No. 24A970

IN THE SUPREME COURT OF THE UNITED STATES

DAVID YOST, ATTORNEY GENERAL OF OHIO, *Applicant*,
v.
CYNTHIA BROWN, ET AL., *Respondents.*

BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION FOR STAY

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the Separation of Powers Clinic at The Catholic University of America's Columbus School of Law (previously at the Antonin Scalia Law School at George Mason University) provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation. The Clinic has submitted nearly fifty briefs at this Court and lower courts in cases implicating separation of powers, including federalism and comity.

SUMMARY OF THE ARGUMENT

Four Justices of this Court have already stated that review is warranted to address the Sixth and Ninth Circuits' unusual line of precedent holding that certain ballot-access requirements are subject to strict or otherwise heightened scrutiny under the First Amendment. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring in the grant of stay).

Amicus emphasizes the federalism harms imposed by these outlier circuits' doctrine, which has resulted in federal district judges rewriting state election laws and superintending the ballot access process. The district judges who must carry out this unusual interference are often as opposed to it as the states themselves are. *See* Part I, *infra*. Ballot-access requirements—like those at issue here in Ohio—are present in literally dozens of states across the country, yet only certain states must run the gauntlet of strict scrutiny. *See* Part II, *infra*. Finally, this issue is undoubtedly

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

worthy of review because it implicates a circuit split on a critically important issue. *See* Part III, *infra*.

ARGUMENT

I. The Sixth and Ninth Circuits' Ballot-Access Precedents Impose Serious Federalism Harms.

"Nothing in the Constitution requires [Ohio] or any other State to provide for ballot initiatives." *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of stay). Accordingly, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 191 (1999).

But the Sixth and Ninth Circuits in particular have adopted frameworks that subject even "the most typical sort of neutral regulations on ballot access" to First Amendment scrutiny, typically strict scrutiny. *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of stay).

As Chief Justice Roberts has explained, states have a "sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment." *Id.* Accordingly, precedent in the Sixth and Ninth Circuits results in federal courts interfering with core state sovereignty by forcing district judges to superintend the minutiae of state ballot requirements.

As Judge Bumatay explained in a recent dissent criticizing his circuit's precedent in this area, "[u]ltimately, it's federalism that suffers." *Comm. to Recall Dan Holladay v. Wiley*, 120 F.4th 590, 593 (9th Cir. 2024) (Bumatay, J., dissenting

from the denial of rehearing *en banc*). District courts "have taken it upon themselves to rewrite the neutral, nondiscriminatory state procedures that structure ballot initiatives and the like to give proponents a better shot." *Id.* "Federal courts now blow past States' policy balancing to ask and answer a standardless question: is it too hard to put an issue to a vote? This federal inquiry threatens a wide array of state procedures—not just direct democracy initiatives—that reflect States' considered policy judgments." *Id.* at 604.

Because Applicant ably addresses the flaws with the Sixth Circuit's application of First Amendment review to the ballot-initiative process, *Amicus* will focus on how the Ninth Circuit's doctrine has played out, pursuant to its decision in *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012).

District courts within the Ninth Circuit have rightfully bemoaned the situation in which *Angle* places them. "[T]he Court telling the [state] Secretary precisely how she must administer the initiative-petition process this election season 'would raise significant separation of powers and federalism concerns," and, moreover, "affirmatively ordering the Secretary to do things … is untenable because 'federal courts have no authority to dictate to the States precisely how they should conduct their elections,'" let alone "by rewriting" state law. *Fair Maps Nevada v. Cegavske*, 463 F. Supp. 3d 1123, 1145 (D. Nev. 2020). But that is precisely what *Angle* compels

the district courts to do. In that case, the district judge invoked *Angle* to extend the signature deadline for a proposed state constitutional amendment.[2]

Similarly, in *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988 (D. Idaho 2020), the district court concluded that difficulty in collecting signatures because of COVID-19 triggered *Angle*, and the court then forced Idaho to choose "between accepting as sufficient the 30,000 signatures Reclaim Idaho had collected or giving Reclaim Idaho 48 more days to gather signatures while suspending the in-person signature requirement." *Wiley*, 120 F.4th at 604–05 (Bumatay, J., dissenting). "So in the end, the Idaho political branches had spoken on an issue of Idaho law—whether ballot procedures should be relaxed based on the State's own COVID-19 response. But applying *Angle*, a federal district court second-guessed them to rewrite Idaho's rules." *Id.* at 605.

