over election procedure and the fundamental right to vote, the Supreme Court adopted the "flexible" *Anderson-Burdick* test. *Id.* at 433–34. This flexible test ensures that States have latitude to structure elections while simultaneously ensuring judicial oversight to guard against the unjustified diminution of voting and associational rights.

The need for so "flexible" a test collapses in cases, like this one, where there is no constitutional tension to resolve. Courts generally agree that individuals have no constitutional right to legislate through direct democracy. *See, e.g.*, *Taxpayers United,* 994 F.2d at 295*; Jones,* 892 F.3d at 937; *Molinari*, 564 F.3d at 597; *Kendall v. Balcerzak*, 650 F.3d 515, 523 (4th Cir. 2011); *accord Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). Thus, state laws that limit the initiative power are not in tension with any fundamental right, and there is no need for a balancing test that em-

powers federal courts to oversee the exercise of state authority.

The practical problems are equally severe. The *Anderson-Burdick* test requires courts to "weigh 'the character and magnitude of the asserted injury to'" First Amendment rights against the state interests furthered by the allegedly injurious state law. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789); *but see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring in the judgment) (explaining that the test does not require *ad hoc* balancing, but rather strict scrutiny for "severe" burdens and rational-basis review for all others). The immediate problem with applying this test in the initiative context stems from the fact that no one can explain how laws regulating the mechanics of the initiative process "injur[e] … the rights protected by the" First Amendment. *Burdick*, 504 U.S. at 434 (quotation omitted). Again, there is no First Amendment right to legislate by initiative, *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring), and the right to free speech does not include any "right to use governmental mechanics to convey a message," *Carrigan*, 564 U.S. at 127. Given that, how do ballot-access laws, as applied to initiatives, impact speech rights at all? No one seems to know. The Ninth Circuit has suggested that such laws "indirectly impact core political speech" because they decrease the odds that initiatives, should they fail to qualify for ballot access, will become "the focus of statewide discussion." *Angle*, 673 F.3d at 1133 (internal quotation omitted). That, however, proves too much. *All* limits on legislative power, including Article I's limits on congressional power, "indirectly impact core political speech" by making it less likely that issues beyond

the legislative power become "the focus of [widespread] discussion." *Id.* Thus, accepting this logic "would call into question all subject matter restrictions on what Congress or state legislatures may legislate about." *Schmitt*, 933 F.3d 628, 649 n.3 (6th Cir. 2019) (Bush, J., concurring in part and in the judgment) (quotations omitted).

Because no one can define the injury to First Amendment rights that the *Anderson-Burdick* test is supposed to protect in the initiative context, the test makes no sense: asking whether an impossible-to-identify injury outweighs the government's interests is rather like "judging whether a particular line is longer than a particular rock is heavy." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment) (quoting *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment)).

To make matters worse, *Anderson-Burdick*, at least as applied in many circuits, "is a dangerous tool." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment). It is a "quintessential balancing test," and one that "does little to define the key concepts a court must balance." *Id.* (quotations omitted). Thus, "*Anderson-Burdick* leaves much to a judge's subjective determination." *Id.* As the Seventh Circuit recently noted, lower courts too often apply *Anderson-Burdick* as though it empowers "the judiciary to decide whether any given election law is necessary." *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). That approach "allows a political question—whether a rule is beneficial, on balance—to be treated as a constitutional

question and resolved by the courts rather than by legislators." *Id.*

This type of discretion may be necessary to maintain an appropriate balance between state authority over voting laws and the fundamental right to vote. But it is unnecessary, and thus unacceptable, when used to decide what the initiative process within a given State should look like. Courts "are ill-suited to determine whether or not a state advances an important governmental interest" in the structuring of the State's legislative power. *Schmitt*, 933 F.3d at 648–49 (Bush, J., concurring in part and in the judgment).

2. Although *Anderson-Burdick* should not apply to laws regulating ballot access for initiatives, Thompson's challenge fails under any fair application of that test.

