No. 08-151

In The
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CITIZENS FOR TAX REFORM, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant review despite the absence of a conflict among the circuits concerning the proper legal standard to be applied in a First Amendment challenge to a state elections statute that severely burdens core political speech.

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The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 518 F.3d 375. The opinion of the district court (Pet. App. 28a-49a) is reported at 462 F. Supp.2d 827. One earlier opinion of the district court (Pet. App. 50a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2008. The petition for a writ of certiorari was filed on August 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331.

STATEMENT

I. MATERIAL FACTS

Ohio law forbids any method of paying circulators of initiative petitions "except on the basis of time worked." O.R.C. § 3599.111(D). Thus, no person may pay or receive payment for circulating a petition "on a fee per signature or fee per volume basis." O.R.C. § 3599.111(B).

At the time this law was enacted in 2005, Citizens for Tax Reform (CTR) was preparing for an initiative petition effort designed to qualify a constitutional amendment to the ballot. Pet. App. 4a. As part of this preparation, CTR had engaged a political consulting firm to collect signatures and manage the overall petition effort. *Id*. CTR's agreement with the consulting firm specified that it would pay $1.70 to the firm for each signature

collected, up to 450,000 signatures, for a maximum total cost of $765,000. *Id*.

Upon passage of the new law, the consulting firm, which had experience operating under a similar law in Oregon, advised CTR that the agreement would need to be amended to comply with the law. *Id*. No longer could CTR pay for signatures at a fixed price; it would now have to pay for labor, based on "time and materials." *Id*. at 4a, 36a. The firm also advised CTR that under the per-time-only requirement, the cost of the petition effort (for the same 450,000 signatures) would increase dramatically—by at least an additional $300,000, and possibly by much more. *Id*.

Finally, the firm advised CTR that under an exclusively per-time payment scheme, it would have trouble hiring the best circulators; the pool of available circulators, consequently, would be limited to those with considerably less experience than the "professional" circulators that the firm typically hired. *Id*. at 37a. Based on the effects of the new law—and in particular, the significant increase in cost—CTR concluded that it could not afford to go forward with its petition campaign. *Id*. at 4a.

II. PROCEEDINGS BELOW

A. District Court

Rather than forego the initiative effort, CTR filed a lawsuit in which it claimed that the Statute imposed a severe and unjustified burden on its First Amendment rights. Pet. App. 3a-4a. CTR initially moved for a temporary restraining order, seeking an

injunction that would allow it to proceed with its time-sensitive petition effort under the original terms of its agreement with the petition-collection firm. *Id*. at 5a.

The district court granted the motion and issued a temporary restraining order enjoining the State from enforcing the Statute. *Id*. The court found that CTR had presented actual evidence that the regulation would make it more difficult to retain effective circulators, thereby restricting its ability to qualify the initiative to the ballot and, consequently, reducing the likelihood that its constitutional amendment would become the subject of a statewide campaign. *Id*. The court thus concluded that CTR had demonstrated a high likelihood that the Statute impermissibly infringed upon CTR's core political speech rights. *Id*. at 56a.

The district court also found that, although the State had introduced some evidence of fraud in the 2004 Nader petition effort, it had failed to produce any evidence of a causal link between the fraud and the method of payment, as required by *Meyer v. Grant*, 486 U.S. 414 (1988). Pet. App. 5a, 58a. Accordingly, the district court temporarily enjoined the Statute, thereby permitting CTR to move ahead with its petition effort under its original fixed-price agreement. *Id*. at 5a.

The parties agreed to convert the TRO to a preliminary injunction for the duration of the litigation, *id*. at 5a, and, after discovery, each filed a cross-motion for summary judgment. *Id*. at 6a. The district court granted summary judgment in favor of CTR. *Id*. at 6a, 28a.

Following *Meyer* and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the district court looked at whether the Statute burdened CTR's core political speech rights and, if so, whether such a burden was justified by the State's interest in preventing fraud. Pet. App. 34a. It found that CTR had established that the Statute would increase petition-circulation costs by as much as 60% and that the most experienced and effective circulators, who would work if paid by the signature, would refuse to work if paid by the hour. *Id.* at 37a. As in the previous proceeding, the district court held that because the Statute limited CTR's ability to retain effective circulators and because it reduced the likelihood that petition proponents would be able to qualify their petitions for the ballot, the Statute burdened core political speech rights. *Id.* at 6a.

