No. 19-974

In the Supreme Court of the United States

WILLIAM T. SCHMITT, CHAD THOMPSON, AND DEBBIE BLEWITT,

Petitioners,

v.

FRANK LAROSE, OHIO SECRETARY OF STATE,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are voter initiatives and referenda private "speech" protected by the First Amendment?

LIST OF PARTIES

The petitioners are William T. Schmitt, Chad Thompson, and Debbie Blewitt.

The respondent is Frank LaRose, Ohio Secretary of State.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Schmitt v. Husted*, No. 18-cv-966 (S.D. Ohio) (judgment entered February 11, 2019).

2. *Schmitt v. LaRose*, No. 19-3196 (6th Cir.) (judgment entered August 7, 2019)

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INTRODUCTION

The petitioners ask this Court to decide whether, and how, the First Amendment applies to subject-matter limitations on ballot initiatives. Pet.i. This Court should decide that important question in an appropriate case. This is not that case.

First, the question presented was neither pressed nor passed upon below. Thus, the question is not preserved for this Court's review. In the lower courts, the petitioners challenged a discrete aspect of Ohio's municipal-initiative process. The Ohio Constitution, which creates that process, allows the People to enact "legislative" initiatives, but not "administrative" initiatives. (In other words, Ohioans may *enact* rules, but they may not *enforce* rules, through municipal initiatives.) State law requires county boards of election to exclude administrative initiatives from the ballot. The petitioners now suggest that the legislative-administrative distinction is a subject-matter limitation on the municipal initiative process, and one that ought to receive some degree of First Amendment scrutiny. But the petitioners, as the Sixth Circuit recognized, "*never challenged* the legitimacy of the legislative-administrative distinction" below. Pet.App.13a (emphasis added). Instead, they argued that Ohio violated the First Amendment by requiring proponents of an initiative excluded from the ballot to challenge that exclusion in mandamus proceedings, rather than through a direct, *de novo* appeal. Because the constitutionality of subject-matter restrictions on the initiative process was neither pressed nor passed on below, it is not properly preserved for this Court's review.

Moreover, the question would not have been preserved for review *even if* the petitioners had challenged the legislative-administrative distinction below. Why not? Because the legislative-administrative distinction is *not* a subject-matter restriction. Instead of regulating the subjects that Ohioans may address through municipal initiatives, the legislative-administrative distinction limits the function those initiatives may serve; initiatives must create law, not enforce it. That is a limit on the type of governmental authority the People may wield via the initiative, not a subject-matter limitation.

Second, even if the issue were preserved for this Court's review, this case would not adequately present the circuit split. While the circuits have divided over whether (and how) the First Amendment applies to limits on the initiative and referenda processes, Ohio's law survives scrutiny under every circuit's approach. As such, the Court could affirm the Sixth Circuit without resolving the split, making this a poor candidate for review.

Finally, this is a bad vehicle for resolving the circuit split because the Court cannot trust the petitioners to make a meritorious argument. The *certiorari* petition is conspicuously silent on what degree of First Amendment scrutiny the petitioners think ought to be applied to subject-matter restrictions on the initiative process. That is concerning, because the petitioners, in the courts below, pursued a quixotic "prior restraint" theory: they argued that Ohio's ballot-access process somehow "restrained" their speech by failing to provide for a direct, *de novo* appeal. No court has ever held that States impose prior restraints when they exclude issues from the ballot.

Nor has any court ever held that the prior-restraint doctrine requires States to provide aggrieved initiative proponents with a direct, *de novo* appeal. Any argument to that effect would be meritless. Because the petitioners have not disclaimed this argument, granting *certiorari* would subject the Court to the risk of having to decide an important issue without hearing plausible arguments from both sides.

STATEMENT

1. The U.S. "Constitution does not require a state to create an initiative procedure." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). "It is instead 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).

