

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 FOR *AMICI CURIAE*
INITIATIVE AND REFERENDUM
INSTITUTE AND CENTER FOR
COMPETITIVE DEMOCRACY
IN SUPPORT OF PETITIONERS**

Anne Marie Lofaso	Lawrence D. Rosenberg
WEST VIRGINIA UNIV.	<i>Counsel of Record</i>
COLLEGE OF LAW	JONES DAY
U.S. SUPREME COURT	51 Louisiana Ave., N.W.
LITIGATION CLINIC	Washington, DC 20001
101 Law Center Dr.	(202) 879-7622
Morgantown, WV 26056	ldrosenberg@jonesday.com

*Counsel for Amici Curiae Initiative and Referendum
Institute and Center for Competitive Democracy*

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INTEREST OF *AMICI CURIAE* ¹

1. The Initiative and Referendum Institute at the University of Southern California (IRI) is a nonprofit, nonpartisan research and educational organization. IRI's mission is to study the mechanisms of direct democracy; to develop clear analyses of the strengths and weaknesses of the rules and regulations proposed, adopted, and used to regulate the process; and to disseminate that information as broadly as possible. IRI seeks to educate the public about the initiative process and its effects on the political, fiscal, and social fabric of our society.

IRI files this brief to provide the Court with critical factual information regarding the initiative process, the practical aspects of its use, and its relevance to this case. These are issues about which IRI has written substantially in the past, and Justices of this Court have cited IRI's work in this area. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 210 (2010) (Alito, J., concurring); *id.* at 234 (Thomas, J., dissenting).

2. The Center for Competitive Democracy (CCD) was founded in Washington, D.C., in 2005 to strengthen American democracy by increasing electoral competition. CCD works to identify and eliminate barriers to political participation and to secure free, open, and competitive elections by fostering active civic engagement in the political process. CCD has

¹ All parties have consented to the filing of this brief and received timely notice of *amici's* intent to file as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

participated in numerous cases involving electoral barriers across the country as either *amicus curiae* or through direct representation. *E.g.*, *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437 (6th Cir. 2016).

Of relevance to this case, CCD filed the litigation that compelled the District of Columbia to rescind its petition circulator residency and registration requirements. *See Libertarian Party v. Danzansky*, No. 1:12-cv-01248-CKK (D.D.C. Dec. 30, 2014) (case dismissed as moot following enactment of legislation eliminating challenged restrictions). In that case, the District of Columbia conceded that its restrictions were unconstitutional, and CCD agreed to stay the action to allow for the enactment of remedial legislation. More recently, CCD won a judgment on behalf of several minor political parties and their supporters, which judgment held Pennsylvania’s ballot access requirements unconstitutional as applied to them. *See Constitution Party of Pa. v. Cortez*, 116 F. Supp. 3d 486 (E.D. Pa. 2015), *aff’d*, 824 F.3d 386 (3d Cir. 2016). Prior to that decision, the Third Circuit reversed the District Court’s decision dismissing the case and concluded that the challenged requirements created “a chilling effect on protected First Amendment activity.” *See Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 363 (3d Cir. 2014). CCD also won a judgment invalidating Michigan’s ballot access requirements for independent candidates. *See Graveline v. Johnson*, No. 2:18-cv-12354 (E.D. Mich. Dec. 22, 2019) (granting plaintiff candidate summary judgment and injunctive relief placing him on Michigan’s 2018 general election ballot).

SUMMARY OF ARGUMENT

Direct democracy through ballot initiatives has long played a crucial role in United States lawmaking and should be strongly protected by the First Amendment. Starting with the American colonies, the electorate has been able to propose and vote on ballot initiatives, which supplement and complement the representative legislative process. Direct democracy improves lawmaking, highlights issues that the legislative process may overlook or be unable to address and increases voter participation. Today, over half of the states use some form of ballot initiative and/or veto referendum to make new laws or veto laws passed by elected representatives. And the use of direct democracy has been increasing and has played a particularly important role in state legislation over the past decade.

Direct democracy, however, faces a pernicious threat. Subject matter restrictions on ballot initiatives have proliferated in recent years. Some of those restrictions take forms similar to that challenged in the Petition, which vest arbitrary power in the hands of state officials to censor ballot initiatives based upon their subject matter and content. Confusion about the legal validity of such restrictions abounds because the lower courts have adopted inconsistent views of whether and what level of First Amendment scrutiny applies. This Court's guidance is therefore essential to resolve this confusion, and thereby to safeguard direct democracy.