The court held that the State, on the other hand, in its attempt to justify the Statute's burden on political speech, had presented only inconclusive, irrelevant, or otherwise inadmissible evidence. *Id.* at 6a, 40a-44a. In particular, the State had offered no evidence to show that the per-signature payment method produced a significant incentive to fraud. *Id.* at 6a. Failure to produce such evidence, the court noted, was a common thread through the several previous district court decisions in which similar regulations in other states had been invalidated on First Amendment grounds. *Id.* at 44a-46a (citing *LIMIT v. Maleng*, 874 F. Supp. 1138 (W.D. Wa. 1994); *Term Limits Leadership Council v. Clark*, 984 F. Supp. 470 (S.D. Miss. 1997); *On Our Terms '97 PAC v. Secretary of State of Maine*, 101 F. Supp.2d

19 (D. Me. 1999); *Idaho Coalition for Bears v. Cenarrusa*, 234 F. Supp.2d 1159 (D. Id. 2001)).

The district court also noted that previous court of appeals' decisions upholding similar statutes were distinguishable from this case in several respects. Pet. App. 46a-48a (citing *Initiative & Referendum Institute (IRI) v. Jaeger*, 241 F.3d 614 (8th Cir. 2001); *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006); *Person v. New York State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006)). First, in each of these decisions the States had sufficiently substantiated the necessity of such regulations, while the plaintiffs had produced insufficient evidence of a burden on petition circulation. Pet. App. 46a-48a. The court found that in this case, however, the situation was reversed: CTR had produced actual evidence to prove the burden on its speech, but the State had offered no evidence to show the necessity of such a burden. Pet. App. 48a.

Second, the Court catalogued numerous differences between the comprehensive petition requirements in Ohio and those of the States in which similar laws had been upheld. *Id*. at 39a-40a. Comparing the Statute to its Oregon counterpart, the district court found that: the Statute was fundamentally more restrictive than the Oregon law; Ohio's county-distribution requirement made signature collection more difficult than in Oregon, where no such requirement is imposed; and Ohio's practice of individually verifying each signature made the detection of irregularities and fraud much easier than in Oregon, where signatures are counted by means of statistical sampling. *Id*. Based on those

comparisons, the district court found this case to be less analogous to those cases in which similar laws had been upheld and more analogous to those in which the pay-per-signature laws had been struck down. In light of these distinctions and based upon its findings that CTR had met its evidentiary burden and that the State had not met its own burden, the court declared the Ohio statute unconstitutional and granted summary judgment to CTR. *Id.* at 49a.

B. Sixth Circuit

On appeal, the Sixth Circuit affirmed. Pet. App. 3a. The court of appeals evaluated the constitutionality of the Statute using the fact-intensive sliding-scale analysis set forth in *Meyer*, *Timmons*, and *Buckley*,[1] and in the Seventh Circuit's decision in *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006). Pet. App. 15a-16a. The court also drew upon the decisions of its sister courts in *IRI*, *Prete*, and *Person* for the principle that the severity of the burden resulting from the regulation is measured both by the availability of other payment methods and also by the extent to which more effective means are foreclosed. Pet. App. 15a-16a.

The court of appeals recognized that the Statute's per-signature ban made the petition process significantly more costly and that it made it more difficult to employ the most effective circulators. *Id.* at 16a-19a. In addition, the court noted that, if the Statute were upheld, it would eliminate the opportunity for a petitioner to enter into a fixed-price contract with a political consulting

[1] *Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999).

firm and would increase the amount of time it would take to get the necessary signatures. Each of these factors, the court found, increased the risks involved in initiating the petition process. *Id.* The court of appeals also noted that, while the statutes upheld by other circuit courts had merely banned one method of paying circulators, the Ohio statute had attempted to ban all methods except for one, which made it more restrictive. *Id.* at 21a-24a.

In light of all its factual findings, the court of appeals concluded that the Statute imposed a severe burden on petitioners' core speech rights. *Id.* at 24a. Thus, the court subjected the Statute to the familiar "well-nigh insurmountable" scrutiny required under *Meyer*, *Timmons*, and *Buckley*, which proscribes that unless the Statute is "narrowly tailored and advance[s] a compelling state interest," it is invalid under the First Amendment. Pet. App. 24a.

