

No. 21-1120

In The
Supreme Court of the United States

CHAD THOMPSON, *et al.*,

Petitioners,

v.

RICHARD MICHAEL DEWINE, GOVERNOR OF OHIO, *et al.*,

Respondents.

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

**BRIEF OF DIRECT DEMOCRACY SCHOLARS,
THE INITIATIVE AND REFERENDUM INSTI-
TUTE, AND CITIZENS IN CHARGE AS *AMICI*
CURIAE SUPPORTING PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici Direct Democracy Scholars are political science and law professors who have written extensively on direct democracy issues in the United States, *viz.*:

Todd Donovan is a Professor of Political Science at Western Washington University;

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; and

Caroline J. Tolbert is a Professor of Political Science at the University of Iowa.

Among *Amici*'s areas of expertise is the democratic process for initiating and qualifying for ballot referenda. *Amici* regularly teach, research and publish about direct democracy issues, including the citizens' initiative campaigns process and the effect the citizens' initiative process has on civic engagement.

Amici also include the Initiative and Referendum Institute (IRI) at the University of Southern

¹ All parties received timely notice and consented to the filing of this brief. 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*, their members, or their counsel made such a monetary contribution. See SUP. CT. R. 37.6.

California. IRI is a nonprofit, nonpartisan research and educational organization. IRI's mission is to study the mechanisms of direct democracy, to develop analyses of the rules and regulations used to regulate the referendum process, and to disseminate that information. IRI's research on the initiative process has been cited by Justices of this Court. E.g., *John Doe No. 1 v. Reed*, 561 U. S. 186, 210 (2010) (Alito, J., concurring); *id.*, at 234 (Thomas, J., dissenting).

Finally, *Amici* include Citizens in Charge, a nonprofit advocacy organization that works with state and local legislators, petitioners, media, and voters to protect and expand the initiative and referendum process.

Amici submit this brief to highlight the importance of the citizens' initiative process, its widespread use, and the public interest in protecting this important and traditional form of political speech. *Amici* believe that the Court should resolve the Circuit split as to whether First Amendment protections apply to the ballot initiative process, and if so, what level of scrutiny governs. The constitutional concern over this issue is not moot and does not dissipate when States retract public health mandates as COVID-19 infection rates fall. The constitutional right to petition is not a seasonal exercise or one that should be truncated by exogenous events or happenings.

SUMMARY OF ARGUMENT

The citizens' initiative is an important form of direct democracy. The use of citizens' initiatives is widespread and frequent. Ballot measures promote political speech and citizen engagement and mobilize voters to participate in elections. Petitioning is a major part of ballot measure campaigns. Current restrictions and regulations on ballot qualifications—*e.g.*, requiring petitioners to collect thousands of original ink signatures through face-to-face interactions within a set timeframe—are demanding.

Gathering signatures to qualify an initiative to appear on the ballot, already an arduous task, is further complicated and severely burdened by public health mandates in response to the coronavirus pandemic. State emergency orders that prohibit large-scale events and direct social distancing made and could make collecting voters' ink signatures extremely difficult for the purpose of qualifying ballot initiatives. The Court's guidance to state and local governments on how to balance and protect First Amendment rights, during public health crises, is needed. The Court may also take into consideration technological advances made in adapting to these public health crises in balancing and protecting First Amendment rights.

The questions the Petition present are important and recurring ones. The Court should grant the Petition.

ARGUMENT

I. The Citizens' Initiative Has Become An Important Feature Of The American Political Process.

“Direct democracy” describes processes through which citizens directly participate in lawmaking. During Colonial America, for more than 150 years during the seventeenth and eighteenth centuries, citizens regularly gathered at town meetings to propose and veto laws passed by elected representatives. Henry Noyes, *Direct Democracy as a Legislative Act*, 19 CHAPMAN L. REV. 199, 200 (2016). Three of the earliest state constitutions—New Hampshire (1776), Pennsylvania (1776), and Massachusetts (1780)—contained features of direct democracy. See *ibid.* It was an exercise of the people’s inherent legislative power, as later reflected in the Declaration of Independence. *Id.* at 201. Direct democracy—the right of initiative and the right to petition the government—is an exercise expressed in manifold ways in the First Amendment to the United States Constitution. See *City of Cuyahoga Falls Ohio v. Buckeye Cmty. Hope Found.*, 538 U. S. 188, 196 (2003).