The petition should be granted.

ARGUMENT

I. Ballot Initiatives Have Deep Roots In, And Are Critical To, American Democracy, And They Are Used Prevalently Today To Further Important Political And Social Ends.

Direct democracy has always had a role in United States lawmaking. In the earliest town hall meetings of the American colonies in the 1600s, citizens had the opportunity to propose new laws and to veto laws passed by elected representatives. Henry Noyes, *Direct Democracy as a Legislative Act*, 19 Chapman L. Rev. 199, 200 (2016). And three of the earliest state constitutions (Pennsylvania, Massachusetts, and New Hampshire) contained features of direct democracy. *Id.*

These forms of direct democracy were—and are today—an “exercise of the people’s inherent legislative power”; they are “not a delegation of power from the state legislature” or a “diminishment of power inherent in the state legislature.” *Id.* at 201. Indeed, these ideas are expressed in the Declaration of Independence and the constitution of every state but New York. *Id.* And on multiple occasions, this Court has declared and confirmed that these methods of direct democracy are rightful exercises of the people’s legislative power. *See id.* at 202-04 (discussing *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015), *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916)). Scholars, too, broadly agree that direct democracy at the state level betters lawmaking in the United States. *E.g.*, Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13

J. Contemp. Legal Issues 531 (2004); Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 Hastings Const. L.Q. 185 (2002).

Direct democracy provides numerous substantial benefits to the electorate. “Ballot initiatives allow citizens to enact meaningful policy changes that otherwise have little chance of being passed by politicians.” Citizens in Charge, *Better Policy*, <https://tinyurl.com/veb36dg>. Moreover, by allowing citizens to challenge bad laws or introduce new laws, the initiative process, provides a “much-needed check on the monopoly power of state legislatures.” Citizens in Charge, *Legislator Competition*, <https://tinyurl.com/uroy8x4>; see also ACE: The Electoral Knowledge Network, *Advantages and disadvantages of the citizens’ initiative instrument*, <https://tinyurl.com/vgqkyt3> (stating that the “simple existence of the initiative mechanism acts as a check on the activities of a legislature.”). And studies have consistently shown that entrusting citizens with the ballot initiative process results in more people voting. Citizens in Charge, *Higher Voter Turnout*, <https://tinyurl.com/sehcjz>.

Direct democracy remains critical today. Modern direct democracy began as a result of Populist and Progressive movements in the late 1800s and early 1900s with the adoption of direct democracy tools, such as the ballot initiative, the referendum, and the recall election. *Noyes, supra* at 200. These forms of direct democracy allowed the people to take back control of government for ordinary citizens and to make government more responsive to their will. *Id.* Generally, “the numbers of initiatives and referendums submitted to voters, and the rate of approval, has waned and waxed”

over time. Michael E. Solimine, *Judicial Review of Direct Democracy: A Reappraisal*, 104 Ky. L.J. 671, 675 (2016). But a resurgence in many states started in the 1970s and has continued to the present day. *Id.* “Today, three states utilize the veto referendum, three states utilize the ballot initiative and, twenty-one states utilize both the veto referendum and the ballot initiative.” *Noyes, supra* at 201. Summaries of these states’ approaches to and histories with direct democracy are below.

Alaska. Voters in Alaska have approved 28 ballot initiatives in the state’s 61-year history. *All Approved Initiatives by State*, Rose Inst. of State & Local Gov’t, <https://tinyurl.com/s2vzkha> (last visited March 5, 2020). Most recently, in 2016, Alaskan voters approved an initiative that allowed “eligible Alaskans to register to vote when applying for the state’s oil revenues ‘permanent fund dividend.’” *Id.* In 2014 alone, voters approved three initiatives that raised the minimum wage, legalized the use and sale of marijuana, and required the legislature to pass a law approving future large-scale mines in the Bristol Bay Fisheries Reserve. *Id.* Throughout the state’s history, approved initiatives have been in the form of statutes and constitutional amendments, with a focus on political reform; health and welfare regulation; environmental regulation; and economic regulation. *Id.*

Arizona. Voters in Arizona have approved 75 ballot initiatives. *Id.* Arizona’s initiative history spans over 100 years, beginning in 1912 with an approved initiative granting the rights of suffrage to women. *Id.* The most recent initiative, approved in 2018, prohibits new or increased future taxes on certain services. *Id.* Like

voters in other initiative states, voters in Arizona approved of a minimum wage increase in 2016 and medical-marijuana use in 2010. *Id.*