As mentioned a moment ago, the *Anderson-Burdick* test is a "flexible standard." *Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 789. It requires courts to balance voting burdens against state interests. *Burdick*, 504 U.S. at 434. And it operates on a sliding scale. Laws that impose "severe" burdens receive strict scrutiny. *Id.* Laws that impose "lesser burdens" receive far more deference. *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005). For those less-than-severely-burdensome laws, the *Anderson-Burdick* test presumes that the State's important interests in regulating elections will "usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 587 (quotations omitted).

Burden. The first question in the *Anderson-Burdick* analysis is whether the challenged laws im-

pose a severe burden or something less. Two points about burden measuring are especially relevant here. *First*, a burden qualifies as "severe" only if it makes exercising the First Amendment right "virtually impossible." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment) (quoting *Storer*, 415 U.S. at 728–29); *accord Williams v. Rhodes*, 393 U.S. 23, 24 (1968); Pet.App.6a. *Second*, in measuring the severity of the burden, States are accountable only for the burdens *they* impose. Neither the First Amendment nor 42 U.S.C. §1983 require the government to relax its ballot-access laws to account for the private decisions of third parties.

Applying these principles here, Ohio's ink requirement, witness requirement, and signature-gathering deadline "impose, at most, only an intermediate burden." Pet.App.5a. Each rule no doubt makes it harder to legislate by initiative than it would otherwise be. But it does not follow that these provisions make ballot access virtually impossible. Far from it. These are all longstanding requirements that many initiative proponents have been able to satisfy in the past, including Thompson. *See* Thompson Compl. ¶4, Pet.App.140a.

The pandemic does not transform these requirements into severe burdens on direct democracy. For one thing, "all throughout the pandemic," Ohio exempted First Amendment activity from its pandemic-related restrictions. Pet.App.6a. And the April 30, 2020 Order made express that people could continue circulating "petition[s] or referend[a]." April 30, 2020 Order ¶4, https://tinyurl.com/y7s6cre2. Thompson and other initiative proponents, therefore, had *months* to circulate their proposed initiatives before

the July 16 signature-gathering deadline. In addition, even if the pandemic reduced the number of people willing to sign initiatives, the decisions of private citizens to stay home for safety reasons cannot be "attribute[d] … to Ohio." Pet.App.7a. Throughout the pandemic, people across this country have come up with many "contactless" ways to go about their business and interact with the public. Initiative proponents could have done the same. They could have, for example, advertised the initiatives "through social or traditional media," offering to "bring the petitions" to the homes of interested citizens who would be able to sign the petition from more than six feet away. Pet.App.20a. Or they could have set up tables in publicly accessible areas where people might sign from a safe distance with sanitized pens. These are only two examples. It is easy to imagine others.

Thompson's petition concedes it was quite possible to obtain enough signatures, as the marijuana-decriminalization initiative he championed qualified for the ballot in some jurisdictions. *See* Pet.6. Thompson says those jurisdictions were small, making it easier to gather the needed signatures. That hardly follows: in a smaller jurisdiction, there are fewer people from whom to solicit signatures, and quite likely fewer busy public spaces in which to do so.

Justifications. The next step in the *Anderson-Burdick* analysis is to consider the state interests that the challenged rule furthers. To understand the state interests here, begin by considering the reason that Ohio (and other States) require signatures: limiting ballot access to initiatives with "sufficient grass roots support" reduces ballot clutter and thus im-

proves the voters' ability to intelligently participate in direct democracy. *Meyer*, 486 U.S. at 425–26. States have a strong interest "in avoiding voter confusion and overcrowded ballots." *Timmons*, 520 U.S. at 364. If States were to put *every* initiative on the ballot, the ballot would be confusing and would likely *dissuade* democratic participation; voters have neither the time nor the interest to learn about every idea that every citizen might wish to turn into state law. "Limiting the number of referenda" and initiatives thus "improves the chance that each will receive enough attention, from enough voters, to promote a well-considered outcome." *Jones*, 892 F.3d at 938; *see also* Br. of Direct Democracy Scholars, *et al.*, as *Amici Curiae* 10–11.