The People of Ohio reserved for themselves a limited power to act by initiative. The Ohio Constitution empowers citizens to pursue initiatives in several contexts. *See, e.g.*, Ohio Const., art. II, §1; art. X, §3; art. XVIII, §§8–9. Relevant here, the Ohio Constitution authorizes municipal residents to propose ballot measures relating to "questions which such municipalities may now or hereafter be authorized by law to control by *legislative action*." Ohio Const., art. II, §1f (emphasis added). Because that constitutional authorization covers only "legislative action," ballot measures must propose legislative actions, not administrative actions. *See, e.g.*, *State ex rel. Ebersole v. Del. Cty. Bd. of Elections*, 140 Ohio St. 3d 487, 491 (2014); *State ex rel. City of Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St. 3d 239, 241 (2015). The distinction, while sometimes difficult to draw, is

familiar to any student of American civics: a legislative action "enact[s] a law, ordinance, or regulation," while an administrative action "execut[es] a law, ordinance, or regulation already in existence." *Ebersole*, 140 Ohio St. 3d at 491 (internal quotation marks omitted).

Three relevant statutes—which this brief calls the "Legislative Authority Statutes," *see* Ohio Rev. Code §§3501.11(K)(2), 3501.38(M)(1)(a), 3501.39(A)(3)—govern enforcement of the legislative-administrative distinction. These statutes require county boards of elections to review proposed municipal initiatives to see if they qualify for the ballot. More precisely, they direct county boards of elections to "determine" whether an initiative "falls within the scope of authority to enact via initiative." Ohio Rev. Code §3501.11(K)(2); *id.* §3501.38(M)(1)(a). And, because only legislative action falls within that scope of authority, boards have "an affirmative duty to keep … off the ballot" any measures that, if passed, would take administrative actions. *State ex rel. Walker v. Husted*, 144 Ohio St. 3d 361, 364 (2015); Ohio Rev. Code §3501.39(A)(3).

When a county board exercises its statutory authority to keep an issue off the ballot, no statute provides a route for directly appealing its decision. But initiative proponents may challenge the board's determination in two ways. First, if there is time, aggrieved proponents may sue in state court for an injunction ordering the county board to include an issue on a ballot. Second, they may challenge the board's decision through a writ of mandamus. Although *federal* courts rarely consider and almost never grant writs of mandamus, successful requests for

mandamus relief are not so unusual in *Ohio* courts. *See, e.g.*, *State ex rel. O'Neill v. Athens Cty. Bd. of Elections*, — Ohio St.3d —, 2020-Ohio-1476, ¶34 (2020); *State ex rel. Ohioans for Secure & Fair Elections v. LaRose*, — Ohio St.3d —, 2020-Ohio-1459, ¶23 (2020). And aggrieved initiative proponents have succeeded in using mandamus proceedings to ensure valid initiatives appear on the ballot. *See, e.g.*, *State ex rel. Citizen Action v. Hamilton Cty. Bd. of Elections,* 115 Ohio St. 3d 437, 445 (2007); *State ex rel. N. Main St. Coal. v. Webb*, 106 Ohio St. 3d 437, 442–44 (2005); *State ex rel. DeBrosse v. Cool*, 87 Ohio St. 3d 1, 6–7 (1999). That success is perhaps owing to the Supreme Court of Ohio's recognition that courts must "liberally construe municipal initiative provisions to permit the exercise of the power of initiative." *Citizen Action,* 115 Ohio St. 3d at 445.

2. This case began when the Portage County Board of Elections excluded from the ballot two municipal initiatives designed to reduce penalties for marijuana possession in Garrettsville and Windham, Ohio. Pet.App.5a. The Board of Elections did so based on its (flawed) determination that both initiatives were "administrative," rather than legislative, and thus ineligible for inclusion. Pet. App. 5a.

Instead of challenging that decision with a writ of mandamus or a state-court action for injunctive relief, the petitioners—this brief refers to them collectively as "Schmitt"—turned to the federal courts. Schmitt sued both the Portage County Board of Elections and Ohio Secretary of State Frank LaRose. Schmitt argued that the Legislative Authority Statutes imposed a prior restraint in violation of the First Amendment. More precisely, Schmitt argued

that Ohio imposed a prior restraint by making no allowance for a direct, *de novo* appeal of a county election board's decision to exclude an initiative from the ballot. Pet.App.181a. Schmitt asked the District Court to facially enjoin the Legislative Authority Statutes in all of their applications. He additionally sought an order requiring the Portage County Board of Elections to put the proposed marijuana initiatives on the ballot. Pet.App.186a–87a.