Applying this standard, the court of appeals affirmed the State's compelling interest in eliminating election fraud. *Id.* The court concluded, nevertheless, that because of the low probative value of the State's evidence that the regulation was necessary, and because of the adequate protections against fraud which were already in place, the State had failed to demonstrate that the Statute was narrowly tailored. *Id.* at 24a-27a. The court, therefore, affirmed summary judgment for CTR. *Id.* at 27a.

REASONS FOR DENYING THE WRIT

Petitioner's principal argument in support of review is that the Sixth Circuit's invalidation of the Statute creates a conflict with decisions of the Second Circuit (*Person*), the Eighth Circuit (*IRI*), and the Ninth Circuit (*Prete*). Pet. 11-17. Such a conflict, however, does not exist, for the Sixth Circuit applied precisely the same legal standard as the other courts; the divergent outcome of this case was the unremarkable result of applying the common legal standard to crucially different facts.

Petitioner also asks this Court to grant a writ of *certiorari* to "vindicate" its interest in preventing election fraud by petition circulators, the importance of which Petitioner claims has been undermined by the Sixth Circuit's decision. Pet. 17-24. "Vindicating important state interests," however, is not a compelling justification for this Court's intervention. Even if it were, the Sixth Circuit has not diminished the importance of the State's interest in eliminating fraud; rather, it has affirmed it, concluding that the State's interest is "certainly compelling." Pet. App. 24a.

Finally, Petitioner asserts that this case merits review because the Sixth Circuit erred on the facts and the law. Pet. 24-37. But this proffered basis for review is one this Court has affirmatively identified as ordinarily *not* justifying review. See Sup. Ct. R. 10.

Because the petition fails to satisfy any of the traditional criteria for a writ of *certiorari*, review should be denied.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

A.

Petitioner asks this Court to grant a writ of *certiorari* to resolve an alleged conflict among circuits. Pet. 11. But the differing case outcomes Petitioner identifies have resulted not from the application of inconsistent legal principles, but from the significant factual differences of each case.

The four circuit courts of appeal that have evaluated the per-signature payment bans have done so under the same well-established "severe burden" standard, as prescribed by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (for election-related restrictions in general), and *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (for restrictions on petition circulation in particular). Thus, there is no "division of authority" among the courts concerning the proper standard for First Amendment challenges to restrictions on petition circulators. Review, therefore, should be denied.

B.

Ironically, even Petitioner acknowledges that the standard applied by all the courts has been the same. Pet. 12-13 ("Applying the balancing test set forth in *Timmons*, these courts properly held that pay-per-signature bans do not impose a severe burden on speech"); Pet. 24 (the Sixth Circuit applied *Timmons*). Nevertheless, Petitioner contends that the case merits this Court's review because, "rather than following th[e] clear precedent" from

the other circuits (upholding per-signature payment bans against constitutional challenge), the Sixth Circuit "manufactured two artificial distinctions" between the Ohio statute and those upheld in *IRI*, *Prete*, and *Person*. Pet. 13.[2] Indeed, according to Petitioner, only by reading the Statute in an "unjustifiably broad fashion" and by "ignoring the canon of constitutional avoidance" was the Sixth Circuit able to distinguish the Statute from the laws in the other states and to justify its departure from the "well-reasoned" decisions of the circuits upholding those laws. Pet. 11.

Petitioner's argument is built upon several false premises, each of which is discussed below.

1. First, the Sixth Circuit did not misinterpret the Statute. Indeed, it did not "interpret" the Statute at all. Far from being ambiguous, the Statute plainly prescribes a single and exclusive method by which a person may be compensated for collecting signatures: "on the basis of time worked." O.R.C. § 3599.111(D). If this were not clear enough, the Statute further proscribes any person from receiving compensation for collecting signatures on a petition "on a fee per signature or fee per volume basis." O.R.C. § 3599.111(B).