The Tenth Amendment of the United States Constitution also allows states to employ techniques of direct democracy: “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.

“Direct democracy is the most direct expression of the people’s power to govern themselves.” Noyes, *Direct Democracy as a Legislative Act*, *supra*, at 201 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2671 (2015)). Through citizens’ initiatives, often referred to as “ballot measures” or “propositions,” voters have a direct say in defining policies subject to a popular vote. Citizens propose policy themselves, and if enough of their fellow citizens concur (by providing their signatures on petitions), the initiative is placed on the ballot; then, the initiative is accepted or rejected by popular vote.

In the late nineteenth and early twentieth centuries, as the result of populist political movements, states returned to the country’s pre-Revolution roots and began statutorily or constitutionally 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. *Ibid.* Most of the states that now have these processes adopted them between 1898 and 1918. *Id.* at 38–39. Additional states

adopted such procedures later in the twentieth century: Alaska in 1959 (upon attaining statehood), Florida and Wyoming in 1968, Illinois in 1970, and Mississippi in 1992. Daniel A. Smith & Dustin Fridkin, *Delegating Direct Democracy: Interparty Legislative Competition and the Adoption of the Initiative in the American States*, 102 AM. POL. SCI. REV. 333, 333–350 (2008). Direct democracy now exists in 24 states. No state has repealed its provisions for initiatives or referenda after adoption.

Many eligible local governments also separately grant their residents the right to participate in the referendum process and ballot initiatives. See, e.g., *City of Tucson v. Arizona*, 273 P.3d 624, 626 (Ariz. 2012). When new cities are incorporated, residents typically seek greater local control by retaining the right to enact or prohibit laws through popular referendum. See John Allswang, *The Origins of Direct Democracy in Los Angeles & Cal.*, 78 S. CAL. Q. 175, 179 (1996).

A significant majority, *i.e.*, more than seventy percent of the country's citizens, resides in a state or city where citizens enjoy the right to enact or challenge laws by referendum. John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 186 (2005). This percentage is increasing with population growth in states that statutorily or constitutionally empower direct democracy, such as Arizona, Colorado and Florida.

As the number of state and local governments that adopt initiative or referendum has grown, so too has the prevalence of citizen-driven propositions. Between 1990 and 2019, more than 1,000 statewide initiatives reached the ballot. See Initiative and Referendum Institute, “Initiative Use,” Dec. 2019, *available at* [http://www.iandrinstute.org/docs/IRI-Initiative-Use-\(2019-2\).pdf](http://www.iandrinstute.org/docs/IRI-Initiative-Use-(2019-2).pdf); 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 been on ballots at the local level.

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

The Supreme Court has long recognized that the circulation of a ballot initiative involves core political speech. *Meyer v. Grant*, 486 U. S. 414, 421–422 (1988). “The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.” *First Nat’l Bank v. Bellotti*, 435 U. S. 765, 791–792 (1978). Those arguments are often presented to the electorate through television and radio, pamphlets, social and digital media, and town hall debates. “The First Amendment protects [such] political speech.” *Citizens United v. F.E.C.*, 558 U. S. 310, 371 (2010).

Amici’s academic research confirms that ballot initiatives stimulate political dialogue. Campaign spending on advertisements generally provides “a

vehicle of information and opinion.” *Lovell v. City of Griffin*, 303 U. S. 444, 452 (1938). 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).

