App. No. 24A970

In The
Supreme Court of the United States

DAVID YOST, OHIO ATTORNEY GENERAL, *in his official capacity*,

Applicant,

v.

CYNTHIA BROWN, *et al.*,

Respondents.

To the Honorable Brett M Kavanaugh,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Sixth Circuit

AMICUS BRIEF OF IDAHO IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY OF INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTEREST OF THE *AMICUS CURIAE*

Idaho "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). To that end, the State has enacted neutral procedural requirements governing access to the ballot for initiative petitions. *See* Idaho Code § 34-1801 *et seq.* However, the Sixth Circuit's reasoning in this case—which is essentially the same line of reasoning applied in the Ninth Circuit—puts Idaho's regulations at risk.

Idaho submits this amicus brief to urge the Court to grant the stay and clarify that procedural regulations governing access to the ballot for direct democracy petitions do not implicate the First Amendment and are not subject to strict scrutiny.

SUMMARY OF ARGUMENT

The States—not the federal Constitution—decide whether to permit ballot initiatives, and the States—not the federal courts—should choose the procedures by which initiatives qualify for their ballots. But that is not how it works in the Sixth and Ninth Circuits; in those circuits, federal judges may strike down any procedures that they deem significantly inhibit initiative sponsors' ability to win ballot access.

This Court's stay rescued Idaho from such a ruling in 2020, and since then Ninth Circuit judges have twice called for their circuit to correct its doctrine en banc. So far it has refused to do so, and until this Court explains that the Free Speech Clause protects speech—not ballot access—many States' ability to regulate their own initiative systems will remain subject to a federal judicial veto.

The Court should grant Ohio's stay application and correct the Sixth and Ninth Circuits' erroneous application of First Amendment law.

ARGUMENT

1. "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." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). Thus, those "[s]tates 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. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999).

Yet the Sixth and Ninth Circuits refuse to afford the leeway this Court has promised. Like the Sixth Circuit—and unlike any other circuit—the Ninth Circuit closely scrutinizes all neutral procedures governing which issues will appear before voters, subjecting to strict scrutiny any restrictions it deems to "significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). The Ninth Circuit acknowledges that "[t]here is no First Amendment right to place an initiative on the ballot," but justifies subjecting ballot-access restrictions to strict scrutiny on the faulty rationale that they "reduce the total quantum of speech on a public issue." *Id.* (cleaned up).

The Sixth Circuit's decision to enjoin Ohio's "fair-and-truthful certification" requirement is just the latest "toll on federalism" exacted by this strict-scrutiny approach. *Comm. to Recall Dan Holladay v. Wiley*, 120 F.4th 590, 604 (9th Cir. 2024) (Bumatay, J., dissenting from denial of rehearing en banc). Other requirements governing ballot access restrictions within the Sixth and Ninth Circuit have met a similar fate, and more will too absent this Court's corrective action.

For example, the Court likely recalls the last time it had to save a "reasonable, nondiscretionary restriction[]" on the initiative process that had been enjoined by the Ninth Circuit. *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring in the grant of a stay). A district court applying strict scrutiny decided that Idaho's refusal to suspend its in-person signature-gathering requirement during the COVID-19 pandemic imposed an "unconstitutional burden" on a group's efforts to get its initiative on the ballot. *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988, 999–1003 (D. Idaho 2020). Overriding Idaho's political branches, the court ordered Idaho to either (1) accept as sufficient the 30,000 signatures the group had already collected, or (2) give the group 48 more days to gather signatures. *Id.* at 999, 1002. This Court stayed the order, concluding it was "reasonably likely to grant certiorari" on the question and that "there [was] a fair prospect that the Court [would] set aside" the order since Idaho's restriction was "almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Reclaim Idaho*, 140 S. Ct. at 2616–17 (Roberts, C.J., concurring in the grant of a stay).

But not all ballot access restrictions challenged in the Sixth and Ninth Circuits have been so lucky. Other signature-gathering requirements were enjoined during the COVID-19 pandemic. *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020); *see also Fair Maps Nev. v. Cegavske*, 463 F. Supp. 3d 1123, 1145–47 (D. Nev. 2020) (enjoining signature-collection deadline). And other procedural requirements have been embroiled in needless litigation even absent extenuating circumstances—

most recently, the Ninth Circuit remanded a challenge to a 90-day signature-collecting deadline for recall petitions so the plaintiffs could produce more facts showing the severity of the burden that the time limit imposed. *Comm. to Recall Dan Holladay v. Wiley*, 2024 WL 1854286, at *3 (9th Cir. Apr. 29, 2024); *see also Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 534 (9th Cir. 2015) (en banc) (ending six years of litigation, and upholding initiative requirement).

2. Ninth Circuit judges have repeatedly called for this line of cases to be corrected, and have done so as recently as six months ago. *People Not Politicians Or. v. Clarno*, 826 F. App'x 581, 584, 592 (9th Cir. 2020) (Nelson, J., dissenting) ("I recommend reviewing *Angle* en banc in a future case . . . *Angle* must be revisited and brought back in line with fundamental First Amendment principles"); *Comm. to Recall Dan Holladay*, 120 F.4th at 591 (Bumatay, J., dissenting from denial of rehearing en banc) ("*Angle* needs to be revisited because it departs from the text and historical understanding of the First Amendment."). A petition for certiorari is currently pending in this Court from the most recent case in which a Ninth Circuit judge criticized the circuit's erroneous precedent. *Oregon v. Comm. to Recall Dan Holladay*, No. 24-1026 (U.S.).