Arkansas. Arkansas voters have approved 63 ballot initiatives. *Id.* The earliest Arkansas state initiatives were passed in 1912, resulting in a state history of ballot initiatives spanning over 100 years. *Id.* The most recent initiatives, passed in 2018, raised the minimum wage and authorized four new casinos in four separate counties. *Id.* The substance of the approved initiatives has been diverse, ranging from authorizing medical-marijuana use in 2016 to regulating public education curricula in 1928. *Id.*

California. Ballot initiatives have had a significant impact in California; voters have approved 132 ballot initiatives dating back to 1918. *Id.* Voters approved three initiatives in 2018 that authorized fundraising for children's hospitals, established a minimum space requirement for certain farm animals, and allowed employers to require EMTs to remain on-call during rest breaks. *Id.* Californians also voted to legalize marijuana for general use and to establish stricter regulations on guns and ammunition in 2016. *Id.*

Colorado. Colorado has approved 80 ballot initiatives, beginning with changes to its election laws in 1912. *Id.* Minimum wage increase initiatives have been approved multiple times throughout Colorado's history, most recently in 2016. *Id.* Colorado voters also approved the legalization of medical marijuana in 2000 and recreational marijuana in 2012. *Id.* Many of

Colorado's ballot initiatives have furthered environmental regulation; political and government reform; education; health; and welfare. *Id.*

Florida. Florida voters have approved 30 ballot initiatives, beginning with a 1976 initiative that required disclosures from state officials and candidates for office. *Id.* Florida's ballot initiatives are limited to state constitutional amendments. *Id.* In 2018, Florida voters approved two initiatives that required voter approval for casino gambling and provided certain felons automatic restoration of suffrage upon completion of their sentences. *Id.* Voters also expanded access to medical marijuana in 2016. *Id.* Like in many states, ballot initiatives in Florida have been diverse in substance, covering issues from economic and environmental regulation to education and government reform. *Id.*

Idaho. Voters in Idaho have approved 15 ballot initiatives dating back to 1938. *Id.* Most recently, in 2018, voters approved of Medicaid expansion to those under 65 and below a certain percentage of the federal poverty line. *Id.* Idaho approved its first ballot initiative in 1938, which established the state's fish and game commission statute. *Id.*

Illinois. Voters in Illinois have approved one "binding" initiative in 1980 to reduce the size of the state legislature from 177 members to 118 members. *Id.*

Maine. Maine voters have approved 28 ballot initiatives dating back to 1911. *Id.* Most recently, in 2017, voters approved an initiative expanding Medicaid coverage to people under 65 and below a certain percentage of the poverty line. *Id.* Additionally, in recent

years, Maine voters have passed ballot initiatives addressing important topics such as establishing ranked-choice voting, increasing the minimum wage, legalizing recreational marijuana, and modifying campaign finance laws. *Id.*

Massachusetts. Massachusetts voters have approved 42 ballot initiatives since 1920. *Id.* Most recently, in 2018, voters passed an initiative creating a citizen committee to advocate for amendments to the U.S. Constitution regarding political spending and corporate personhood. *Id.* Additionally in recent years, Massachusetts voters have passed initiatives on, for example, legalization of recreational marijuana, prohibitions of the sale of animal products from animals inhumanely confined, and requirements related to employee sick time. *Id.*

Michigan. Michigan voters have passed 31 ballot initiatives since 1916. *Id.* Most recently, in 2018, the voters passed three separate initiatives. *Id.* One was an initiative to expand voting rights, to include automatic and same day voting registration, and to remove straight-ticket voting. *Id.* The second formed an independent redistricting commission for congressional and legislative districts. *Id.* And the third legalized marijuana. *Id.* Other relatively recent ballot initiatives, for example, restricted use of human embryos in research and banned use of gender or racial preferences in public contracting, hiring, education, and defining marriage. *Id.*

Mississippi. Mississippi voters have passed two ballot initiatives since 2011. *Id.* One prohibited the sale of private property taken by eminent domain to private persons within 10 years of the taking. *Id.* The

other required all voters to submit government-issued photo identification before being allowed to vote. *Id.*

Missouri. Missouri voters have passed 40 ballot initiatives since 1920. *Id.* In 2018 alone, Missouri voters passed three separate initiatives. *Id.* One raised the minimum wage. *Id.* Another legalized and set a tax for medical marijuana. *Id.* And the last addressed redistricting processes, campaign finance, and political lobbying. *Id.*

