No. 21-1360

In the Supreme Court of the United States

MIKE KOWALL, ET AL, PETITIONERS

v.

JOCELYN BENSON, MICHIGAN SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

Fadwa A. Hammoud
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
HammoudF1@michigan.gov
(517) 335-7628

Heather S. Meingast
Division Chief
Erik A. Grill
Assistant Attorney General
Civil Rights & Elections Division

Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether term limits for state elective offices should be reviewed under rational basis as qualifications for state office, instead of ballot-access laws to be reviewed under the *Anderson-Burdick* balancing test?

PARTIES TO THE PROCEEDING

Petitioners Mike Kowall, Roger Kahn, Paul Opsommer, Joseph Haveman, David E. Nathan, Scott Dianda, Clark Harder, Mary Valentine, Douglas Spade, and Mark Meadows are voters and former members of the Michigan Legislature. The only named Respondent is Jocelyn Benson, who is the Michigan Secretary of State.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

OPINIONS BELOW

The district court's opinion and order granting Respondent's motion to dismiss is not reported and is reprinted in the Petitioner's Appendix (App.) at 12a–31a, and the district court's judgment is reprinted at App. 32a.

The Sixth Circuit's opinion affirming the district court is reported at 18 F.4th 542 and reprinted at App. 1a–11a.

JURISDICTION

The district court had jurisdiction over Petitioners' federal claims under 28 U.S.C. § 1331. Although the district court exercised jurisdiction over Petitioners' state-law claims in order to dismiss them, the Sixth Circuit determined that the district court should not have exercised supplemental jurisdiction after determining that there were no viable federal claims, and Petitioners do not appear to challenge that determination in this petition. The Sixth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 4, § 54 of the Constitution of the State of Michigan of 1963 provides:

> No person shall be elected to the office of state representative more than three times. No person shall be elected to the office of state senate more than two times. Any person appointed or elected to fill a vacancy in the house of representatives or the state senate for a period greater than one half of a term of such office, shall be considered to have been elected to serve one time in that office for purposes of this section. This limitation on the number of times a person shall be elected to office shall apply to terms of office beginning on or after January 1, 1993. This section shall be self-executing. Legislation may be enacted to facilitate operation of this section, but no law shall limit or restrict the application of this section. If any part of this section is held to be invalid or unconstitutional, the remaining parts of this section shall not be affected but will remain in full force and effect.

INTRODUCTION

This is a case about term limits for state offices, an issue that this Court has previously declined to review. The Sixth Circuit has twice upheld Michigan's term limits as constitutional, most recently under the rational basis standard as qualifications for state office. The Petitioners urged the Sixth Circuit to consider terms limits as ballot-access laws that they seek to have reviewed under strict scrutiny because—they insist—term limits impose a "severe burden" on their First Amendment rights. In a clear, thoroughly researched, and well-supported opinion, the Sixth Circuit squarely rejected Petitioners' arguments.

Now, the Petitioners present this case as posing a circuit split. But the cases on which they base this argument create no split, and notably do not address term limits at all. Instead, Petitioners rely on cases involving entirely different restrictions, such as state laws barring civil servants from running for office. Those cases offer little or no support for holding term limits unconstitutional. Moreover, Petitioners' arguments in this regard beg the question by assuming the premise that Petitioners even have a First Amendment right to be candidates for state office.

Petitioners next posit that the Sixth Circuit's decision is "in tension" with decisions from this Court, but their argument fails to demonstrate how the lower court's opinion is in any way contrary to any prior holding of this Court. The Petitioners instead point to only two decisions of this Court, neither of which undermines the Sixth Circuit's reasoning. Petitioners point to *Lubin* v. *Parish*—a decision of this Court concerning an excessive filing fee—and then to *U.S. Term*

Limits v. *Thornton*, which addressed a state law seeking to impose term limits on members of the U.S. Congress. Neither case makes any statement on the constitutionality of term limits for state officers.

Petitioners propose this case as an "excellent vehicle" for this Court to decide—for the first time—to impose a federal standard on state term limits. Petitioners' appraisal, however, is unduly favorable. Petitioners base much of this assessment on an unsupported belief about how other federal courts might have treated the case differently than the Sixth Circuit. But Petitioners' unfounded assumptions about how various courts might have ruled on a case they never heard offers no basis for this Court to grant certiorari.

Lastly, Petitioners assert that this case cleanly frames the issue because the facts are not in dispute. But this would assuredly be so for any case raising a constitutional challenge to a state enactment regarding term limits for state office, and so there is nothing unique about the absence of factual issues here. Moreover, Petitioners fail to note that Michigan's Legislature has put forth a proposal to amend the state constitution that will appear on the ballot for the state's November 2022 general election. As a result, there is no certainty that the term limits on which Petitioners based their original claim will still be in place by the time this Court has a chance to fully consider the case.