The District Court concluded that Ohio, by failing to offer a direct, *de novo* appeal, violated the Due Process Clause. After *sua sponte* invoking this due-process theory, which neither party raised, the court entered a temporary restraining order and a preliminary injunction, ordering the Portage County Board of Elections and the Secretary to "place both initiative petitions" on the November 2018 ballot. Pet.App.61a; R.28, Order, PageID#177 (S.D. Ohio). The Board complied. On election day, the voters of Garretsville rejected the marijuana initiative, while Windham voters approved it. Pet.App.7a.

With the elections over, the parties turned their attention to the question whether the Legislative Authority Statutes ought to be facially and permanently enjoined. The District Court converted its preliminary injunction to a permanent injunction. Pet.App.39a. And, once again, it did so based on the Due Process Clause rather than the First Amendment.

3. Secretary LaRose appealed to the Sixth Circuit, arguing that the Legislative Authority Statutes were consistent with both the Due Process Clause and the First Amendment. On appeal, Schmitt declined to defend the District Court's due-process the-

ory. And, of particular importance here, he affirmatively waived any argument that the First Amendment prohibited Ohio's legislative-administrative distinction. Schmitt wrote in his Sixth Circuit brief that he did "not question Ohio's power to define what may be put to voters through initiatives." Pet.App.121a. Instead of challenging the legislative-administrative distinction, Schmitt challenged the State's means of enforcing it; Schmitt argued that the Legislative Authority Statutes violated the First Amendment because, by failing to provide for a direct, *de novo* appeal, they "violate[] the procedural protections required by the doctrine against prior restraints." Pet.App.121a; *accord* Pet.App.119a.

The Sixth Circuit unanimously rejected that argument and reversed. The prior-restraint doctrine, the Sixth Circuit explained, forbids the government from censoring speech before it occurs. Pet.App.9a. But an initiative is not "speech." While voters might engage in speech *about* an initiative, the initiative itself is "a step removed" from speech protected by the First Amendment. Pet.App.11a (quoting *John Doe No. 1*, 561 U.S. at 212–13 (Sotomayor, J., concurring)). Accordingly, the government does not censor *speech*—it does not impose a prior restraint on protected speech—when it declines to place a proposed initiative on the ballot.

Since Schmitt rested his entire case on the prior-restraint theory, the court could perhaps have stopped there. But the Court went further, making clear that the Legislative Authority Statutes comport with the Due Process Clause and the First Amendment. With respect to the First Amendment, a two-judge majority upheld the Legislative Authority

Statutes under the *Anderson-Burdick* test. Pet.App.12a–18a. That test proceeds in two steps. At the first step, courts "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *accord Burdick v. Takushi*, 504 U.S. 428, 434 (1992). At the second step, courts asks whether the harm to First and Fourteenth Amendment rights is justified by sufficiently strong state interests. The "rigorousness of" the "inquiry into the propriety of" the challenged law turns on the degree of burden imposes. *Burdick*, 504 U.S. at 434. Regulations that "severe[ly]" restrict First or Fourteenth Amendment rights "must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman* v. *Reed*, 502 U.S. 279, 289 (1992)). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

The Sixth Circuit determined that the absence of a direct, *de novo* appeal did not impose a "severe" restriction on free-speech rights. It pointed to the fact that aggrieved initiative proponents may seek relief in mandamus proceeding. Those mandamus proceedings, the court explained, are practically indistinguishable from a direct, *de novo* appeal, because Ohio courts pay "no particular deference to boards' decisions." Pet.App.13a–14a. The Sixth Circuit further concluded that Ohio had "legitimate and substantial" interests in keeping ballot-ineligible initia-

tives—that is, administrative initiatives—from being placed on the ballot. Pet.App.17a. Such initiatives, even if they passed, would later be held invalid and struck down in court. By keeping them off the ballot, the State prevented the voter confusion that attends ballot overcrowding. It also preserved voter confidence in the initiative process: confidence would lapse if voters were too often asked to vote on later-invalidated initiatives. Pet.App.17a. These interests, the court held, justified a moderate burden on First Amendment rights. "Although the State's chosen method for screening ballot initiatives may not be the least restrictive means available," the court reasoned, "it is not unreasonable given the significance of the interests it has in regulating elections." Pet.App.18a. The Legislative Authority Statutes' failure to provide for a direct, *de novo* appeal thus passed constitutional muster.