Although specific mention of the prohibition on fee-per-signature payment is arguably redundant,

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[2] The two "artificial distinctions" alleged by Petitioner are, first, that the penalty for violation of the Ohio statute is more severe than the penalties for the other state statutes, and, second, that the Ohio statute is more restrictive than the others. Pet. 13.

the Statute's meaning and application are nonetheless clear. Thus, Petitioner's accusation that the court "manufactured" an "artificial distinction" by reading the Statute to prohibit payment to petition circulators on any basis other than time worked is simply unwarranted. The court did not err in its "plain reading" of the Statute. Nor did the court err when—in order to demonstrate agreement in principle with the previous circuit decisions—it noted the obvious distinctions between the Statute and the laws upheld by the other circuits (*i.e.*, that it is more restrictive and the sanctions are more severe).

Moreover, even if the Statute were "arguably ambiguous," the Sixth Circuit has no authority, as Petitioner erroneously contends (Pet. 11), to narrowly construe the Statute to avoid a constitutional infirmity, for federal courts are not authorized to construe state statutes. See, *e.g.*, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 370 (1971) ("we lack jurisdiction authoritatively to construe state legislation."); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws.") The cases cited by Petitioner in support of its "constitutional avoidance" argument, Pet. 16-17, save one, involved *federal* statutes, which federal courts have authority to narrowly construe. *Thirty-Seven Photographs*, 402 U.S. at 369. The other case, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988), involved a state statute, but the Court did not narrowly construe it; rather, the Court appropriately deferred to the Virginia Supreme Court (via certification) to construe the statute. *Id.*

at 395-96. Thus, the court of appeals was not required—indeed, it would not even have been *permitted*—to narrowly construe the Statute, even if by doing so it could have avoided the constitutional infirmity presented by the Statute's plain language.

2. The second false assumption in Petitioner's argument is that these allegedly manufactured distinctions between Ohio's regulation and the other regulations were actually the critical factor in the court's decision. As the court noted, even if the Statute were "substantively identical" to the other laws considered by its sister courts (or even if it were less restrictive), the outcome of this case would not necessarily have been any different.

> We take no position on the hypothetical question of whether, if Ohio were to enact a partial ban similar to Oregon's, North Dakota's or New York's, that partial ban would be subject to the less exacting review of *Timmons*. *The constitutional analysis is, as we have noted, fact- and context-intensive.* There may be significant differences between how Ohio and those other States govern and operate their respective petition drives and elections which would make even a lesser ban in Ohio subject the more exacting scrutiny of *Meyer*.

Pet. App. 23a, n.3 (emphasis supplied).

In determining the severity of the burden imposed by Ohio's statute, the court did look at the details of the Statute itself. Equally important to the

court's decision, however, were the particulars of Ohio's entire petition and election context. Comprehensive regulation of these matters being so different from state to state, the court explained, it is to be expected that divergent results will arise even though the laws being considered may be similar in many respects. *Id*.

Petitioner, however, argues that if the Sixth Circuit had interpreted the Statute to be "substantively identical" to the other state bans, it would have been required by this conclusion to follow the "clear precedent" of the other circuits and uphold the Ohio statute. Pet. 13. This is manifestly incorrect, if not absurd. The Sixth Circuit is not obligated to reproduce the *outcome* of the (fact-intensive) cases from other circuits. To the contrary, its only duties are to review and assess the facts of *this* case, and to apply the proper legal standard. And, as Petitioner concedes (*id*. at 24), that is exactly what it did.

To be sure, the Sixth Circuit prudently examined the per-signature payment bans at issue in the other cases as comparators, and looked to the circuit decisions for guidance on the proper application of the *Timmons-Buckley* analysis. Pet. App. 15a-16a. In so doing, the court properly recognized the importance of the finding, in each of the other cases, that the plaintiffs did not demonstrate a severe burden on the petition process. *Id*. at 13a-15a.

While the Sixth Circuit's fact-intensive approach led to a different conclusion than those reached by its sister circuits, it was, to be sure,

entirely consistent with this Court's precedents. Indeed, this Court has repeatedly said, "[No] litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." *Buckley*, 525 U.S. at 192. Such judgment is exactly what the Sixth Circuit exercised in the present case—it carefully examined the evidence and vigilantly made the hard judgment that needed to be made "to guard against undue burdens to political conversations and the exchange of ideas." *Id.*

Unsatisfied with this approach (or perhaps with just the outcome it produced), Petitioner proposes a different standard, one that *would* be a "substitute for the hard judgments that must be made." Indeed, in place of the longstanding *Timmons-Buckley* standard—requiring a case-by-case assessment of the burden imposed by the challenged restriction—Petitioner implicitly urges this Court to adopt a one-size-fits-all, universally-applicable standard, the application of which would result in courts upholding *all* pay-per-signature bans, regardless of the burden they might impose on core political speech rights. Under this novel and unprecedented theory, once a circuit court upholds a petition regulation (such as a pay-per-signature ban), subsequent circuit courts reviewing a "substantively identical" petition regulation (from a different state) would be required to abandon the severe burden test and blindly follow the "clear precedent" from the other circuits. Such a test is neither sensible nor justifiable, and should be rejected.