For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Michigan's term limits amendment

The People of Michigan have reserved to themselves the right to amend the Michigan Constitution, the state's foundational document. See Mich. Const. art. XII, § 2.

Michigan voters exercised this right in 1992 and adopted Proposal B, which established term limits on state legislators. Under the amendment, state representatives are limited to three terms of two years each, and state senators are limited to two terms of four years each. Mich. Const. art. IV, § 54. The amendment added the following language to the State Constitution:

> No person shall be elected to the office of state representative more than three times. No person shall be elected to the office of state senate more than two times. . . . This limitation on the number of times a person shall be elected to office shall apply to terms of office beginning on or after January 1, 1993.
>
> This section shall be self-executing. Legislation may be enacted to facilitate operation of this section, but no law shall limit or restrict the application of this section. If any part of this section is held to be invalid or unconstitutional, the remaining parts of this section shall not be affected but will remain in full force and effect.

Mich. Const. art. IV, § 54. The amendment does not preclude candidates from serving the maximum in both houses. For instance, a candidate could be elected three times and serve six years in the House, and then seek election to the Senate, and serve two four-year terms there, or vice versa. Thus, a candidate could run for legislative office at least five times and serve 14 years in the Michigan Legislature.

A large majority of voters—58.8 percent—approved the proposal. *Citizens for Legislative Choice* v. *Miller*, 144 F.3d 916, 918 (6th Cir. 1998). Section 54 became operative as to state legislators beginning with the 1998 primary elections in Michigan. *Id*.

In the same year, four voters and two public interest groups filed a lawsuit challenging the constitutionality of § 54 under the First and Fourteenth Amendments in *Citizens for Legislative Choice* v. *Miller*. The *Miller* Court upheld the constitutionality of the amendment in a published decision. 144 F.3d at 918. A challenge was also filed in the Michigan Supreme Court. *Massey* v. *Secretary of State*, 579 N.W.2d 862 (Mich. 1998). In that case, the Court rejected a challenge to the manner in which Proposal B was placed upon the ballot. The amendment has thus remained an operational part of the Michigan Constitution for over 23 years.

B. The Plaintiffs-Petitioners

Petitioners are all former state legislators who have served in at least one house of the Michigan Legislature. While none of the petitioners have exhausted their eligibility to serve in the Michigan Legislature under § 54, all are term-limited with respect to one

house of the Legislature, except for Petitioner Mary Hostetler Valentine, who has served only two terms in the Michigan House of Representatives and none in the Michigan Senate, and is therefore eligible for election to either house. R. 33, Joint Statement, Page ID # 327–30, ¶29–38.

C. The alleged effects of term limits in Michigan

In support of their petition, Petitioners cite to and rely upon several articles discussing or concluding that term limits in general or Michigan's term limits have had a deleterious effect on government or have not served the purposes for which they were adopted. Pet. at p 7. Petitioners similarly referenced these same articles before the district court during the motion for summary judgment. R. 25, Page ID # 168–72, 174. These articles are also referenced in the parties' joint statement of facts filed below. R. 33, Joint Statement, Page ID # 318–27, ¶¶6–28. The parties stipulated only that the referenced articles say what Plaintiffs represent they say, i.e., the quotes or paraphrasing is accurate, not that the articles are true or correct in their analysis or conclusions regarding § 54.

D. Procedural history of the case

Petitioners filed this lawsuit on November 20, 2019, R. 1, Compl., Page ID # 1–30, and filed an amended complaint on December 11, 2019, R. 5, Am. Compl., Page ID # 34. In Counts I and II, Petitioners alleged that § 54 violates the First and Fourteenth Amendments. *Id.*, Page ID # 58–62. In Count III, Petitioners alleged that § 54 violates the Guarantee Clause of the federal constitution. *Id.*, Page ID # 62–

63. Petitioners alleged in Count IV that § 54 violates the Title-Object Clause of the Michigan Constitution. *Id.*, Page ID # 63–64. And in Count V, Petitioners alleged that § 54's ballot language violates Article XII, § 2 of the Michigan Constitution. *Id.*, Page ID # 64.

On January 20, 2021, the district court issued its opinion and order granting summary judgment in favor of Secretary Benson on all counts. R. 34, Op. & Order, Page ID # 336.

On November 17, 2021, the Sixth Circuit affirmed the district court in part. The Sixth Circuit first considered whether federal courts had jurisdiction to hear the claims and determined that it did. App. 3a–5a.