For example, 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 141–144. And, in the 2008 general election cycle, more money was spent on state-level ballot measures than the winning 2008 U.S. presidential campaign. *Ibid.* Such spending for initiatives is not new. In the early twentieth century, when the current form of direct democracy was in its infancy, initiative campaigns routinely had significant spending on both sides of an issue. 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). The First Amendment promotes and protects this political discourse. And, the robust exercise of the First Amendment reflected in the significant amount of spending on initiative campaigns, see *Citizens United*, 558 U. S., at 371, is indicative of the importance of this political discourse to voters and citizens generally.

III. The Citizens' Initiative Drives Voter Engagement.

Citizens are 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 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, 657–658 (2003).

Ballot measures drive political engagement and voter turnout. Informed citizens are more likely to turn out to vote in midterm and presidential elections. Todd Donovan, Caroline J. Tolbert & Daniel A. Smith, *Political Engagement, Mobilization, and Direct Democracy*, 73 PUB. OP. Q., 98, 114 (2009); Janine A. Parry, Daniel A. Smith & Shayne Henry, *The Impact of Petition Signing on Voter Turnout*, 34 POL. BEHAV. 117, 132 (2012). Relatedly, campaign spending for ballot measures, particularly 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, 160–162 (2009).

The presence of citizen-driven ballot initiatives spurs media coverage and increases citizen awareness of ballot measures. Todd Donovan, Caroline Tolbert & Daniel A. Smith, *Priming Presidential Votes by Direct Democracy*, 70 J. POL. 1217, 1227 (2008). 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. States Have Various Signature Thresholds And Rules For Qualifying Citizen-Driven Initiative Petitions.

Amici agree that states rightly should set qualification rules for ballot petitions. Otherwise, various interest groups would overwhelm voters with lengthy and crowded ballots; voters would be unable to comprehend all the issues and propositions. Jay Barth, Craig M. Burnett & Janine A. Parry, *Direct Democracy, Educative Effects, and the (Mis)Measurement of Ballot Measure Awareness*, POL. BEHAV. (Jan. 28, 2019).

During the early twentieth century, the proponents of direct democracy recognized that an initiative proposal should garner a threshold level of public support before it appears on the ballot. Todd Donovan & Daniel Smith, *Identifying and Preventing Signature Fraud on Ballot Measure Petitions*, in

ELECTION FRAUD: DETECTING AND DETERRING ELECTORAL MANIPULATION, at 130 (Brookings 2008). Each direct democracy state now sets threshold requirements to qualify initiative petitions for the ballot. Caroline J. Tolbert, Daniel H. Lowenstein & Todd Donovan, *Election Law and Rules for Initiatives*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES, at 28 (Ohio State Univ. Press 1998).

Some ballot qualification rules include obtaining a certain percentage of voters' ink signatures, collecting these signatures within a set timeframe, requiring geographic distribution of signatures (*i.e.*, signatures need to come from all regions of a state), setting standards for "valid" signatures, and requiring petitioners to witness voters' signing of the petition. *Ibid.* Some states, like Wyoming, currently have stringent signature qualification rules, requiring proponents to collect signatures from 15% of those who voted in the prior general election *and* who represent at least two-thirds of the counties in the state. Wyoming Secretary of State, "Initiative & Referendum," *available at* <https://sos.wyo.gov/Elections/InitiativeReferendumInfo.aspx>. Other states, like Arizona, California, Colorado and Oregon, have less demanding thresholds. Shaun Bowler & Todd Donovan, *Measuring the Effect of Direct Democracy on State Policy: Not All Initiatives Are Created Equal*, 4 ST. POL. & POL'Y Q. 345, 350 (2004).

Regardless of the state's specific referendum requirements, qualifying initiative petitions is an expensive and difficult task. Signature gathering is often the largest expense for direct democracy campaigns. Todd Donovan, Shaun Bowler, David McCuan & Ken Fernandez, *Contending Players and Strategies, Opposition Advantages Initiative Campaigns*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES*, at 97 (Ohio State Univ. Press 1998). Initiative proponents often spend as much or more on petitioning as on communicating with voters during the actual campaign season. Todd Donovan, Shaun Bowler & David McCuan, *Political Consultants and the Initiative Industrial Complex*, in *DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA*, at 118 (Rowman and Littlefield 2002). Due to generally high qualification thresholds, only a handful of statewide initiatives normally clear existing petitioning hurdles and reach the ballot in every two-year general election cycle. Todd Donovan, Christopher Z. Mooney & Daniel Smith, *STATE AND LOCAL POLITICS: INSTITUTIONS AND REFORM*, at 128 (Cengage 2013).