Montana. Montana voters have passed 48 ballot initiatives since 1912. *Id.* Most recently, in 2016, Montana voters passed two ballot initiatives: one provided specific rights for crime victims in the judicial process, and the other expanded the availability of medical marijuana. *Id.* Other recent ballot initiatives restricted corporate personhood, increased the minimum wage, regulated lobbying by former public officials, and expanded health care for uninsured children. *Id.*

Nebraska. Nebraska voters have passed 20 ballot initiatives since 1916. *Id.* Most recently, in 2018, Nebraska voters passed an initiative expanding Medicaid coverage to those under 65 and below a certain percentage of the federal poverty line. *Id.* Other recent ballot initiatives raised the minimum wage; prohibited discrimination in public employment, education, and contracting; and taxed gaming revenues. *Id.*

Nevada. Nevada voters have passed 24 ballot initiatives since 1918. Most recently, in 2018, three ballot initiatives were passed. *Id.* One required electric utilities to source 50% of their energy from renewable sources by 2030. *Id.* The second established automatic voter registration through the department of motor vehicles. *Id.* And the third exempted medical equipment

from sales and use tax. *Id.* Other recently passed ballot initiatives have legalized recreational marijuana, restricted firearm sales, increased the minimum wage, and established a property owner's bill of rights. *Id.*

New Mexico. New Mexico has passed two referenda to overrule laws governing state nominating conventions. *Id.* In both instances, the people voted to uphold the legislature. *Id.*

North Dakota. North Dakota has passed 89 ballot initiatives, with the earliest passed in 1918. *Id.* As recently as 2018, North Dakota voters passed three initiatives, including a restriction on voting in state and local elections, establishment of an ethics commission, and provision for personalized license plates to voluntary emergency responders. *Id.* North Dakota voters have also passed recent initiatives addressing such important topics as legalizing medical marijuana, prohibiting smoking in public places, defining marriage, and adjusting various tax rates. *Id.*

Ohio. Dating back to 1914, Ohio voters have passed 22 separate ballot initiatives. *Id.* Most recently, in 2017, Ohio voters passed an initiative to provide specific rights in the judicial process for certain crime victims. *Id.* Also, in recent years, Ohio voters have passed ballot initiatives to address important issues, such as restricting smoking in places of employment and other public places, raising the state minimum wage, and defining marriage. *Id.*

Oklahoma. Oklahoma voters have passed multiple ballot initiatives, with the first dating back to 1910. *Id.* Most recently, in 2018, Oklahoma voters passed an initiative to legalize marijuana and to impose a sales tax on the sale of medical marijuana. *Id.* Additionally, in

2016, Oklahoma voters passed two initiatives: one that allocated funds from prison-cost savings to criminal rehabilitation programs, and another that reclassified nonviolent drug and theft-related crimes from felonies to misdemeanors. *Id.*

Oregon. Oregon voters have relied on ballot initiatives, including one in 1912 that allowed women to vote. *Id.* In 1994, for example, voters passed by initiative the state's Death with Dignity Act. *Id.* And in 2014, they voted to legalize recreational marijuana. *Id.*

South Dakota. South Dakota voters have passed 24 ballot initiatives, with the first dating back to 1912. *Id.* Voters have approved initiatives regarding, for example, term limits, tax reform, and gaming. *Id.*

Utah. Utah voters have passed seven ballot initiatives, with the first dating back to 1960. *Id.* Utah passed by initiative, for example, the 2018 Marijuana Initiative, the 2000 English As Official Language Initiative, and the 1976 End Compulsory Fluoridation Initiative. *Id.*

Washington. Washington voters have passed 96 initiatives dating back to 1914. In 1948, voters passed an initiative giving bonuses to veterans and increasing social security benefits. *Id.* And in 2012, they voted by ballot initiative to allow same-sex couples to marry. *Id.*

Wyoming. In 1992, Wyoming passed three initiatives: triple-trailers ban from state highways, a term-limits measure, and an initiative regulating railroads and hazardous materials. *Id.*

U.S. Virgin Islands. Finally, Virgin Island voters are permitted to vote on referendums, initiatives, and recalls, and several referenda have been successful. Bill Kossler, *Ballot Initiatives in the USVI: How Do*

They Work?, St. Thomas Source (Mar. 13, 2018), <https://tinyurl.com/r4r6dgy>. In 2014, for example, voters approved a medical-marijuana referendum and rejected an increase in senators' terms of office. *Id.*

As these summaries demonstrate, ballot initiatives allow Americans to participate directly in our democracy to achieve significant changes in law and policy.