Next, the Court rejected Petitioners' arguments that term limits violate their rights under the First and Fourteenth Amendments, and that the *Anderson-Burdick* test ought to apply. App. 5a. The panel recognized that courts use the *Anderson-Burdick* sliding-scale analysis to assess election-related ballot-access and freedom-of-association claims. App. 5a. But it concluded that *Anderson-Burdick* was inapposite here because term limits are not state election laws. App. 5a. Instead, the Court concluded that term limits are an attempt by states to set qualifications for office-holders. App. 6a. "[T]erm limits let Michigan define its own 'republican form of government' based on the type of representatives its citizens can elect." App. 6a. "Rather than keeping eligible candidates off the ballot," the Court recognized that "term limits restrict eligibility for office." App. 6a. Like any other qualification, they limit which individuals are eligible to hold office. App. 6a.

Petitioners had argued below that this Court's decision in *U.S. Term Limits* v. *Thornton* required state term limits to be analyzed as ballot-access requirements. But the Sixth Circuit observed that *U.S. Term Limits* turned on the Qualifications Clauses of the U.S. Constitution—not upon ballot-access analysis. App. 6a (citing *U.S. Term Limits*, 514 U.S. 779, 783 (1995)). The panel observed that the only discussion of ballot access in *U.S. Term Limits* was because the state had framed its term limits as such. App. 7a. The Sixth Circuit then noted that this Court in *U.S. Term Limits* reached the same conclusion: term limits were qualifications for office. App. 7a.

The Sixth Circuit—citing *Clements* v. *Fashing*, 457 U.S. 957, 963 (1982) and *Zielasko* v. *Ohio*, 873 F.2d 957, 959 (6th Cir. 1989)—then observed that there is no fundamental right to run for office. App. 7a. Without a fundamental right at issue, the Sixth Circuit reverted to what it called "the baseline" review—rational basis. App. 7a. In so doing, the Sixth Circuit reviewed multiple opinions of this Court and earlier Sixth Circuit panels reviewing other qualifications for office under rational basis: *Gregory* v. *Ashcroft*, 501 U.S. 452, 470–71 (1991) (reviewing age limit for state judges); *Clements*, 457 U.S. at 968–71 (reviewing candidacy restrictions for existing officeholders); *Zielasko*, 873 F.2d at 959 (reviewing age limit for state judges). App. 7–8a. The Sixth Circuit also noted that this Court had summarily dismissed the last case that attempted to raise a similar constitutional challenge to term limits for state offices. App. 8a (citing *Moore* v. *McCartney*, 425 U.S. 946 (1976)).

The Sixth Circuit panel offered one additional reason for applying rational basis. The Court stated that restrictions upon who may hold state offices "lie at the heart of representative government," and a state " 'defines itself as a sovereign' by structuring its government and choosing qualifications for its officeholders." App. 8a (quoting *Gregory*, 501 U.S. at 460, 462–63). "To respect states' sovereign authority," the Sixth Circuit said, "federal review must not 'be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." App. 8a (quoting *Sugarman* v. *Dougall*, 413 U.S. 634, 647–48 (1973)). Because qualifications for office fall squarely within those prerogatives, the Court concluded that rational basis was appropriate. App. 8a.

Having determined that rational basis review was the appropriate standard, the Sixth Circuit then proceeded to consider Michigan's term limits under that standard. App. 8a. The Court held that Michigan's term limits were rationally related to their stated goal of electing a citizen legislature, and thus passed rational basis review. App. 8–9a.

The Sixth Circuit also rejected the Petitioners' free speech and association arguments. The Court held that Petitioners did not have a fundamental First Amendment right to specific platforms for speech, i.e., the greater access to media reporting afforded to candidates. App. 9a. Next, the Court held that Petitioners' claims as voters under freedom-of-association failed because there was no recognized fundamental right to vote for specific candidates or even a specific class of candidates—i.e., "experienced legislators." "Term limits are still qualifications for office" that

"implicate no fundamental right for *Anderson-Burdick*" analysis. App. 10a.

Lastly, the Sixth Circuit reversed the district court's summary judgment as to the Petitioners' state law claims under the Michigan constitution, holding that—after having concluded there were no viable federal claims—the district court should not have exercised jurisdiction over the state law claims, and should instead have left those claims to the state courts to decide. App. 10–11a. Accordingly, the Sixth Circuit reversed as to the Petitioners' state law claims, and remanded the case to the district court to dismiss those claims without prejudice. App. 11a.

REASONS FOR DENYING THE PETITION

I. There is no split among the circuits about the appropriate standard to apply to term limits for state offices.

Petitioners' principal argument in support of their petition is their contention that the Sixth Circuit's holding in this case "conflicts" with other circuits and certain state courts. However, the cases on which they rely for this premise have nothing to do with term limits. Instead, they involve restrictions on candidacy that have nothing to do with the candidates' qualifications for office—such as laws barring civil servants from office. These cases offer little support for Petitioners' claims about the constitutionality of state term limits, and they fail to demonstrate a split among the circuits that would warrant this Court's review.