These "all too real" harms to federalism only emphasize the importance of granting relief. *Id.*

II. Many States Have Requirements for Ballot Initiatives.

Two dozen states allow the public to vote directly on legislative measures or constitutional amendments.[3] And nineteen states also allow voters to decide whether to remove an elected state official from office through a recall election.[4] Ohio is thus

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[2] The district court here likewise politely registered protest with being pulled into this difficult situation. App.9 ("Though bound to follow *Anderson-Burdick*, the Court would otherwise be inclined to consider an approach applying a diminished level of scrutiny.").

[3] *See* Nat'l Conf. of State Legisl., *Initiative and Referendum Processes*, https://www.ncsl.org/elections-and-campaigns/initiative-and-referendumprocesses.

[4] *See* Nat'l Conf. of State Legisl., *Recall of State Officials*, https://www.ncsl.org/elections-and-campaigns/recallof-state-officials.

far from unique in imposing some form of "obstacle" to ballot access for initiatives or recalls. *See Wiley*, 120 F.4th at 591 (Bumatay, J., dissenting from the denial of rehearing *en banc*) (such requirements are "commonplace").

For example, according to the National Conference of State Legislatures, in California, a proponent must collect signatures amounting to 12% of the last vote for the particular office, with signatures from each of five counties equal in number to 1% of the last vote for the office in the county. For California state senators, members of the Assembly, members of the Board of Equalization, and judges of the courts of appeal: 20% of the votes cast in the last election for the official being recalled. And all this must be done 160 days in advance.[5]

The majority opinion below suggested that signature-and-time requirements "look[] nothing like the requirement at issue in this case." App.32 n.2. But that is wrong even under the majority's approach, which seeks to measure whether the state requirement at issue "severely burdens Plaintiffs' access to the ballot." App.33. Under that framework, if anything, Ohio's requirement that the Attorney General approve a short summary of the proposal is far *less* burdensome than many states' signature-and-time requirements, especially given the guaranteed direct review provided in the Ohio Supreme Court when the Attorney General declines to accept a proposed summary. *See* App.6.

[5] *See* Nat'l Conf. of State Legisl., *Recall of State Officials*, https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials.

It must be far easier to satisfy Ohio's procedure than, say, Illinois's recall requirement of collecting 15% of the votes cast for governor in the preceding general election with at least 100 signatures from each of at least 25 counties, and also collect signatures from at least 20 members of the Illinois House of Representatives and 10 members of the Illinois Senate, with no more than half the signatures of members of each chamber from the same political party—all 150 days in advance.[6]

Yet Illinois's rule rightfully receives no First Amendment scrutiny at the Seventh Circuit, *see Morgan v. White*, 964 F.3d 649, 652 (7th Cir. 2020), while Ohio's gets blasted with strict scrutiny at the Sixth Circuit, *see* App.33.

Of course, the takeaway is not that Illinois has it too easy, but that the Sixth and Ninth Circuits' "how burdensome is too burdensome" test is just wrong for ballot-access requirements. It asks a court to "weigh the 'character and magnitude of the asserted injury' against the 'precise interests put forward by the State as justifications for the burden imposed by its rule,'" then determine "the magnitude of the burden." App.32. That first part is a bit "like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). And the second part seems to be repetitive of the first, with burden on the plaintiff being counted twice, or maybe once-and-a-half.

[6] *See* Nat'l Conf. of State Legisl., *Recall of State Officials*, https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials.

How many of the dozens of existing state-law ballot requirements would be subject to strict scrutiny under the Sixth and Ninth Circuits' precedent? How many would fail? Your guesses are as good as anyone's. But under a correct interpretation of the Constitution, the answer is zero.

III. This Issue Is Worthy of Review.

Four Justices of this Court have already stated the question presented here is worthy of further review. *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of stay). There is no doubt that a circuit split exists. *See id.*; *Wiley*, 120 F.4th at 592–93 (Bumatay, J., dissenting from the denial of rehearing *en banc*) (detailing split in authority); *Beiersdorfer v. LaRose*, No. 20-3557, 2021 WL 3702211, at *15 (6th Cir. Aug. 20, 2021) (Readler, J., concurring) (same); *Schmitt v. LaRose*, 933 F.3d 628, 646 (6th Cir. 2019) (Bush, J., concurring) (same).

Review is desperately needed not only because of the federalism harms imposed by the minority position, *see* Part I, *supra*, but also because its "logic … would call into question 'all subject matter restrictions on what Congress or state legislatures may legislate about' because 'such restrictions make it harder for those subjects to become the focus of' national or 'statewide discussion.'" *Schmitt*, 933 F.3d at 649 n.3 (Bush, J., concurring).

This highly unusual line of precedent has already caused serious harms, and the Court should correct it before it spreads further.

CONCLUSION

The Court should grant the Application.

April 10, 2025

Respectfully submitted,

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