Once States require signatures, they must ensure the signatures' authenticity. *See Buckley*, 525 U.S. at 205. In other words, States have a "legitimate—indeed compelling—interest" in "preventing fraud by ensuring the authenticity of signatures." Pet.App.8a. They also have related-but-separate interests in ferreting out mistakes, promoting transparency, and preserving the public's confidence in the initiative process. *See Reed*, 561 U.S. at 198; *Crawford*, 553 U.S. at 197 (op. of Stevens, J.). These interests are compelling as to all election-related laws, but particularly with respect to those that govern the initiative process. One reason is that signature gathering takes place, by and large, outside the presence of election officials. Moreover, there is often quite a bit of money riding on initiatives. For example, in 2015, proponents of a marijuana initiative stood to make millions (likely billions) because they had built a distribution monopoly into their proposed constitutional amendment. *See Fears Of Marijuana 'Monopoly' In*

Ohio Undercut Support For Legalization, NPR (Sept. 2, 2015), https://n.pr/2B1763i; *cf. State ex rel. ResponsibleOhio v. Ohio Ballot Bd.*, 2015-Ohio-3758 (2015). Those types of stakes, unfortunately, create financial incentives to cut corners. The State must be proactive in ensuring that self-interested proponents, hired circulators, and all others are turning square corners. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986).

The ink and witness requirements further these interests. The ink requirement, by mandating a handwritten signature in ink, gives election officials unalterable signatures that officials can then compare to the signatures in voters' records. The signatures thus aid election officials in fulfilling their "duty … to establish the authenticity of the elector." *Georgetown v. Brown Cnty. Bd. of Elections*, 158 Ohio St.3d 4, 9 (2019) (emphasis omitted). The witness requirement also helps counteract potential fraud. By requiring that petition circulators swear to having personally witnessed each signing, circulators have a strong incentive to keep close watch over the initiative petition and to stop improper signatures. Both requirements ensure that all individuals sign the petition by themselves and not by proxy, and decreases the odds that fraud will corrupt Ohio's initiative-lawmaking process. *See State ex rel. Citizens for Responsible Taxation v. Scioto Cnty. Bd. of Elections*, 65 Ohio St.3d 167, 173–74 (1992).

The deadline for submitting signatures is vital, too. As a general matter, deadlines allow election officials to accomplish the many tasks they have to complete in the "busy pre-election period." *Mays v. LaRose*, 951 F.3d 775, 787–88 (6th Cir. 2020). More

specifically here, the signature-gathering deadline gives election officials enough time "to verify signatures in a fair and orderly way." Pet.App.9a. In addition to allowing time for verification, the signature deadline ensures "that interested parties have enough time to appeal an adverse decision in court." *Id.* And importantly, the ultimate cutoff for completing all initiative-related tasks comes long before Election Day, since ballots are sent six weeks early to military and overseas voters. *See* Ohio Rev. Code §3509.01(B)(1).

Balancing. All told, Ohio's interests in its signature requirements easily outweigh the at-most-moderate burdens those requirements impose. Because Ohio's requirements impose less-than-severe burdens, they trigger a deferential standard. *See Clingman*, 544 U.S. at 586–87. The challenged provisions easily pass muster under that deferential standard in light of Ohio's weighty interests.

3. Thompson has not identified any circuit in which he would have won relief under the *Anderson-Burdick* test.

Perhaps recognizing this, Thompson says that courts have disagreed about what amounts to a "severe" burden under *Anderson-Burdick*. But he overstates any discord. To begin, in trying to show confusion, Thompson leans heavily on statements from district courts. *See* Pet.20–21, 24. Such decisions fail to show any disagreement among the circuits. And Thompson's reliance on *Fair Maps Nevada v. Cegavske*, 463 F. Supp. 3d 1123 (D. Nev. 2020), is particularly unjustified, as this Court implicitly rejected that court's analysis by staying injunctions out of the Ninth Circuit grounded on comparable reason-

ing. *See Reclaim Idaho*, 140 S. Ct. 2616; *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020).