Petitioners start by pointing to the First Circuit's decision in *Mancuso* v. *Taft*, 476 F.2d 1987 (1st Cir. 1973). In that case, a city police officer wanted to run for a seat in the Rhode Island General Assembly and challenged a local law prohibiting city workers from continuing in civil service after becoming candidates for public office. *Mancuso*, 476 F.2d at 188. *Mancuso* did not involve term limits or qualifications for office—in fact, term limits are never mentioned in the decision. *Mancuso*, then, does not show the existence of a circuit split about the proper standard of review for either term limits or qualifications for state office. Petitioners' discussion of this case instead appears limited to whether the First Amendment protects the right of an individual to run for office. Pet. at 20. Their argument, however, merely begs the question by assuming term limits are equivalent to a restriction like the one at issue in *Mancuso*. Notably, the First Circuit made no such holding. Instead, *Mancuso* considered a prohibition against civil servants running for office while maintaining public employment. *Mancuso*, 476 F.2d at 188. That is simply not the case here.

Moreover, *Mancuso* was decided nearly two decades before Michigan adopted the amendment imposing the term limits at issue and over forty years before Petitioners filed this case, but Petitioners never cited this case in their briefing before the Sixth Circuit. Had Petitioners genuinely believed that this case had bearing on the outcome of this case, there is no reason they could not have presented that argument to the lower courts.

Also, *Mancuso* was decided shortly before this Court's decisions in *Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), both of which upheld laws barring civil servants from partisan political activity. In *Magill* v. *Lynch*, 560 F.2d 22 (1977), the First Circuit revisited its holding in *Mancuso*. There, the First Circuit held that the district court "found more residual vigor in our opinion in *Mancuso* v. *Taft*, than remains after *Letter Carriers*," and with regard to whether political candidacy is a fundamental right, the court was forced to conclude that "while this approach may still be viable for citizens who are not government employees," *Letter Carriers* had recognized the government's interests in regulating the conduct and speech of its employees. *Magill*, 560 F.2d at 27. Even in *Magill*, the reference to non-employee citizen candidacies is, at best, dicta. The First Circuit in *Magill* held that the government *may* constitutionally restrict public employees' participation in non-partisan elections. *Magill*, 560 F.2d at 29. In light of *Magill*, *Mancuso* is not even binding in the First Circuit for its actual holding, let alone any inference that might be drawn about how its holding could be applied to term limits. *Mancuso* simply does not support the existence of a circuit split.

Petitioners next cite *Phillips* v. *City of Dallas*, 781 F.3d 772, 774–75 (5th Cir. 2015), in which the Fifth Circuit considered a provision of the Dallas city charter that—much like the law in *Mancuso*—prohibited city employees from being candidates for county office, and the plaintiff was terminated from his city employment as a result. The Fifth Circuit—applying *Letter Carriers* and *Broadrick*—upheld the Dallas Charter.

Phillips, 781 F.3d at 783. Here again, the Fifth Circuit made no reference to either term limits or qualifications for office. Instead, the issue was whether the plaintiff could be fired from his civil service position for becoming a candidate, which the Court held was allowed under *Letter Carriers*. Petitioners here have no such claim. The holding in *Phillips*, then, does not show a split among the circuits.

Rather, Petitioners argue that the Fifth Circuit's discussion of "First Amendment interests" gives rise to a fundamental right to be a candidate. Pet. at 23. But notably, the Fifth Circuit never states that candidacy is a fundamental right. Rather, it merely cited to *Morial* v. *Judiciary Com of Louisiana*, 565 F.2d 295, 301 (1977), which it quoted as regarding the First Amendment interest as "substantial," and held that the burden was imposed upon an "important, if not constitutionally 'fundamental' right." In fact, earlier on the same page of its opinion in *Morial* (but not part of the quote cited in *Phillips*) the Fifth Circuit explicitly observed that it was "enjoined to recall that the Supreme Court has not declared a right to candidacy as fundamental." *Morial*, 565 F.2d at 301. Accordingly, neither *Phillips* nor *Morial* offer any support for the proposition that a split among the circuits exists as to whether there is a fundamental right to candidacy.

At this point, the petition pauses its review of circuit decisions to consider state supreme court decisions from Oregon, West Virginia, Minnesota, and Pennsylvania. However, these decisions are just as unrelated to term limits or qualifications as *Mancuso* and *Phillips*. The petition starts its state court survey

with *Minielly* v. *Oregon*, 411 P.2d 69, 70 (Or. 1966), which concerned a state law prohibiting civil service employees from being candidates for office unless they resigned their civil service positions. This is the same issue presented under *Mancuso* and *Phillips*, and so the analysis is no more favorable for Petitioners' argument. Moreover, *Minielly* was decided in 1966—seven years before even *Mancuso*, and so its value following this Court's 1973 decision in *Letter Carriers* is questionable at best. Regardless, even taking this case at face value, it similarly does not mention term limits or the standard for reviewing qualifications for office, and so offers no support for this petition.

