No. 20-3557

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN S. BEIERSDORFER, et al.
Plaintiffs-Appellants,
and
DARIO HUNTER
Plaintiff,
v.
FRANK LAROSE, et al.
Defendants-Appellees.

Appeal from the United States District Court
Northern District of Ohio, Eastern Division
Honorable Benita Y. Pearson

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF DEFENDANTS-APPELLEES AND THEIR REQUEST FOR INITIAL EN BANC REVIEW

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STATEMENT OF INTEREST OF AMICUS CURIAE

Like Ohio, the State of Michigan has been subject to repeated constitutional challenges to its initiative and referendum process. The state constitution in Michigan provides both an initiative process, which allows the people to propose laws and enact them, and a referendum process, which allows the people to approve or reject laws enacted by the Legislature. *See* Mich. Const. art. II, § 9. The State of Ohio likewise provides this same basic authority to its voters as well as the authority to amend county charters. Ohio Const. art. II, § 1 *et seq*. The legislatures in each state then created the mechanisms for implementing these laws.

The U.S. Constitution does not require Michigan and Ohio to provide for this avenue for enacting laws. In fact, in this Circuit the States of Kentucky and Tennessee do not offer it to their citizens. This point merely shows that this is a matter for the states to decide. The federal courts should not impose unwarranted limitations on the states and their ability to apply the processes for voter-initiated laws.

The Amicus Curiae Brief of the State of Michigan is being filed pursuant to Federal Rule of Appellate Procedure 29(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

The time has come for this Circuit to revisit its review of state processes for voter-initiated laws under the First Amendment. There is a fundamental distinction between a law that limits a person's speech and one that determines the process by which a law is enacted or a charter is amended. The latter does not ordinarily implicate the First Amendment.

As a first principle, there is no constitutional right for the voters to enact laws or to amend charters. Like Ohio, the State of Michigan has created the right to enact laws through its state constitution.

These are good laws. But they are not without limit. In Michigan, for voter-initiated laws, proponents must gather a sufficient number of signatures before a certain date in order to place such an initiative on the ballot. Likewise, in Ohio, for amending charters, its constitution places limits on the nature and subject of the amendment that may be proposed.

These are vital matters of state sovereignty. This Court should recognize the limits of its role in reviewing the state-law processes that Ohio and Michigan have established. The U.S. Supreme Court has signaled this direction. If the Circuit has any doubts, it may certify the question to the U.S. Supreme Court. See U.S. Supreme Rules, Rule 19.

ARGUMENT

I. In recent orders, the U.S. Supreme Court has signaled that the First Amendment does not impinge on laws governing the initiative process, such as the one at issue here.

While the coronavirus pandemic has been a scourge in Michigan and elsewhere in this country, states' various stay-at-home orders created an opportunity for the U.S. Supreme Court this summer to enter two orders that suggest the limits of the First Amendment in this arena.

On August 11, 2020, the U.S. Supreme Court issued an order staying a decision from an Oregon district court that ordered signature reductions and modified deadlines for a ballot measure seeking to enact a law under Oregon's initiative process. *See Clarno v. People Not Politicians*, 591 U.S. ___; 2020 WL 4589742 (2020) (Ginsburg and Sotomayor, JJ., dissenting). The district court had ruled that Oregon's protective orders regarding COVID-19 burdened the petitioners' First Amendment rights by limiting their ability to collect signatures and place their initiative on the ballot. *See Clarno,* 2020 WL 3960440, *7 ("Because the right to petition the government is at the core of First Amendment protections, which includes the right of initiative, the current signature requirements in Oregon law are unconstitutional as applied to these specific Plaintiffs") (citation omitted). The Supreme Court stayed the order.

Earlier in the summer, on July 30, 2020, the U.S. Supreme Court issued a stay for a ballot initiative out of Idaho over the dissent of Justices Ginsburg and Sotomayor. *See Little v. Reclaim Idaho*, 591 U.S. ___, 140 S. Ct. 2616 (2020). In that case, Chief Justice Roberts wrote a concurrence in which he characterized the signature requirements for ballot initiatives and deadlines for submission as "neutral regulations on ballot access." *Id.* at 2617 (joined by Justices Alito, Gorsuch, and Kavanaugh). After noting the divide in the circuits in their review of the issues, he stated that "[e]ven assuming that the state laws at issue implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified" by combating fraud and ensuring grass-roots support. *Id.* Thus, there was a "fair prospect" that the Supreme Court would set aside the district court's order, warranting a grant of a stay. *Id.*

Similar to these neutral procedural requirements, the Ohio constitutional provision at issue here establishes limits to the subject that is eligible for an initiative. But it does not impair a person's First Amendment liberty because it does not restrict political discussion or petition circulation.

II. The circuits that recognize the distinction between speech and processes offer the better reasoning on this matter.

As noted by Chief Justice Roberts, there is an established circuit split on this issue, *see Reclaim Idaho,* 140 S. Ct. at 2616, and this Circuit stands on the wrong side of the divide. The better reasoning provides that a state's decision to remove certain subjects from the initiative process stands outside of the First Amendment and its protections. That is because "[n]othing in the Constitution requires . . . [a] State to provide for ballot initiatives." *Reclaim Idaho*, 140 S. Ct. at 2617 (Roberts, C.J.) (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)).