Each of the four circuits that has reviewed pay-per-signature bans has consistently applied the *Timmons-Buckley* standard when reviewing similar laws. The different conclusions reached were merely the result of the different factual circumstances each case presented. The Sixth Circuit's ruling participates in the consensus. There is no conflict.

C.

To be sure, the fact- and context-specific nature of the *Timmons-Buckley* standard has been acknowledged by all of the circuits that have decided challenges to pay-per-signature regulations to date. As elaborated below, in each of these cases, the outcome hinged not upon the different legal principles involved, nor even on the differences in the laws, but almost entirely on the degree to which each party met its evidentiary burden.

In *IRI*, the Eighth Circuit's decision upholding North Dakota's ban on per-signature payments resulted from the plaintiffs' failure to produce any "evidence that payment by the hour, rather than on commission, would in any way burden their ability to collect signatures." *Id.*, 241 F.3d at 618. And due to the lack of any evidence that the ban imposed a severe burden on the plaintiffs, the state did not need to satisfy strict scrutiny. Instead, the paucity of evidence introduced by the state (that fraud had been committed by circulators who had been paid by the signature), and the state's assertion that the measure was necessary "to insure the integrity of the initiative process," were sufficient to justify the ban. *Id.*

Likewise, in *Prete* the Ninth Circuit noted at the outset that its decision upholding Oregon's pay-per-signature ban was based largely upon plaintiff's failure to meet its evidentiary burden.

> To be clear, we do not hold that Measure 26 is facially constitutional. Rather … we hold that because the district court did not clearly err in determining plaintiffs failed to establish that Measure 26 … imposes a "severe burden" under the First Amendment …, we conclude the district court did not err in upholding the constitutionality of Measure 26 as applied. *We express no opinion, however, regarding whether Measure 26 could withstand strict scrutiny had plaintiffs proven the measure imposed a "severe burden" under the First Amendment.*

438 F.3d at 970, n.29 (emphasis supplied).

Moreover, and contrary to Petitioner's insistence upon an across-the-board ruling, the Ninth Circuit recognized the context-limited character of its decision. Even within its own circuit, courts have reached opposite conclusions. Indeed, pay-per-signature restrictions have been invalidated in Washington and Idaho, see *LIMIT v. Maleng*, 874 F. Supp. 1138 (W.D. Wa. 1994), and *Idaho Coalition for Bears v. Cenarrusa*, 234 F. Supp.2d 1159 (D. Id. 2001), but have been upheld in Oregon. See *Prete*, 2004 U.S. Dist. LEXIS 28738 (D. Or. Feb. 18, 2004), *aff'd*, 438 F.3d 949 (9th Cir. 2006). The difference

between these decisions, according to the Ninth Circuit, is that in Washington and Idaho "the state defending the prohibition on per-signature payment for petition circulators failed to present any evidence that per-signature payments increased fraud," whereas in Oregon the state satisfied that burden. *Id.*, 438 F.3d at 970, n.29. The Ninth Circuit implicitly recognized that despite their different outcomes, these decisions could peacefully co-exist within the same circuit (which they still do) because the cases were decided not on the nature of the bans or the legal standard applied, but on the sufficiency of the evidence.

Lastly, in *Person* the Second Circuit expressly agreed with the approach of the Eighth and Ninth Circuits, holding that a state law prohibiting payment on a per-signature basis did not constitute a *per se* violation of the First or Fourteenth Amendments. Rather, the plaintiff's claim that the ban was unconstitutional simply lacked sufficient support "on the record presented." *Id.*, 467 F.3d at 143.

The one simple but critical difference between the present case and those decided by the other circuits is that in each of those cases, the plaintiffs failed to satisfy their evidentiary burden. But in this case, CTR satisfied its burden, having presented evidence that the Statute imposes a severe burden on its core political speech rights. This triggered more-exacting review, which the State was unable to withstand.