Next, the petition cites *West Virginia ex rel. Piccirillo* v. *City of Follansbee*, 233 S.E.2d 419 (W. Va. 1977), which concerned a municipal requirement that city council candidates hold and have paid at least $100 of taxes upon real or personal property in order to be eligible to appear on the ballot. As an initial matter, this case was premised upon equal protection, which was not a claim advanced by the petitioners or decided by the lower courts in this case. Instead, the petition cites to this case purportedly because the court held that candidacy was a fundamental right. Pet. at 25. That is not quite accurate. In *Piccirillo*, the West Virginia Supreme Court cited its holding in *Brewer* v. *Wilson*, 150 S.E. 592 (W. Va. 1966), which recognized the right to be a candidate as a "valuable and fundamental right." *Piccirillo*, 160 W. Va. at 333. However, the *Brewer* Court was discussing candidacy as a right under only the state Constitution—specifically Section 23 of Article VIII—and it does not ever mention the United States Constitution. See *e.g.*, *Brewer*, 151 W. Va. at 121–22. Even so, the Court in

Brewer held that the state legislature could still "prescribe the qualifications of a person who desires to become a candidate for office, but provisions in that regard must be reasonable and not in conflict with any constitutional provision." *Id.* *Brewer* was later expressly overruled by the West Virginia Supreme Court, which held that any qualifications for office other than those found in Section 4 of Article IV of its state constitution were unconstitutional. *Marra* v. *Zink*, 163 W. Va. 400, 408 (1979). Accordingly, *Brewer* is no longer good law, and the West Virginia Supreme Court's citation to it in *Piccirillo* does not demonstrate any active dispute among the states. Even so, the qualification at issue—i.e., the term limits—are expressly provided in the state constitution, and so would pose no issue under West Virginia's interpretation of its own constitution, even were its interpretation to apply.

Next, the petition refers to *Bolin* v. *Minnesota*, 313 N.W.2d 381, 382 (Minn. 1981), in which the Minnesota Supreme Court considered a state law requiring a civil servant—in this case, a state patrol officer—to resign if the employee chose to run for political office. Once again, this case makes no mention of term limits or qualifications for office; the case was also decided consistent with this Court's decision in *Letter Carriers* and *Broadrick*. *Bolin*, 313 N.W.2d at 383. Moreover, the petition acknowledges that the Court in *Bolin* recognized that the right to run for office was not fundamental, and instead described it only as an "important right protected by the First Amendment." Pet. at 25 (quoting *Bolin*, 313 N.W.2d at 382–83). Even so, the Court held that the right was "not absolute, and may be subject to restriction."

Bolin, 313 N.W.2d at 383 (citing *Broadrick* and *Letter Carriers*). For the reasons already discussed above, the statute at issue and the appropriate legal analysis is readily distinguishable from this case, and *Bolin* offers little or no support for the Petitioners' arguments.

The last state court decision referenced by the petition is *Pennsylvania ex rel. Toole* v. *Yanoshak*, 346 A.2d 304 (Pa. 1975). There, the Supreme Court of Pennsylvania considered—and upheld—a law that imposed a two-year gap after leaving certain offices, including the office of chief deputy recorder of deeds, before such an office-holder could be a candidate for the office of county controller. *Id*. at 306. As with the other cases cited by the Petitioners, this case does not mention or refer to term limits. Moreover, this opinion predates this Court's decisions in *Letter Carriers* and *Broadrick*, and so its analysis of First Amendment limits on public employees is significantly out of date. Further, the Court's analysis of First Amendment principles was abbreviated, citing only its own earlier decision in *Pennsylvania ex rel. Specter* v. *Moak*, 307 A.2d 884, 887 (Pa. 1973), which itself stated only that "freedom of political expression and activity is embodied in the First Amendment." But in *Toole*, the Court concluded "Because running for and holding political office are forms of political expression there must be a compelling state interest to uphold the validity of a restriction on holding political office." *Toole*, 346 A.2d at 306. This bears no resemblance to the *Anderson-Burdick* analysis urged by Petitioners—likely because *Anderson* v. *Celebrezze*, 460 U.S. 780, 787–88 (1983) and *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) would not be decided until a decade or more after this decision of the Pennsylvania court. As a result, it

offers limited insight into the current approach of Pennsylvania courts, and no insight at all as to how they might approach a constitutional amendment imposing term limits on its state officers.