What about the supposed disagreement among the circuits? *See* Pet.21–23. Thompson is correct that courts of appeals have at times used slightly different language to describe what constitutes a "severe" burden. The Sixth Circuit, for example, has said that a severe burden entails "exclusion or virtual exclusion from the ballot." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) (citing *Rhodes*, 393 U.S. at 24, 35); *accord Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). The Seventh Circuit has described the key inquiry this way: "What is ultimately important is … whether a reasonably diligent [proponent] could be expected to be able to meet the requirements and gain a place on the ballot." *Stone v. Bd. of Election Comm'rs for Chi.*, 750 F.3d 678, 682 (7th Cir. 2014) (quotations omitted).

Such descriptions do not, on their face, conflict in a material way. And indeed, the Second Circuit has concluded that the two standards mean the same thing. *Libertarian Party v. Lamont*, 977 F.3d 173, 177–78 (2d Cir. 2020). To be sure, if there comes a case where the outcome hinges on the precise phrasing of the burden test, that might be an issue worth the Court's time. But the circuits, in their reasoned opinions, have uniformly held that signature rules and deadlines *do not* constitute severe burdens for *Anderson-Burdick* purposes, even in the midst of the pandemic. *See, e.g.*, *id.* at 179–80; *Hawkins v. Dewine*, 968 F.3d 603, 606–07 (6th Cir. 2020); *Miller v. Thurston*, 967 F.3d 727, 740 (8th Cir. 2020); *Libertarian Party v. Governor of Pa.*, 813 F. App'x 834,

834–35 (3d Cir. 2020); *cf. Morgan v. White*, 964 F.3d 649, 651–52 (7th Cir. 2020) (*per curiam*).

At bottom, Thompson can point to no circuit that would find a severe burden under the facts in this case. Nor has he identified any court that, assuming a lesser burden, would find Ohio's interests insufficient to carry the day. That makes sense since this Court has concluded that a State's interests in regulating ballot access are strong. *See Munro*, 479 U.S. at 195. Such interests "will usually be enough" to justify reasonable regulations. *Clingman*, 544 U.S. at 587 (quotations omitted).

In sum, Thompson loses even under the *Anderson-Burdick* test, as the Sixth Circuit correctly held.

C. Thompson loses as a matter of law under the *O'Brien* intermediate-scrutiny test.

Thompson also loses under the First Circuit's peculiar approach.

In *Wirzburger*, 412 F.3d 271, the First Circuit, in a case challenging the legality of a Massachusetts law limiting the initiative power, applied the intermediate-scrutiny test from *United States v. O'Brien*, 391 U.S. 367 (1968). It provided little explanation for its decision to employ this test. And it is unclear what explanation it could have given, because the *O'Brien* test, like *Anderson-Burdick*, makes little sense in its application to the initiative context. The *O'Brien* test is designed to protect expressive conduct. It permits the States to regulate "conduct combining 'speech' and 'non-speech' elements" only if "four requirements are met: (1) the regulation 'is within the constitutional power of the Government;'

(2) 'it furthers an important or substantial government 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 (quoting *O'Brien*, 391 U.S. at 377).

The First Circuit's decision to apply this test is hard to understand. *O'Brien* does not apply to the initiative context because the question of whether an initiative qualifies for ballot access does not involve "conduct combining 'speech' and 'non-speech' elements." *Id.* Indeed, ballot-access regulations do not regulate conduct or speech at all; they regulate the State's lawmaking apparatus, and they leave initiative proponents free to do or say whatever they want.

Regardless, the challenged laws, even in their application to the November 2020 election, pass constitutional muster under the *O'Brien* test. First, Ohio possesses the "sovereign capacity" to decide "whether and how to permit legislation by popular action." *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). Second, Ohio has important, well-settled interests in protecting the integrity of its ballot. *Timmons*, 520 U.S. at 364. Third, Ohio's interests in regulating ballot access are entirely unrelated to any desire to suppress free expression. If anything, Ohio's signature requirements reflect the desire to make the ballot more effective in communicating issues to voters. *See Jones*, 892 F.3d at 938. Fourth, Thompson failed to identify any less intrusive but equally effective way for Ohio to achieve the compelling interests laid out above. Certainly he did not identify any alternative that Ohio might adopt, test, and implement in

the time between the outbreak of COVID-19 and the November 3, 2020 election. Quite tellingly, in granting Thompson a preliminary injunction, the District Court was light on the specifics: it put the onus on the parties to meet and confer about the technical and security problems that any alternative approach would inevitably pose. *See* Pet.App.65a–66a.