A consistent application of these settled precedents allows pay-per signature bans to be

lawful in some states while not in others; this is how the *Timmons-Buckley* standard is designed to work. In the present case, this is precisely how it has worked. This Court should deny review.

II. PETITIONER'S UNWARRANTED CONCERN THAT THE COURT OF APPEALS DIMINISHED THE IMPORTANCE OF ITS INTERESTS DOES NOT JUSTIFY REVIEW BY THIS COURT.

Petitioner next contends that the Court should grant review to "vindicate" the State's important interests in protecting ballot integrity and in preventing fraud in the electoral process, which it claims the Sixth Circuit "undermined" in its decision. Pet. 17-24. This is hardly a rousing argument for the necessity of this Court's corrective intervention. Indeed, "vindicating an important government interest" is not identified in Rule 10 as a consideration justifying review.

Nonetheless, Petitioner contends that this case merits review because the Statute is necessary to combat fraud "by removing a direct incentive to unlawfully pad the number of signatures obtained." Pet. 23-24. But this argument is not new, nor is this the first time this Court has heard it.

Indeed, in *Meyer v. Grant*, the State of Colorado offered this same justification in support of its ban on payment to circulators. This Court squarely rejected it, stating:

> we are not prepared to assume that a professional circulator … is any more likely to accept false signatures than a

> volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

486 U.S. at 438; see also *Buckley*, 525 U.S. at 203-04 (quoting same and also noting that "the risk of fraud … is more remote at the petition stage of an initiative than at the time of balloting.")

The Sixth Circuit's by-the-book application of the *Timmons-Buckley* test did not diminish or undermine the State's important interest in eliminating election fraud. To the contrary, the Sixth Circuit affirmed that the State's interest is not only important, but *compelling*. Pet. App. 24a. Nevertheless, because the court concluded that the Statute was not narrowly (or even reasonably) tailored to protect those interests (*id.*), it found the Statute unconstitutional. *Id.* at 27a. The State's assertion that this conclusion somehow diminishes the importance of those interests, however, in addition to being inaccurate, is simply not a compelling reason for a writ of *certiorari* to be granted. Accordingly, this Court should decline review.

III. PETITIONER'S ASSERTIONS THAT THE COURT BELOW ERRED IN ITS FACTUAL FINDINGS AND THAT IT MISAPPLIED WELL-SETTLED LAW ARE NOT COMPELLING REASONS TO GRANT A WRIT OF *CERTIORARI*.

In a final plea for the Court to accept this case for review, Petitioner offers a wholly uncompelling reason, which amounts to "the lower court got it wrong." Pet. 24-37. Petitioner contends, in

particular, that the Sixth Circuit misapplied the *Timmons* standard, because that standard should only be applied to laws burdening *constitutional* rights, and no such right is implicated by the Statute. Pet. 26-27. Petitioner also argues that the Sixth Circuit's factual findings are erroneous (Pet. 28-30) and that the court erred in requiring the State to demonstrate that the Statute is narrowly tailored. Pet. 31-37.

As elaborated below, these arguments constitute nothing more than a direct attack on the lower court's application of well-settled law and its factual findings, matters well outside the scope of appropriate considerations for granting review.

A.

Petitioner initially contends that the Sixth Circuit misapplied *Timmons* because that case only applies to laws that "burden[] a *constitutional* right." Pet. 26 (emphasis in original). According to Petitioner, the complete ban struck down in *Meyer* "*dramatically* limited the number of voices to just volunteers." Pet. 26 (emphasis supplied). Unlike the laws at issue in *Meyer* and *Buckley*, Petitioner says, this particular Statute "regulates only payment methodology, not the communicative aspect of signature-gathering." Pet. 26.

This is not a compelling reason to grant a writ of *certiorari*. Even if it were, Petitioner's alleged basis for criticizing the court's application of *Timmons* is unsound. The constitutional implications of the Colorado ban at issue in *Meyer* and the ban at issue in this case are

indistinguishable. If there is any difference between them whatsoever, it can only be, at best, a difference of degree. The decision in *Meyer* hinged on the evidence that some circulators would not work unless they were paid. Although this didn't eliminate expression altogether (since the State of Colorado benevolently chose not to prohibit volunteer circulators), it did reduce the quantity of expression.