The petition next raises decisions from the Seventh, Eighth, and Ninth circuits applying *Anderson-Burdick* to what it describes as "candidacy restrictions." Pet. at 26–27. However, the Seventh and Eighth Circuit cases have nothing to do with qualifications for office like the term limits at issue in this case. In *Claussen* v. *Pence*, 826 F.3d 381 (7th Cir. 2016), the Seventh Circuit reviewed an Indiana law that prohibited individuals from simultaneously holding elective office and being employed as civil servants in the same unit of government. *Id.* at 383. The law operated to consider the civil servants as having resigned when they assume elected office of the unit of government that employs them. *Id.* So, the law was not a term limit, or qualification for office, or even a prohibition against civil servants running for office or having access to the ballot—rather, it compelled a civil service employee's resignation upon taking office. Petitioners fail to explain how this law constitutes a "candidacy restriction." Indeed, the Seventh Circuit analyzed the First Amendment issue as a restriction on political activity of state employees. *Claussen*, 826 F.3d at 384. In addition, the Seventh Circuit expressly noted at the outset that the "right to be a candidate for office is not a fundamental right." *Id.* at 385. The Seventh Circuit's discussion of *Anderson-Burdick* occurred in context of its discussion of the plaintiffs' alternative argument that the Indiana law burdened the rights of voters, which the court similarly rejected after finding that the statute imposed a "negligible

impact on voters" because it did not bar would-be candidates from the ballot. *Id.* Because the court had no cause to reach or consider the distinction between ballot access and qualification for office, *Claussen* does not demonstrate any disagreement or conflict with the Sixth Circuit's decision in this case.

Next, the petition discusses the Eighth Circuit's decision in *Peeper* v. *Calloway Ambulance District*, 122 F.3d 619 (8th Cir. 1997). In that case, after the plaintiff was elected to the county Ambulance District Board of Directors, it adopted, over her objection, a resolution limiting her participation as a member of the board so as to preclude her from participating in discussions or voting upon matters that might affect her husband, who was an employee of the ambulance district. *Peeper*, 122 F.3d at 620–22. The Seventh Circuit construed the resolution as a limitation on the plaintiff's right to hold office, which it held was "nearly identical" to the right to be a candidate for office. *Id.* at 622. The Court proceeded to analyze the board resolution under *Anderson-Burdick*.

Obviously, the case did not involve term limits, but it also did not involve any qualification for the plaintiff to run for or hold office. Indeed, the plaintiff was allowed to run for—and won—a seat on the board. Instead, the resolution at issue limited the actions the plaintiff could take after having been elected based upon apparent conflict of interest and "chilling" of board members' candid discussions. *Id.* at 624. Still, the Seventh Circuit rejected strict scrutiny and analyzed the resolution under rational basis and still found the resolution constitutionally infirm as written. *Id.*

Notably, the Eighth Circuit cited no authority for its holding that the right to be a candidate was nearly identical to the right to hold that office, and no holding of this Court compels that conclusion. However, that determination was the entire basis for applying *Anderson-Burdick*. The use of *Anderson-Burdick* in circumstances that had nothing to do with ballot access or election rules is itself subject to some doubt. See *e.g.* *Daunt* v. *Benson*, 999 F.3d 299, 322 (2021) (Readler, J., concurring) ("We have utilized that [*Anderson-Burdick*] framework only in ballot-access cases or, at its most generous application, voting-access matters, such as voter-identification laws or early voting regulations.")

Regardless, the Eighth Circuit's framing of the board resolution as a "candidacy restriction" was tenuous, and nothing in the opinion suggests that the Eighth Circuit would seek to apply *Anderson-Burdick* to either term limits or other qualifications for office. There is no conflict with the Sixth Circuit's opinion in this case.

Lastly, the petition raises the Ninth Circuit's decision in *Bates* v. *Jones*, 131 F.3d 843 (9th Cir. 1997) (Bates II). This is the only case cited by the petition that concerns term limits. Here, the Ninth Circuit upheld California's lifetime term limits after applying the *Anderson-Burdick* analysis and determining that the term limits imposed minimal impact on the rights of the plaintiffs (who were also former state legislators), and was instead a "neutral candidacy qualification" that was justified by the state's legitimate interests. *Bates II*, 131 F.3d at 847. It is significant that the Ninth Circuit found the burden imposed to be

minimal, because under *Anderson-Burdick* reasonable, nondiscriminatory restrictions are generally justified by important regulatory interests. *Burdick*, 504 U.S. at 434. This less-searching examination is akin to rational basis. In other words, the Ninth Circuit effectively applied the same level of scrutiny as the Sixth Circuit did here—and reached the same result—but arrived at it by a different approach. This is not the kind of variance among circuits that calls for this Court's review in order to settle the divide.