Judge Bush concurred in part and concurred in the judgment. Judge Bush determined that laws regulating the initiative process regulate the law-making process, not "speech" protected by the First Amendment. As a result, such regulations are not subject to the First Amendment *at all*. In adopting this position, Judge Bush endorsed the view of the *en banc* Tenth Circuit. Pet.App.27a–34a; *see also Initiative & Referendum Inst., v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (*en banc*). Instead of applying *Anderson-Burdick* review, Judge Bush would have applied rational-basis review. Pet.App.26a, 34a. Because the Legislative Authority Statues passed that deferential standard, Judge Bush agreed with the majority's judgment reversing the District Court.

4. Schmitt petitioned for *en banc* review. The Sixth Circuit denied that petition, without calling for a response from the Secretary, on September 4, 2019. Pet.App.62a. After obtaining an extra sixty days in which to file a petition for *certiorari*, Schmitt timely filed his petition on February 3, 2020.

REASONS FOR DENYING THE PETITION

The Court should deny the petition for *certiorari*. This case does not present the question on which Schmitt seeks review. Even if it did, this would be a bad vehicle for resolving that question.

I. This case does not present the question on which Schmitt seeks review.

Schmitt asks this Court to resolve a circuit split regarding the First Amendment's application "to subject matter restrictions on ballot initiatives." Pet.9. For two reasons, this case does not present that question. *First*, the issue was neither presented nor passed upon below. *Second*, while there is indeed a split concerning the First Amendment's application to restrictions on the initiative process, Schmitt's challenge to Ohio law fails under every potentially applicable standard of First Amendment scrutiny. As such, the Court could affirm without resolving the circuit split.

A. Schmitt did not challenge, and the Sixth Circuit did not consider, the legality of subject-matter restrictions on the initiative process.

This is "a court of review, not of first view." *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017) (internal quotation marks omitted). As such, the Court will not usually "address a question neither pressed

nor passed upon below." *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019). That is reason enough to deny Schmitt's petition: Schmitt affirmatively waived, and the Sixth Circuit expressly declined to consider, the issue on which Schmitt now seeks Supreme Court review.

Ohio law limits the types of actions that voters may take by municipal initiative. More precisely, it permits the People to pass *legislative* municipal initiatives, but not *administrative* municipal initiatives. *See* Ohio Const., art. II, §1f; *State ex rel. Ebersole v. Del. Cty. Bd. of Elections*, 140 Ohio St. 3d 487, 491 (2014). And the Legislative Authority Statutes empower county boards of election to enforce that distinction by excluding administrative initiatives from the ballot. Schmitt asks this Court to grant *certiorari* to decide "[w]hether the First Amendment and strict scrutiny apply to subject matter restrictions on ballot initiatives." Pet.i. According to Schmitt, the legislative-administrative distinction is a subject-matter limitation, *see* Pet.6 n.2, which ought to be invalidated under the First Amendment.

Schmitt did not challenge that distinction below. To the contrary, he affirmatively waived any First Amendment challenge to the legislative-administrative distinction. He instead argued *only* that Ohio violates the First Amendment by providing no mechanism for directly appealing county election boards' adverse applications of the legislative-administrative distinction. Schmitt's Sixth Circuit brief, which he included in the appendix to his *certiorari* petition, could not have been clearer about this:

> Schmitt does not challenge Ohio's authority to vertically separate powers between

> local and State officials. *He does not question Ohio's power to define what may be put to voters through initiatives.* Schmitt's claim is that Ohio's [Legislative Authority Statutes] fail[] because [they] violate[] the procedural protections required by the doctrine against prior restraints.

Pet.App.121a (emphasis added).

The Sixth Circuit limited its opinion accordingly. It wrote: "We begin by making clear that Plaintiffs have never challenged the legitimacy of the legislative-administrative distinction or the state's right to vest in county boards of elections the authority to apply that distinction." Pet.App.13a. "Instead, Plaintiffs assert, and the district court found, a right to de novo review of a board's decision." Pet.App.13a. Accordingly, the *only* issue the Sixth Circuit considered was whether Ohio violated the First Amendment by requiring initiative proponents to challenge county boards' legislative-administrative determinations in mandamus proceedings, instead of through direct, *de novo* appeals. So while this Court's "practice 'permit[s] review of an issue not pressed so long as it has been passed upon," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)), the question presented here was neither pressed *nor* passed upon. The Could should decline to answer the question in the first instance.