V. The Court's Guidance On The First Amendment's Application To Ballot Initiatives Is Needed, Especially Given COVID-19 Public Health Restrictions.

In light of the growing and more frequent use of direct democracy techniques nationwide, the Court's clarification on the First Amendment implications

on ballot initiatives is needed. The Circuits' split on whether the First Amendment applies to the ballot initiative process, and the split within that split of what level of scrutiny governs, should be resolved. The Petition presents the Court with an excellent opportunity to determine the First Amendment implications of the restrictions on the initiative process.

Amici do not question the need for States to impose public health orders restricting social contact during a pandemic or other public health or similar crises. But the pandemic and resulting health-related measures made and could again make the initiative and referendum process severely burdensome. To qualify an initiative on the ballot, campaigns depend heavily on face-to-face interactions between petitioners and registered voters: petitioners usually discuss and explain the initiative proposal before convincing voters to sign on. Historically, to obtain the necessary number of signatures and gain support for the ballot initiatives, canvassers often approach bystanders at large-scale or community events—*e.g.*, parades—or have a dialogue with citizens on public streets. Public health orders in Ohio and other states during the pandemic, however, generally have included prohibition of large and public gatherings, direction for a six-foot social distance between individuals from different households, and instructions for residents to stay home. These measures—well-intentioned, important, and necessary—nonetheless severely restrict initiative

proponents' ability to satisfy ballot qualification rules. Though Ohio has eased these restrictions since the start of the pandemic, the unpredictable nature of coronavirus and its variants suggest that States likely will reinstate certain public health mandates when faced with new pandemic-related challenges. The pandemic has also demonstrated that in-person and face-to-face interactions are not necessary in order to allow the normal functioning of government, business, political and other activities. Advances in and the widespread use of technology during the pandemic and otherwise demonstrate that stringent petition requirements, *e.g.*, wet signatures, are both outdated and unnecessarily restrictive.

A pandemic halts or hinders petitioning activities. In 1918, the influenza pandemic almost stopped the women's suffrage movement. Ellen Carol DuBois, *A Pandemic Nearly Derailed the Women's Suffrage Movement*, NAT'L GEOGRAPHIC (Apr. 20, 2020), *available at* <https://on.natgeo.com/3Ib7slM>. Gatherings of suffragists aimed to collect petition signatures to amend state constitutions to allow women the right to vote were cancelled. *E.g.*, *Influenza Mars Suffrage Plans*, NEW ORLEANS TIMES-PICAYUNE, at 15 (Oct. 10, 1918) ("Everything conspires against women's suffrage. Now it is the influenza which is trying to prevent a spread of the suffrage doctrine, but obedient to the demands of the health authorities the suffragists will refrain from public gatherings.").

Without modification to overly stringent ballot qualification rules in the face of restrictive public health mandates, initiative petitions will likely fail to reach the ballot. Sarah Holder, *How Coronavirus Is Killing Off Ballot Measures*, BLOOMBERG CITYLAB (Apr. 9, 2020), *available at* <https://bloom.bg/33Js99s>. Prohibitions on large gatherings and fears associated with such gatherings remove the most historically important forum for the exercise of direct democracy. Moreover, the pandemic has reduced the number of available paid and volunteer signature gatherers who may have at-home obligations (*e.g.*, childcare) or who worry about exposure to coronavirus. Thus, initiative proposals will likely fail—not because of the lack of public support—but rather from fear of contracting coronavirus as well as violating public health orders.