Moreover, a closer read of *Bates II* shows that the Sixth Circuit and the Ninth Circuit are in greater chorus than is suggested by the petition. Indeed, *Bates II* was considered by the Sixth Circuit, twice—the Sixth Circuit cited it both in the decision at issue here and in its earlier decision in *Miller*. In *Miller*, the Sixth Circuit agreed with the Ninth Circuit's application of *Anderson-Burdick* to term limits. *Miller*, 144 F.3d at 922. But even in *Miller*, the Sixth Circuit recognized that the concurrence of Judges Rymer and O'Scannlain in *Bates II* had found a distinction between ballot access issues and term limits. *Miller*, 144 F.3d at 924. Even then, the Sixth Circuit was aware that, "*Anderson* and *Burdick* implicate rights and interests related to, but fundamentally different from, the rights and interests involved in this case." *Id*. Similarly, Judge Rymer, joined by Judge O'Scannlain, articulated that there were stronger state interests involved:

> I write separately to suggest that the state's interest in Proposition 140 is somewhat different, and even stronger than Judge Thompson acknowledges, because the people of the State

> of California exercised their own constitutional right to choose the form of their representation in the legislative branch of state government. In this they acted in accordance with the Constitution's guarantee that citizens of each state shall have the right to determine the structure of their own government so long as it is republican in form. Since the state's interest in structuring the state legislature is firmly rooted in the Constitution, a decision to adopt term limits for state officers is presumptively constitutional.

Bates II, 131 F.3d at 855 (Rymer, J., concurring).

This same conclusion is at the core of the Sixth Circuit's decision now, only the panel was better able to articulate what the Sixth Circuit panel in *Miller* and the concurrences in *Bates II* had been grappling with twenty years earlier—namely, that term limits were neither a ballot access law nor a "candidacy restriction," and that *Anderson-Burdick* was a poor fit to review such limits. So, there is no meaningful discord between the Ninth Circuit's decision in *Bates II* and the Sixth Circuit's decision in this case, and so there is no split that warrants this Court's review.

II. The Sixth Circuit's decision does not conflict with prior decisions of this Court.

Petitioners contend that the Sixth Circuit decision is "in tension with" this Court's precedents. In support of this argument the Petitioners cite two decisions of this Court, but neither case is at odds with the lower court's decision here—and in fact, the panel decision

is arguably more consistent with the second case cited by the Petitioners than their own position.

First, the petition cites to *Lubin* v. *Parish*, 415 U.S. 709, (1974), which struck down an excessive filing fee as violating a candidate's "rights of expression and association guaranteed by the First Amendment." But, similar to the petition's arguments above regarding decisions from other circuits and states, this case precedes *Anderson-Burdick* by years. That is significant, because an excessive filing fee would likely be analyzed now as a ballot-access restriction under *Anderson-Burdick*. See e.g. *Libertarian Party of Ky*. v. *Grimes*, 835 F.3d 570, 576–77 (6th Cir. 2016) (comparing costs of signature gathering to the mandatory fee in *Lubin* in terms of the burden each imposed on ballot access). Further, *Lubin* did not concern qualifications for office—the plaintiff was eligible for the office he sought, but asserted that he was indigent and unable to pay the filing fee. *Lubin*, 415 U.S. at 711. So, *Lubin* offers little about the standard to be applied to qualifications for elected office, and is not in "tension" with the Sixth Circuit's decision here.

Second, the petition argues that this Court's decision in *U.S. Term Limits* v. *Thornton* is at odds with the Sixth Circuit's holding. Petitioners' argument appears to be based on this Court's rejection of Arkansas's argument in *Thornton* that their term limits on members of Congress was a "time, place, and manner" election law. Pet. at 32. The petition quotes this Court's holding stating that this Court's line of cases "upholding state regulations of elections procedures thus provide little support for the contention that a state-imposed ballot access restriction is

constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses." Pet. at 32 (quoting *Thornton*, 514 U.S. at 835).

Respectfully, Petitioners appear to misread this Court's conclusion in *Thornton*. The Court's holding was accurately stated in the opinion: "Allowing individual States to adopt their own *qualifications for congressional service* would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States." *Thornton*, 514 U.S. at 835 (emphasis added). This Court went on to state, "If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended." *Id*.

This Court's holding was specifically about whether individual states could impose their own limits on congressional terms without amending the U.S. Constitution—and this Court held they could not. In other words, the states could not use the Elections Clause as an end-run around the Qualifications Clause. This case, however, is not about term limits for members of Congress, and is instead only about term limits for state officials. The Qualifications Clause, and the limits it might impose on state authority, do not apply.