Judge Bumatay's dissent from denial of rehearing en banc in that case thoroughly explains why "[n]othing in the text, history, and tradition of the First Amendment supports [the Ninth Circuit's] expansion of judicial power over state ballot initiatives and other direct democracy petitions." *Comm. to Recall Dan Holladay*, 120 F.4th at 592 (Bumatay, J., dissenting from denial of rehearing en

banc). As he demonstrates—surveying "Founding-era state constitutional amendment procedures [through] 20th-century ballot initiatives and referenda"—"the history of direct democracy in the United States establishes that neutral procedures governing which issues will appear before voters—and which won't—have always been a state function and generally outside the scope of the First Amendment." *Id.* at 594–99.

Judge Bumatay's opinion also explains why this Court's opinion in *Meyer v. Grant*, 486 U.S. 414 (1988)— which both the Ninth Circuit line of precedent and the Sixth Circuit in this case relied on, *see* App. 27—does not support subjecting neutral ballot-access requirements to strict scrutiny. There, the state's limitation on paying petition circulators was subject to strict scrutiny because it interfered with "a citizen's ability to engage in one-on-one political speech with others when seeking to place an issue on the ballot." *Comm. to Recall Dan Holladay*, 120 F.4th at 599 (Bumatay, J., dissenting from denial of rehearing en banc). In other words, it was a "restriction[] that significantly inhibited *communication with voters* about proposed political change." *Id.* at 600 (quoting *Buckley*, 525 U.S. at 191) (emphasis in original) (cleaned up). But "*Meyer* said nothing about the neutral laws setting the ground rules for what it takes to place an issue on the ballot." *Id.* at 590; *see also id.* at 590–603 (explaining flaws in Ninth Circuit's "total quantum of speech" reasoning).

Finally, Judge Bumatay's opinion highlights other flaws in applying "strict scrutiny [to] any state law that a federal court believes makes it too hard for proponents to get their initiatives on the ballot." *Id.* at 602 (emphasis omitted). In

particular, that approach "endangers federalism" and the "healthy balance of power between the States and the Federal Government." *Id.* at 603–04 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). It also splits with "the majority of other circuits that have considered [the] question." *Id.* at 605.

All of this equally supports granting Ohio's stay application. The split among circuits on this issue makes "the Court [] reasonably likely to grant certiorari," *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of a stay), the merits are decisively on Ohio's side, *id.* at 2617, and the federalism harms alone skew the equities in favor of a stay. *See Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) ("[O]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions").

3. If the Court does not act now, state laws regulating ballot access for direct democracy petitions within the Sixth and Ninth Circuits may be at risk.

As with other aspects of the election process, Idaho has enacted regulations to ensure that the initiative process is "fair and honest." *Storer v. Brown*, 415 U.S. 724, 730 (1974). These regulations include a process to assign ballot titles and a fiscal impact statement, submission deadlines, signature requirements, a signature verification process, and others. *See* Idaho Code § 34-1801 *et seq.* In addition to promoting a general sense administrability in the initiative process—"order, rather than chaos," *Storer*, 415 U.S. at 730—the State's initiative laws are meant to deter "fraudulent and misleading practices in soliciting and obtaining signatures." Idaho

Code § 34-1801. These practices can include "outright forgery" as well as more clever tactics like the "bait and switch" practice of describing one petition and then collecting a signature for another. *John Doe No. 1*, 561 U.S. at 198–99.

Under the Sixth and Ninth Circuits' precedents, however, Idaho's regulations are all in jeopardy if a single federal judge decides they "significantly inhibit[] the ability of initiative proponents to place initiatives on the ballot" (as measured by the "hypothetical reasonably diligent initiative proponent"). *Pierce v. Jacobsen*, 44 F.4th 853, 860–61 & n.3 (9th Cir. 2022) (cleaned up). The State's laws would then be subject to strict scrutiny, giving the court a license to "second-guess[] [the State] to rewrite Idaho's rules." *Comm. to Recall Dan Holladay*, 120 F.4th at 605 (Bumatay, J., dissenting from denial of rehearing en banc). To be clear, Idaho believes all its rules are "narrowly tailored and advance a compelling state interest," *Angle*, 673 F.3d at 1132 (cleaned up), but the threat of a court disagreeing looms large.

Granting Ohio's stay application would enable the Court to head off this "threat[] [to a] wide array of state procedures" before it can do more damage than it has. *Comm. to Recall Dan Holladay*, 120 F.4th at 604 (Bumatay, J., dissenting from denial of rehearing en banc). The Court should make clear to lower courts that the First Amendment is not implicated by neutral procedural laws governing direct democracy petitions.

CONCLUSION

The Court should grant the application and re-instate the district court's stay.

Respectfully submitted,

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April 11, 2025