On the other hand, the pandemic has demonstrated that businesses, governments and citizens can adapt to a world without large gatherings, or person-to-person contact. If the Court recognizes that the ballot and initiative process implicate First Amendment rights, then States, like Ohio, should tailor their ballot qualifying requirements to the public health and real-world realities of conducting business, governmental and other activities, which will certainly continue as the pandemic eases or new variants appear. Nationwide, many states have temporarily modified or made modest changes to ballot qualification rules to accommodate public health orders stemming from the coronavirus. *E.g.*, MONT.

DECLARATORY ORDER, No. SOS-2020-DR-0001 (May 8, 2020) (in Montana, permitting citizens to download initiative materials, sign, and mail in the petition); UTAH EXEC. ORDER, 2020-12 (Apr. 1, 2020) (in Utah, suspending the witness requirement and allowing initiative campaigns to distribute petitions electronically, by fax or email, and requiring voters to sign and return the petitions by mail); N.J. EXEC. ORDER 132 (Apr. 29, 2020) (in New Jersey, allowing petitioners to collect signatures online because “[n]ow is not the time for anyone to be going door-to-door or collect signatures for any purpose”). Such adjustments to petitioning rules allow States to protect both public health and ballot petitioners’ First Amendment rights.

Elections are “of the most fundamental significance under our constitutional structure.” See *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U. S. 173, 184 (1979). Elections in 24 states include citizens’ initiatives—the right of direct self-governance. Yet, despite its importance, the Courts of Appeals and state high courts are deeply divided as to whether the First Amendment applies at all, and if it does, the applicable standard of scrutiny to review certain government restrictions that make exercise of such speech particularly burdensome. See Pet. Br., at 15–18. The Petition presents the right case to resolve “an important issue of election administration.” See *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C. J., concurring).

VI. Challenges To Pandemic-Related Restrictions That Impact First Amendment Petitioning Activities Are Not Moot.

Campaign activities for qualifying ballot measures occur yearlong. The citizens' initiative process is not a seasonal sport that stops during peaks of coronavirus infections, *e.g.*, post-holidays, when States may reinstate public health orders that could restrict public gatherings. Cf., *e.g.*, *Governor Murphy Reinstates Public Health Emergency to Respond to Omicron Variant of COVID-19* (Jan. 11, 2022), available at <https://bit.ly/3hcHp1D>. Though Ohio has voluntarily eased its earlier public health restrictions, the First Amendment dispute remains live and controversial because the State could reinstate similar mandates when faced with new variants or rising infections. The Sixth Circuit erred in dismissing the case on mootness grounds.

Establishing mootness from a defendant's voluntary cessation is a "heavy burden." See *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U. S. 167, 189 (2000). The defendant must demonstrate it is "absolutely clear" the practice "could not reasonably be expected to recur." *Ibid.* Ohio cannot satisfy this demand given the unpredictability of COVID-19 and the likelihood that States, including Ohio, reinstate government mandates when infection rates spike. Without clear instruction from this Court on the First Amendment issue, States would be "free to return to [their] old ways," see *City of Mesquite v. Aladdin's Castle, Inc.*,

455 U. S. 283, 289 n.10 (1982), when new COVID-19 variants surface or infection rates increase. Significant litigation activity has occurred in this matter, see Pet. Br. 6–9, and Petitioners should not need to return to square one if Ohio issues new mandates. This would both waste judicial resources, *Laidlaw*, 528 U.S., at 191–192, and thwart “the public interest in having the legality of the practices settled.” *De-Funis v. Odegaard*, 416 U. S. 312, 318 (1974).

The pandemic is not over. Nor are public health mandates or other emergency measures restricting public gatherings unlikely to happen again in the future, including during election cycles. Ballot organizers have a concrete interest in preserving their ability to effectively petition regardless of the ebb and flow of infections and the States’ shifting strategies during times of public health concerns. See *Chafin v. Chafin*, 568 U. S. 165, 172 (2013) (“[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.”). This Court accordingly has a “virtually unflagging” obligation to exercise its jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976).

CONCLUSION

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

Respectfully submitted,

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