The D.C. Circuit and the Tenth Circuit expressly addressed the same basic posture presented here and correctly determined that the First Amendment is not implicated. *See Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) (Tatel, J.) ("although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1104 (10th Cir. 2006) (McConnell, J.) (en banc) ("the supermajority requirement at issue here determines the conditions under which citizen-initiated legislation becomes law. It does not regulate speech or expressive conduct.").

Across the divide, the First Circuit found that a categorical exclusion of certain topics was subject to the First Amendment's intermediate scrutiny by limiting expressive conduct. *Wirzburger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005) (citing *United States v. O'Brien*, 391 U.S. 367, 382 (1968)). Unlike the issue of reducing marijuana penalties that was foreclosed in D.C., *Marijuana Policy,* 304 F.3d at 84, or wildlife management subject to a supermajority requirement in Utah, *Walker*, 450 F.3d at 1085, the Massachusetts constitution prohibited an initiative that would amend the law prohibiting assistance to students attending private schools. *Wirzburger*, 412 F.3d at 274–75. The First Circuit found that this exclusion "involves core political speech." *Id.* (citing *Meyer,* 486 U.S. at 414; *Buckley v. Am. Cons Law Found., Inc.*, 525 U.S. 182 (1999)).

But the Tenth Circuit's Judge McConnell addressed this point, persuasively distinguishing between "protecting the impact on speech" and "simply protecting speech," as the latter is subject to strict scrutiny, while the former is not. *Walker*, 450 F.3d at 1102. In the end, a categorical exclusion as here does not, as D.C. Circuit Judge Tatel explained, restrict speech. *Marijuana Policy,* 304 F.3d at 87. This Circuit should adopt this reasoning.

III. The reasoning from recent opinions from this Circuit confirms that now is the opportune time to reach this issue.

In contrast to *Walker*, this Circuit has been applying the *Anderson-Burdick* framework to challenges to neutral procedural limitations on the ballot process for initiated laws. *See, e.g., Thompson v. DeWine,* 976 F.3d 610, 615 (6th Cir. 2020) ("[W]e evaluate First Amendment challenges to nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework.") (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The time is opportune to revisit this precedent under Rule 35. Fed. R. App. P. 35. In just the last two years, several judges in this Circuit have raised the question, consistent with the U.S. Supreme Court's past summer orders, whether this Circuit should be applying the *Anderson-Burdick* standard to these kinds of cases.

In 2019, this Court reversed an injunction that was imposed on a claim similar to the one at issue here, where the county refused to certify a ballot question because the county board concluded that the matter was administrative rather than legislative. *Schmitt v. LaRose*, 933 F.3d 628, 635 (6th Cir. 2019). The Court applied *Anderson-Burdick* in reversing the injunction. *Id.* at 639–42.

In his concurrence in *Schmitt*, however, Judge Bush described the subject-matter limitations at issue there as "gatekeeper provisions . . . laws regulating election mechanics" that should not be subject to heightened scrutiny under the First Amendment. 933 F.3d at 643, 643–51. Rather, after reviewing the competing views of the matter under *Walker* and *Wirzburger,* Judge Bush determined that the *Walker* court's analysis was "persuasive" and that the provisions at issue should be subject to at most rational basis analysis rather than the more probing scrutiny under *Anderson-Burdick*. *Id.* at 648, 649. On this basis, he agreed that Ohio's subject-matter limitations were constitutional.

Similarly, in 2020, this Court in a per curiam opinion determined that Ohio's signature and deadline requirements should not be subject to a preliminary injunction. *Thompson*, 959 F.3d at 811 (describing as not just "legitimate" but "compelling" the witness and ink signature requirements, which Ohio argued were designed to "help prevent fraud by ensuring that the signatures are authentic" as well as the deadline for submission, which allowed election officials "time to verify signatures in an orderly and fair fashion"). Significantly, the opinion applied *Anderson-Burdick*, leaving for possible en banc review the question here:

"But until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this." *Thompson,* 959 F.3d at 808 n.2.

The recent experience of the State of Michigan underscores the importance of the questions here. Just this past summer, the State was subject to an injunction under the *Anderson-Burdick* standard in seeking to apply its neutral procedural requirements, in which this Court denied the State's request for stay. *See SawariMedia, LLC v. Whitmer,* 963 F.3d 595, 598 (6th Cir. 2020) ("Defendants' motion for a stay pending appeal is denied. . . . If Defendants fail to propose a remedy that resolves the constitutional infirmity by that date, they will be precluded from enforcing the petition deadline against Plaintiffs"). The panel there took "no position" on whether the Circuit should revisit the application of *Anderson-Burdick* to signature requirements for ballot initiatives. *Id.* at 597. Like Ohio here, the State of Michigan had sought initial en banc review, but that request was denied. *Sawari,* No. 20-1594, Docket No. 23, order dated July 29, 2020. The State of Michigan asks this Court to take the Ohio petition en banc and address these questions.

In the end, these are matters of state sovereignty, and this Court should honor the "considerable leeway" conferred on them "to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access (e.g., the number of signatures required, the time for submission, and the method of verification)." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) (citing *Buckley*, 525 U.S. at 191, internal quotes omitted). This matter is ripe for review.

CONCLUSION AND RELIEF REQUESTED

This Court should grant the Ohio Secretary of State's request for initial en banc review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this amicus brief contains no more than 1,950 words. This document contains 1,950 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on November 19, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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