Even if Schmitt had challenged the legislative-administrative distinction, the case *still* would not present the question whether subject-matter restrictions on the initiative process are subject to First

Amendment scrutiny. The reason is this: the legislative-administrative distinction is not a subject-matter restriction. Instead of regulating the *subjects* on which the People may wield the initiative power, the distinction governs *the manner* in which the People may wield that power. It limits them to legislative action, and prohibits them from taking administrative action. Because this functional limitation applies to *all* municipal initiatives, no matter their subject, it is not a subject-matter limit.

B. Schmitt's challenge to Ohio law fails under any conceivable test.

Schmitt is correct that the circuits are split regarding the First Amendment's application to laws regulating the initiative and referenda processes. (The split is not limited to cases addressing subject-matter restrictions.) But this case does not squarely present the split, because Schmitt's challenge to Ohio law fails under every circuit's test. That is true regardless of whether one views this case as a challenge to the legislative-administrative distinction or a challenge to Ohio's failure to give aggrieved initiative proponents a direct, *de novo* appeal of adverse decisions by county boards of elections.

1. In the D.C. and Tenth Circuits, laws regulating the initiative and referenda processes—including subject-matter limitations—are not subject to First Amendment scrutiny at all. *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002) (per Tatel, J.); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (*en banc*) (per McConnell, J.). Schmitt's First Amendment challenge would thus fail in these circuits. And so, if the Court were to adopt the approach of these

circuits, it would have to affirm the Sixth Circuit's judgment.

Whenever the Court does address the question presented, it should hold, as these circuits have, that the First Amendment does not apply to laws regulating the initiative process. The initiative process is "'a power of direct legislation by the electorate.'" *Marijuana Policy Project*, 304 F.3d at 85 (quoting *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethic*s, 441 A.2d 889, 897 (D.C. Ct. App. 1981) (*en banc*)). While the "First Amendment protects public debate about legislation, it confers no right *to legislate* on a particular subject." *Id.* (emphasis added). It is therefore critical to recognize the distinction between laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny," and laws "that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1099–1100. When the People exercise their initiative power, they are acting as legislators. Just as States may limit the power of their legislatures to pass laws pertaining to certain subjects, so too may they limit the power of their people to do the same by direct democracy. *See id.*

In addition, the First Amendment confers no "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). Thus, any suggestion that the Free Speech Clause guarantees a right to express oneself by placing an initiative on the ballot is a nonstarter. True enough, States may violate the First Amendment if they abridge speech *related to* the initiative process. For example, while States may re-

quire that initiative proponents obtain a certain number of signatures, they will violate the First Amendment if they ban proponents from hiring "petition circulators" to gather qualifying signatures. *Meyer v. Grant*, 486 U.S. 414, 415–16 (1988). The second law regulates speech, not legislation mechanics, because it regulates the means by which individuals may communicate with the public about their proposed initiatives. But when the States regulate the initiative process itself—for example, by dictating the process for securing ballot access, by imposing subject-matter restrictions, or by limiting the types of authority (legislative or administrative) that voters may wield by initiative—they do not implicate the First Amendment.

2. The Sixth and Ninth Circuits have assessed the legality of laws regulating the initiative process using the *Anderson-Burdick* standard. Pet.12a; *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012). The Legislative Authority Statutes survive *Anderson-Burdick* review, as the Sixth Circuit held in this case. Application of this standard would thus require affirming the judgment below.