In *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991), this Court—in upholding an age limit on judges as a qualification for office—noted the dual sovereignty between states and the federal government, and that states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. This Court explicitly

recognized the broad authority of states to set qualifications for its own officers:

> The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Gregory, 501 U.S. at 460 (citing *Taylor* v. *Beckham*, 178 U.S. 548, 570–71 (1900).)

It is significant that—in reaching this conclusion—this Court described term limits not as a "ballot access restriction," but rather as a "qualification for congressional service." *Thornton*, 514 U.S. at 835. This Court did not apply *Anderson-Burdick* to balance the state interests against the burden imposed by term limits. Instead, it was only a matter of the authority of the states to set qualifications for Congress beyond those set forth in the U.S. Constitution. As this Court held, the states have no such authority, absent a constitutional amendment.

In contrast, the U.S. Constitution is silent as to the qualifications for state office, and this Court's opinion in *Thornton* did not reach the question of whether states could impose term limits upon their own state officers. But in *Thornton*, this Court described term limits as a "state-imposed restriction" that was "contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.' " *Id*. (quoting *Powell* v. *McCormack*, 395 U.S. 486, 547 (1969)). While perhaps critical of the merits of term limits, the majority nonetheless recognized that the people are the proper authority to determine who will govern them. But here, the people of Michigan have done exactly that, and amended their Constitution to provide term limits as part of the qualifications for those who seek to govern them. The people of Michigan remain free to revise their decision, should they choose to do so.

The Sixth Circuit's decision does not conflict with this Court's decision in *Thornton*. Because the Sixth Circuit has recognized that term limits are a qualification for office, its opinion is consistent with this Court's holding in *Thornton*. Petitioners' arguments to the contrary are unpersuasive.

III. Changes to Michigan's term limits are on the ballot in this election, and the remaining arguments about the merits of this Petition are not persuasive.

In its last argument, the petition characterizes this case as an "ideal vehicle to resolve the splits" of authority because the facts are not disputed. As

argued above, there are no such splits. But in addition, the record in this case may not be as static as the petition represents it to be. In May of 2022, the Michigan Legislature voted to approve a proposal to change Michigan's term limits, and the proposal will be presented to voters as a ballot question during the November 2022 general election.[1] Thus, the term limits the Petitioners challenge may not be the same by the time this case could be fully briefed and heard by Court. A determination to grant the petition might also cast doubt or confusion among voters about whether they could (or should) vote for the pending ballot proposal. Either way, this case is not the "ideal vehicle" presented by the petition.

The petition next argues that other courts "would almost certainly not" have subjected term limits to a rational basis review as did the Sixth and Ninth Circuits. This is hyperbole that is not borne out by the cases cited in the petition—as discussed above, the First, Fifth, Seventh, and Eighth Circuits did *not* consider term limits—or any qualification—in the cases cited by the petition, and any statements about how courts "would certainly" rule can only be speculation.

In its third point, the petition argues that—because this Court's precedents do not dictate a specific level of scrutiny, this Court has "flexibility" to determine a new standard. Of course, this Court has power

---

[1] See State of Michigan, 101st Legislature, Enrolled House Joint Resolution R, available at http://www.legislature.mi.gov/documents/2021-2022/jointresolutionenrolled/House/pdf/2022-HNJR-R.pdf.

to hear and decide cases. But that is hardly a reason for this Court to grant this particular petition.

Fourth, the petition argues that the issue here will not benefit from further percolation. That is simply not so. The Sixth Circuit—building on its own prior decision and the decision in *Bates II*—has advanced a credible and persuasive rationale for treating term limits as a qualification rather than a ballot access restriction. Other courts and circuits may—should the issue come before them—agree and build a better sense of prevailing consensus than is proposed by the petition and its survey of outdated and largely unrelated decisions from other circuits. As discussed earlier, these cases are not in conflict with the Sixth Circuit's decision, and so there is no certainty that the Sixth Circuit will stand "permanently apart from other federal and state jurisdictions."

Lastly, the petition argues that this Court should act to prevent the Sixth Circuit's approach from spreading. It is not at all clear why this should be a reason to grant the petition. It would rather seem to be advantageous to allow lower courts to consider the Sixth Circuit's approach and determine its merits before reaching their own conclusions. If the day should come that other circuits disagree such to create the kind of split the petition fails to demonstrate, then this Court could decide which approach has the greater merit. But foreclosing further review and consideration by lower courts is not a justification for granting this petition.

CONCLUSION

For the reasons set forth above, this Court should deny the petition.

Respectfully submitted,

Fadwa A. Hammoud
Michigan Solicitor General
Counsel of Record

Heather S. Meingast
Division Chief
Erik A. Grill
Assistant Attorney General
Civil Rights & Elections
Division

Attorneys for Respondent

Dated: AUGUST 2022