In the same way, the evidence here shows that some circulators will not work unless they are paid *by the signature*. This too, though it doesn't eliminate expression altogether, and arguably allows more expression than Colorado's complete ban on payment (the State of Ohio benevolently allowing both volunteer circulators *and* circulators paid on the basis of time worked), it still, as in *Meyer*, results in less expression and, thus, is equally a burden on a constitutional right.

In both cases, the effect of the laws was to reduce core political speech. The law in *Meyer* may have reduced speech more than the law in Ohio. It does not matter. The difference is one only of degree. Nor does it matter (for purposes of this argument) whether the laws had a *direct* effect on speech, or an *indirect* effect. Either way, the effect of the law was the same: to reduce constitutionally-protected speech, thereby triggering application of the *Timmons-Buckley* standard. Therefore, even if the alleged misapplication of a legal standard were a compelling reason to grant review, the Sixth Circuit's proper application of *Timmons* would eliminate it from contention in this case.

B.

Petitioner next asserts that the Sixth Circuit's factual findings are erroneous—that the evidence does not support the court's conclusion that the Statute imposes a severe burden on CTR's core political speech rights. Pet. 28-30. This is not a compelling reason for the Court to review this case. See Sup. Ct. R. 10 (*certiorari* is "rarely granted when the asserted error consists of erroneous factual findings"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (*certiorari* not granted "to review evidence and discuss specific facts").

C.

Finally, Petitioner argues that, because "no one disputes" that the pay-per-signature arrangement induces circulators to engage in fraud, the State should not have been required to present any evidence to that effect. Pet. 31-33. It argues also that the court misapplied *Timmons* by requiring the State to demonstrate that the Statute is narrowly tailored. Pet. 34-37.

Like those that came before it, these are not compelling reasons for this Court to grant a writ of *certiorari*. Even if they were, it simply is not true that no one disputes the link between payment methods and fraud. This assumption was challenged, not only by Respondents, but also by the Sixth Circuit. Pet. App. 25a.

Equally without merit is the argument that, by requiring the Statute to be narrowly tailored, the Sixth Circuit misapplied *Timmons*. To begin with,

the assertion that the court misapplied a legal standard, as already noted, is not worthy of *certiorari*. See Sup. Ct. R. 10. Furthermore, Petitioner confuses the *standard* applied in *Timmons* with the particular facts and holding of the case. "Empirical verification" (Pet. 31) of fraud was not required in *Timmons* precisely because the Court found that the Minnesota statutes did not impose a severe burden on the plaintiffs' associational rights. The "lesser burdens" triggered "less exacting review." *Id.*, 520 U.S. at 358. But if the Court had found that the statutes imposed a severe burden, such evidence would have been required and the statutes would have been subject to strict scrutiny (*i.e.*, narrowly tailored to advance a compelling state interest). *Id.*

That is the case here. Had the Sixth Circuit found that the Statute only imposed a lesser burden, the State's evidence likely would have been sufficient (for in most cases where the burden imposed is only slight, the mere *assertion* by the State of its desire to prevent fraud is enough). But under the *Timmons-Buckley* standard, once the plaintiff proves that the challenged restriction imposes a severe burden, the government "faces a 'well-nigh insurmountable' obstacle to justify it." Pet. App. 24a (quoting *Meyer*, 486 U.S. at 425).

CONCLUSION

This Court has recognized the paramount importance of the First Amendment right to engage freely "in discussions concerning the need for change," including change accomplished through petition speech and elections. *Meyer*, 486 U.S. at 421.

Likewise, this Court has affirmed the importance of the States' interests in protecting the electoral process. Indeed, how to go about striking the proper balance between these two important interests is itself a question of great significance.

But the fact of the matter is, this very significant question has already been clearly and consistently answered by all the circuits that have taken it up. It has been answered in such a way as to give the States perfectly-comprehensible guidance in how to fully protect both interests.

The standard used by each of the circuits is one and the same. The occasional differences in outcome are based entirely on the different facts that were before each court. And that is all we have here. The Sixth Circuit has applied precisely the same standard used by the other circuits, but has applied it to a unique set of facts. The outcome is not, then, a result of any split among the circuits, but merely the product of a fact-intensive application of this Court's well-settled standard. The Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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