The *Anderson-Burdick* test is a "flexible standard." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). In applying it, courts "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Laws that severely burden First Amendment rights are reviewed under a standard that approximates strict scrutiny. Less severe burdens get lesser scrutiny. For example, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

The Sixth Circuit applied this test below. And in *Angle*, 673 F.3d 1122, the Ninth Circuit applied *Anderson-Burdick* to uphold a provision in the Nevada Constitution that required initiative proponents to gather a certain number of signatures from each congressional district. *Id.* at 1126. (Although *Angle* cited neither *Anderson* nor *Burdick*, it applied the *Anderson-Burdick* test and relied on circuit precedent applying that test.) *Angle* recognized that "[t]here is no First Amendment right to place an initiative on the ballot." *Id.* at 1133. Nonetheless, it held that ballot-access regulations are subject to First Amendment scrutiny because they "indirectly impact core political speech"; after all, issues that do not make it onto the ballot never become "'the focus of statewide discussion,'" reducing "'the total quantum of speech on a public issue.'" *Id.* (quoting *Meyer*, 486 U.S. at 423). The court applied *Anderson-Burdick*, and upheld the challenged law after conducting the balancing that test requires. *Id.* at 1133–35.

This line of reasoning is seriously flawed. *Every* limit on the legislative power, including Article I's limits on congressional power, "indirectly impact[s] core political speech" by making it less likely that issues beyond the legislative power become "the focus of [widespread] discussion." *Id.* at 1133 (internal quotation marks omitted). Thus, accepting the *Angle* court's logic "would call into question all subject matter restrictions on what Congress or state legislatures may legislate about." Pet.App.33a n3. (Bush, J., concurring in part and concurring in the judgment) (quotation omitted).

What is more, the *Anderson-Burdick* test is not well-suited to assessing the constitutionality of rules governing the initiative process. The test, which "is tailored to the regulation of election mechanics," not limits on the legislative power, "is a dangerous tool." *Daunt v. Benson*, —F.3d. —, No. 19-2377/2420, 2020 U.S. App. LEXIS 11926, at *54, *58–59 (6th Cir. Apr. 15, 2020) (Readler, J., concurring in the judgment) (emphasis added). "In sensitive policy-oriented cases, it affords far too much discretion to judges in resolving the dispute before them," resting as it does on "a sliding scale," in which courts "weigh the burden a law imposes against the corresponding state interests." *Id.* at *59. It is a "quintessential 'balancing test,'" *id.* (quoting *Ohio Council 8 Am. Fedn. of State v. Husted*, 814 F.3d 329, 334–35 (6th Cir. 2016)), and one that "does little to define the key concepts a court must balance." *Id.* "Absent stricter rules and guidelines for courts to apply, *Anderson-Burdick* leaves much to a judge's subjective determination." *Id.* at *60. That discretion is unacceptable in the context of deciding what the initiative process within a given State should look like. For one thing, courts "are ill-

suited to determine whether or not a state advances an important governmental interest by limiting the subject-matter of its initiative petitions" or by otherwise regulating the initiative process. Pet.App.32a (Bush, J., concurring in part and concurring in the judgment). For another, courts should be especially deferential with respect to the question of whether and to what extent the People may wield the legislative power directly; it is hard to envision an issue over which the States should receive more deference than their own division of sovereign authority.

Even if *Anderson-Burdick* applies, however, the Legislative Authority Statutes are constitutional. That remains true whether one focuses on the legality of the procedures Schmitt challenged below or the legislative-administrative distinction he challenges now.

The Sixth Circuit already held that *Anderson-Burdick* does not require Ohio to offer aggrieved initiative proponents a direct, *de novo* appeal. Rightly so. Given the availability of mandamus review that is practically identical to a direct, *de novo* appeal, the failure to provide such an appeal imposes a relatively minor burden. Pet.App.13a–14a. And that burden is more than justified by the two "legitimate and substantial" interests that the Legislative Authority Statutes serve. Pet.App.17a. By allowing the county election boards to review initiatives' eligibility, and by channeling any disputes into quickly-resolved mandamus proceedings before the highest court in the State, the Legislative Authority Statutes ensure that only ballot-eligible initiatives go to the voters. Keeping the ballot from becoming overcrowded with initiatives that are not even legal promotes the

State's "strong interest in simplifying the ballot" to avoid voter confusion. *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (7th Cir. 2018). It also furthers the State's interest in maintaining voter "confidence in government" and the electoral process, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789 (1978), which would diminish if voters were frequently asked to vote on initiatives later held invalid in court. The current process is thus a reasonable means for achieving important state interests, and it does so without seriously burdening protected speech. It therefore survives *Anderson-Burdick* scrutiny. Pet.App.18a.