All told, Ohio's requirements survive intermediate scrutiny under *O'Brien*, just as the Massachusetts rules at issue in *Wirzberger* did.

D. No circuit or state court applies strict scrutiny to all laws regulating ballot access for initiatives.

There is no defensible argument for applying strict scrutiny to every law that regulates initiatives' ballot eligibility. And Thompson, perhaps unsurprisingly, identifies no circuit or state high court that takes such a drastic approach. The "strict scrutiny" cases Thompson offers fit into one of two categories.

First, Thompson cites several cases about laws restricting who may circulate petitions. *See, e.g.*, *Yes on Term Limits, Inc.*, 550 F.3d 1023; *Libertarian Party of Va. v. Judd*, 718 F.3d 308 (4th Cir. 2013); *Bernbeck v. Moore*, 126 F.3d 1114 (8th Cir. 1997); *Wilmoth v. Sec'y of N.J.*, 731 F. App'x 97 (3d Cir. 2018); *cf. Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993) (applying strict scrutiny to actions amounting to a "complete bar" on petition circulation). Because such laws go beyond ballot access and actually restrict communicative conduct during the initiative process, they fall squarely under *Meyer* and receive strict scrutiny. *See* 486 U.S. at 424–25. *Meyer*, however, leaves open the question of whether and how

the First Amendment applies to regulations (like Ohio's requirements here) that simply "determine the process by which legislation is enacted" through initiatives. *Walker*, 450 F.3d at 1100. And no circuit or state supreme court has held that strict scrutiny *always* applies to laws that regulate initiative and referendum processes. That is no accident. States would have little room to decide "how to permit legislation by popular action," *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring), if strict scrutiny applied to all regulations pertaining to the process for putting an initiative on the ballot.

Second, Thompson cites a number of cases applying *Anderson-Burdick*. *See, e.g.*, *Esshaki v. Whitmer*, 813 F. App'x 170 (6th Cir. 2020); *SawariMedia LLC v. Whitmer*, 963 F.3d 595 (6th Cir. 2020), *vacated in* No. 20-1594, 2020 U.S. App. LEXIS 38582 (6th Cir, Dec. 9, 2020); *Angle*, 673 F.3d 1122; *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003); *cf. Fusaro v. Cogan*, 930 F.3d 241, 258 (4th Cir. 2019) ("borrow[ing]" from *Anderson-Burdick* in the context of access to voter lists). Recall that, under *Anderson-Burdick*'s sliding scale, laws that impose severe burdens receive strict scrutiny. *Burdick*, 504 U.S. at 434. It follows that, in some extreme circumstances, the framework leads to strict scrutiny.

The Sixth Circuit's decisions in *Esshaki* and *SawariMedia* (which is now vacated) illustrate how *Anderson-Burdick* can result in the application of strict scrutiny. Those cases involved Michigan's response to the pandemic. Unlike Ohio, Michigan failed to exempt petition circulation from stay-at-home restrictions for all or much of the signature-gathering period. And unlike Ohio, Michigan left its

stay-at-home restrictions in place either through, or nearly through, the end of the signature-gathering period. *See Esshaki*, 813 F. App'x at 171; *SawariMedia LLC v. Whitmer*, No. 20-cv-11246, 2020 U.S. Dist. LEXIS 102237, at *9 (E.D. Mich. June 11, 2020). In other words, Michigan effectively banned ballot-initiative proponents from gathering signatures until it was too late to do so. That combination resulted in a severe burden on those seeking ballot access: forbidding petition circulation through the deadline makes ballot access virtually impossible, and thus imposes a severe burden. Given the different facts in Ohio—including the consistent exemption of First Amendment activity from pandemic-related orders, and the lifting of the stay-at-home restrictions well before the July 16 deadline—the Sixth Circuit correctly distinguished those cases from this one. Pet.App.7a, 19a–20a.

CONCLUSION

This Court should deny the *certiorari* petition.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
ZACHERY P. KELLER
Deputy Solicitor General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for Respondents