



DAVE YOST

OHIO ATTORNEY GENERAL

Office of the Solicitor General
Office 614-466-8980
Fax 614-466-5087

May 26, 2020

Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: Response to 28(j) notice in *Thompson, et al. v. DeWine, et al.*, No. 20-3526

Dear Ms. Hunt:

The State will not respond to every Rule 28(j) submission from the plaintiffs. But today's filing deserves a brief response. The attorney for one group of plaintiffs, who was also counsel of record in *Schmitt v. LaRose*, No. 19-974 (U.S.), says the Supreme Court denied *certiorari* in *Schmitt* because it did "not perceive sufficient disagreement in the Circuits over the First Amendment's application to the initiative process." *See* Doc.34.

That claim is baseless. No one outside the Supreme Court does or could possibly know why the Supreme Court denied *certiorari*. More important, it is exceptionally unlikely that the Court denied *certiorari* based on the absence of a split in authority. The State, in its Brief in Opposition in *Schmitt*, *conceded* the existence of a circuit split on the question whether the First Amendment applies to laws governing the mechanics of the initiative process. *See* Brief in Opposition 1, 13, online at <https://tinyurl.com/Schmitt-BIO>. And the courts themselves have recognized the split of authority. *See, e.g., Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099-1103 (10th Cir. 2006) (*en banc*); *Schmitt v. LaRose*, 933 F.3d 628, 647-48 (6th Cir. 2019) (Bush, J., concurring in part and in the judgment). But the State argued that the court should deny *certiorari* anyway for three reasons.

30 E. Broad Street, 17th Floor, Columbus, Ohio 43215

www.OhioAttorneyGeneral.gov

First, the petitioners had waived the argument underlying the question presented. *Second*, the case did not adequately present the circuit split, because the petitioners would lose under every conceivable test. *Finally*, the State urged the Court to await a case in which the petitioner committed to making a non-frivolous argument. This vehicle problem arose because the petitioners in *Schmitt* made the frivolous argument that seemingly all restrictions on the initiative process constitute a prior restraint. Thus, “granting *certiorari* would [have] subject[ed] the Court to the risk of having to decide an important issue without hearing plausible arguments from both sides.” BIO.3. In all likelihood, the Supreme Court denied review for one of these three reasons.

Sincerely,

/s/ Benjamin M. Flowers

BENJAMIN M. FLOWERS*

Solicitor General

**Counsel of Record*

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

bflowers@ohioattorneygeneral.gov

Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Benjamin M. Flowers

Benjamin M. Flowers
Solicitor General