The same interests support the legislative-administrative distinction. The courts that apply *Anderson-Burdick* recognize that "[t]here is no First Amendment right to place an initiative on the ballot." *Angle*, 678 F.3d at 1133. Accordingly, when a law excludes an issue from the ballot, it does only indirect harm to First Amendment interests: by keeping the issue off the ballot, the State makes it less likely that the topic of the initiative will be discussed by the public. *Id.* That is a moderate burden, at most. Excluding an initiative from the ballot does not *stop* anyone from speaking about anything, it just makes it less productive to discuss the topic as the subject of a possible initiative. That at-most moderate burden is justified by the important interests it serves. *First*, the legislative-administrative distinction itself is justified by separation-of-powers concerns. Ohio's Constitution, just like the United States Constitution, protects liberty by dividing legislative and executive power. *See Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting); *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 386

(2006). Here in particular, the Ohio Constitution safeguards liberty by allowing *legislative* municipal initiatives ("no one shall have an unused car in his yard), but not *administrative* initiatives ("Joe Smith will be assessed a $5,000 fine for having an unused car in his yard"). This keeps the People from directly and simultaneously wielding legislative and executive authority. *Second*, and as just explained, the practice of excluding administrative initiatives from the ballot is justified by the State's interests in simplifying the ballot and promoting confidence in the initiative process, both of which would be undermined by loading up ballots with initiatives destined to be struck down in court.

3. The First Circuit applies intermediate scrutiny to state laws governing the initiative process. If this standard applies, the Legislative Authority Statutes survive constitutional scrutiny. Thus, adopting this test would, once again, require affirming the Sixth Circuit.

In *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), the First Circuit considered the constitutionality of provisions in the Massachusetts Constitution that prohibit using the initiative process to pass constitutional amendments relating to religion or religious schools. *Id.* at 275. The court recognized that "a state initiative procedure, although it may involve speech, is also a procedure for generating law, and is thus a process that the state has an interest in regulating, apart from any regulation of the speech involved in the initiative process." *Id.* But instead of rejecting all First Amendment scrutiny, the court applied "the *O'Brien* standard." *Id.* Under that standard, "conduct combining 'speech' and 'non-

speech' elements can be regulated if four requirements are met: (1) the regulation 'is within the constitutional power of the Government;' (2) 'it furthers an important or substantial governmental interest;' (3) 'the governmental interest is unrelated to the suppression of free expression;' and (4) 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Id.* at 279 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Applying that test, the First Circuit upheld the constitutionality of the Massachusetts subject-matter limitations. *First*, it determined that "the only serious, non-speech-related constitutional challenges to Massachusetts' power to regulate the subjects that may be reached by its initiative process" were "Free Exercise and Equal Protection arguments" that the court elsewhere rejected. *Id.* at 279. *Second*, the limitations furthered the State's "substantial interest in maintaining the proper balance between promoting free exercise and preventing state establishment of religion," and in "restricting the means by which these fundamental rights can be changed." *Id.* *Third*, the limitations "aim[ed] at preventing certain uses of the initiative process, not at stemming expression." *Finally*, the provision restricted no more speech than was "essential." *Id.*

It is hard to understand the First Circuit's decision to apply *O'Brien*. As the court recognized, *O'Brien* applies to laws that restrict conduct with an expressive element—for example, laws that ban draft-card burning. *O'Brien*, 391 U.S. at 376–77. Subject-matter (and other) limitations on how the initiative process may be wielded do not regulate

conduct; they define the People's legislative authority. So *O'Brien* has seemingly no relevance.

Although the Court should not adopt the First Circuit's approach, it would uphold the Legislative Authority Statutes even if it did. Indeed, *Wirzburger*'s justification for upholding the provision before it applies here. *First*, there are no "serious, non-speech related constitutional challenges to [Ohio's] power to regulate the subjects that may be reached," or the functions that may be carried out, "by its initiative process." *Second*, the legislative-administrative distinction furthers Ohio's substantial interest in maintaining the distribution of legislative and executive ("administrative") authority, while the process for excluding ineligible initiatives promotes the State's interest in avoiding voter confusion and preserving voter confidence. *See above* 18–20. *Third*, the Legislative Authority Statutes are "aim[ed] at preventing certain uses of the initiative process, not at stemming expression." *Wirzburger*, 412 F.3d at 279. *Finally*, the Statutes burden no more speech than is necessary to keep ballot-ineligible issues off the ballot.