II. Many States Impose Subject-Matter Restrictions On Ballot Initiatives, And This Court's First Amendment Guidance Is Greatly Needed On This Important And Recurring Issue.

While direct democracy has seen a resurgence over the past 50 years, "subject matter restrictions" in ballot initiatives are also "on the rise, and may become even more popular in the future." Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 Mich. L. Rev. 1305, 1311 (2009) (*Conditions on Taking the Initiative*); see Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 Colum. L. Rev. 1437, 1439 (2007) (*Editing Direct Democracy*) (noting "a possible trend toward forestalling political change—and shaping state political agendas—by redefining the subject matter bounds of state initiative processes"). Subject-matter restrictions "remove particular subjects entirely from the initiative process" and "appear in state constitutions because they define the scope of the legislative power 'reserved' by the people through those instruments." *Id.* at 1451.

At least 17 states currently impose explicit subject-matter restrictions on methods of direct democracy. In

these states, initiatives and referenda are restricted in several ways. “The most restrictive states are Massachusetts (no initiatives concerning religion; courts or access to them; local matters; appropriations; public school funding; just compensation; trial by jury; freedom from unreasonable searches, bail, and martial law; freedom of speech, press, elections, and assembly; or the initiative process itself), Mississippi (no initiatives affecting the state bill of rights; state pensions; the ‘right to work’; or the initiative process itself), and Illinois (no initiatives concerning subjects other than the structure and procedures of the legislature).” *Editing Direct Democracy*, *supra* at 1451-52 & nn.97-99. Other states have restricted the ability to affect appropriations through initiatives. *See, e.g.*, Alaska Const. Art. XI, § 7; Missouri Const. Art. III, § 51; Mont. Code Ann. § 13-27-101; Nev. Const. Art. 19, § 6; Wyo. Const. Art. III, § 52; *see also Editing Direct Democracy*, *supra* at 1451 & n.95 (noting that several states “either forbid initiatives to concern budget matters, such as taxes and appropriations, or severely restrict the operation of initiatives on those subjects”). Similarly, at least three states have restricted the ability to dedicate revenue through direct-democracy methods. *See* Alaska Const. Art. XI, § 7; Ariz. Const. Art. IX, § 23; Wyo. Const. Art. III, § 52. Other states have also restricted the ability to affect the state judicial branch of government. *E.g.*, Alaska Const. Art. XI, § 7; Wyo. Const. Art. III, § 52; *see also Editing Direct Democracy*, *supra* at 1451 & n.96 (discussing bans on “initiatives to affect the organization of the state judiciary”). And in addition to restricting the subject matter of initiatives (*see* Pet. 4-5), Ohio—the state at issue in this case—bars voters from passing laws by referendum

that, for example, “provid[e] for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety,” Ohio Const. Art. II., § 1d, as well as laws regarding property taxation and that would “[r]estrain[]” trade, *id.* § 1e(B)(1).

As Petitioners note (at 4-5), these subject-matter restrictions—enshrined in state constitutions—“vest[] broad subject matter discretion” over core political speech “in local officials,” with little in the way of procedural safeguards. *See also Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (noting that ballot initiatives “involve[] the type of interactive communication concerning political change that is appropriately described as ‘core political speech’”). And yet, as Petitioners describe (at 9-17), federal courts of appeals and state courts of last resort disagree deeply about whether the First Amendment even applies to subject-matter restrictions on ballot initiatives, and if it does, what kind of scrutiny they trigger. This Court’s guidance is therefore urgently needed on this important and recurring issue. *See, e.g.,* Pet. 17-18 (citing other recent petitions “ask[ing] to clarify First Amendment protection for subject matter restrictions for ballot initiatives”). After all, “[i]f courts are indeed the guardians of free speech and the protectors of the democratic process, they must not shirk their duty when it comes to content- and viewpoint-based regulations of ballot initiatives.” Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. Ann.

Surv. Am. L. 129, 163–64 (2008) (internal quotation marks and brackets omitted).

CONCLUSION

The petition should be granted.

March 5, 2020

Respectfully submitted,

Anne Marie Lofaso
WEST VIRGINIA UNIV.
COLLEGE OF LAW
U.S. SUPREME COURT
LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

Lawrence D. Rosenberg
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-7622
ldrosenberg@jonesday.com

*Counsel for Amici Curiae Initiative and Referendum
Institute and Center for Competitive Democracy*