So the First Circuit's test, just like every other test, requires affirming the Sixth Circuit's judgment.

4. That is the end of the circuit split. Schmitt disagrees, insisting that two courts—the Ninth Circuit and the Supreme Judicial Court of Maine—"apply strict scrutiny to content restrictions on ballot initiatives." Pet.13–14. That is not true. And it would be stunning if it *were* true: it would mean that States could permit initiatives on some topics (school funding, perhaps) but not others (state taxes, for example), only if they could show that the distinction

was narrowly tailored to satisfying a compelling government interest. This strict-scrutiny approach would require striking down state laws all across the country. *See* Br. for *Amici Curiae* Initiative and Referendum Institute and Center for Competitive Democracy 14–15.

Neither the Ninth Circuit nor the Supreme Judicial Court of Maine applies strict scrutiny to subject-matter restrictions on the initiative process. Schmitt's contrary claim about the Ninth Circuit rests on *Angle v. Miller*, 673 F.3d 1122. There are two problems with his reliance on that case. First, as noted above, *Angle* applied the *Anderson-Burdick* test, not strict scrutiny. *Id.* at 1133–36; *see above* 16–17. Second, because the case involved a challenge to a signature-gathering requirement, not a subject-matter limitation, the court had no occasion to "apply strict scrutiny to content restrictions on ballot initiatives." Pet.13–14.

Schmitt's claim about Maine's high court rests on another case that never considered the legality of subject-matter limitations: *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993). In that case, the plaintiff sued Maine's secretary of state, arguing that the secretary violated the First Amendment by refusing to give him the "petition forms" he needed "to collect the necessary signatures" to have a citizen initiative put before the state legislature. *Id.* at 309. In other words, the secretary denied Wyman the forms he needed to petition the government for legislative change. In so doing, the Maine court held, the secretary denied Wyman a full opportunity to engage in the "core political speech" that accompanies a signature-gathering campaign. *Id.* at 311 (quoting *Meyer*

v. Grant, 486 U.S. 414, 421–22 (1988)). Thus, the Maine court applied strict scrutiny not to a subject-matter distinction, but rather to state action that blocked a citizen from engaging in a petition-gathering campaign—a campaign that, unlike an initiative itself, would undoubtedly have involved protected speech. Whatever the merits of that decision, it does not show that Maine applies "strict scrutiny to content restrictions on ballot initiatives." Pet.13–14.

* * *

Because this case comes out the same way under any possibly applicable standard of review, this is a poor vehicle for determining what that standard of review ought to be.

II. Schmitt has not committed to making a defensible argument for reversal.

There is yet another problem with this case as a vehicle for resolving the circuit split: Schmitt is likely to argue for a meritless First Amendment rule that no court has ever endorsed.

At every stage of this litigation, Schmitt has argued that the Legislative Authority Statutes violate the prior-restraint doctrine. The prior-restraint theory was the *only* theory Schmitt advanced before the Sixth Circuit. Pet.App.13a. Schmitt's petition, in discussing the circuit split, is conspicuously silent on what standard of First Amendment scrutiny he thinks this Court should adopt. So it is possible that Schmitt will revive the prior-restraint theory.

That presents a vehicle flaw because the prior-restraint theory is frivolous—a word the Secretary does not use lightly. A prior restraint is a law that

censors speech before it can occur. But the placement of an issue on the ballot is not protected "speech." *See Walker*, 450 F.3d at 1099–1100; *Marijuana Policy Project*, 304 F.3d at 85–86; *Angle*, 673 F.3d at 1133; *Wirzburger*, 412 F.3d at 275. Thus, a law that prevents some initiatives from being placed on the ballot does not censor protected speech and does not impose a prior restraint.

Because of Schmitt's insistence on the prior-restraint theory, this petition carries with it a risk that the Court will be asked to resolve an important circuit split without hearing good arguments from both sides. The Court should await a case in which all sides are sure to make non-frivolous arguments.

CONCLUSION

This Court should deny the *certiorari* petition.

Respectfully submitted,

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