No. 24-3354

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTHIA BROWN, CARLOS BUFORD, JENNY SUE ROWE,

Plaintiffs-Appellants,

v.

DAVID YOST,
Ohio Attorney General, in his official capacity,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio, Case No. 2:24-cv-01401

PLAINTIFFS-APPELLANTS' EN BANC SUPPLEMENTAL BRIEF

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INTRODUCTION

For the last year and a half, Plaintiffs have made every effort to follow the procedures outlined in Ohio law to introduce and circulate their initiative petition in hopes of placing it on the ballot, only to be stymied by Defendant Attorney General David Yost at every turn. They have collected the requisite signatures and submitted their summary for Yost's review—not once, but *seven times*—and Yost has offered a series of shifting rationales to reject their summary each time. When Plaintiffs amend their summary in response to Yost's critiques, he offers a new ground to reject it. And because of the timelines governing ballot initiatives, Plaintiffs have no recourse for timely review by the Ohio Supreme Court of Yost's unilateral rejections: Without expedition, they cannot hope to get a ruling from that court in time to get their petition on the upcoming ballot, no matter how early they start.

Because Yost's rejections thwarted Plaintiffs' ability to circulate and discuss their petition with voters, Plaintiffs filed this suit to challenge Yost's gatekeeping authority under Ohio Revised Code § 3519.01. On May 29, 2024, a panel of this Court held that Yost's enforcement of the summary provision violates the First Amendment. The panel entered a preliminary injunction requiring Yost to allow Plaintiffs' proposed amendment and their most recent summary to proceed so that they could circulate their initiative petition for signatures in advance of the July 3, 2024, deadline for getting their ballot measure on the November 2024 ballot.

On June 17, 2024, the Court granted Yost's petition for rehearing en banc and

vacated the panel's decision, making it impossible for Plaintiffs to meet the July 3 deadline. In light of that development, Plaintiffs submitted a new summary to Yost on July 5, 2024. Although the revised summary addressed all of Yost's prior concerns, he rejected it on July 15, 2024. The need for a preliminary injunction thus remains urgent, as Yost continues to exercise his unreviewable discretion to block Plaintiffs from circulating their petition. As this supplemental brief explains, neither of the issues raised in Yost's rehearing petition provide a reason to deny such relief: (1) sovereign immunity does not bar Plaintiffs' request for a preliminary injunction; and (2) Yost's enforcement of § 3519.01 violates the First Amendment.

STATEMENT

Plaintiffs seek to exercise the "power" that the People of Ohio have "reserve[d] to themselves" to "propose [an] amendment[] to the [State] constitution" for voters "to adopt or reject … at the polls." Ohio Const. art. II, § 1. To comply with the process outlined in the Ohio Constitution, petitioners must obtain signatures from 10 percent of electors in the State before their proposal can be placed on the ballot. *Id.* § 1a. As a matter of statutory law, however, Plaintiffs cannot begin circulating their petition without approval from the Attorney General. Specifically, after obtaining an initial 1,000 signatures, Plaintiffs must submit a summary of their proposed amendment to Attorney General David Yost, who has unilateral authority to determine whether, "in [his] opinion," "the summary is a fair and truthful statement of the proposed … constitutional amendment." Ohio Rev. Code § 3519.01(A). Only after Yost signs off

may Plaintiffs start to collect the hundreds of thousands of signatures they need by circulating the full text of the amendment and the approved summary. *See id.* § 3519.05.

Plaintiffs initially submitted their proposed summary to Yost in February 2023, and he rejected it. Plaintiffs revised the summary to respond to Yost's objections, collected another 1,000 signatures, and tried again. Yost again blocked the proposed amendment from proceeding, this time asserting new purported problems with the summary. Plaintiffs tried again, and Yost blocked them again. This has now happened *seven times*, with Yost pointing to a shifting series of supposed shortcomings in the summary. In his rejection of the sixth submission, for example, Yost criticized for the first time the amendment's proposed title, even though the same title had been used for previous submissions. *See* Panel Op. 34.[1] And in his most recent rejection, Yost objected to the fact that Plaintiffs did not include a title at all, even though Ohio law does not require proponents to submit a title for the Attorney General's review. *See* Ohio Rev. Code § 3519.01(A) (requiring submission only of "the proposed law or constitutional amendment and a summary of it"); *see also* Respondent's Brief at 8, *State ex rel. Dudley v. Yost*, No. 2024-0161 (Ohio July 11, 2024) (arguing that § 3519.01 and § 3519.05, only the latter of which requires a title, "pertain to different parts of the petition process").

[1] The panel opinion incorrectly stated that "Yost cited the misleading title as a reason he did not certify" Plaintiffs' fifth proposed summary in November 2023. Panel Op. 34. Yost indicated that Plaintiffs' use of the term "any subset" was a reason for both his March 2024 and November 2023 rejections, not the title of the amendment. *See* Complaint, R. 1, PageID # 39.

In March 2024, after Yost's sixth rejection of their summary, Plaintiffs filed an original action in the Ohio Supreme Court. *See* Ohio Rev. Code § 3519.01(C). Although the Ohio Supreme Court provides for expedited review when an action is filed "within ninety days prior to the election," Ohio S.Ct.Prac.R. 12.08(A)(1), it has no rule requiring expedition for ballot-initiative petitions, which must be completed *125* days before the election, *see* Ohio Const. art. II, § 1a. Based on the Ohio Supreme Court's usual timeline for deciding cases, this lack of expedition makes it functionally impossible for proponents to get judicial review before the deadlines for completing the petition process in time to have their proposals appear on the ballot in the upcoming general election. It often takes the court months—sometimes over a year—to decide non-expedited original actions in mandamus. *See, e.g.*, *State ex rel. Barr v. Wesson*, 227 N.E.3d 1221 (Ohio 2023) (decided 8 months, 13 days after filing); *State ex rel. Lusane v. Kent Police Dep't*, 213 N.E.3d 681 (Ohio 2023) (decided 9 months, 30 days after filing); *State ex rel. Hunt v. City of E. Cleveland*, 220 N.E.3d 792 (Ohio 2023) (decided 1 year, 1 month, 18 days after filing). And a similar challenge to Yost's rejection of a summary for a different ballot initiative, which was filed in February and in which the court denied expedited review, will not even be fully briefed until July 18—missing the July 3, 2024, deadline for the initiative to appear on the November 2024 ballot. *See* Order Granting Alternative Writ, *Dudley*, No. 2024-0161 (Ohio May 22, 2024).

Given that review in the ordinary course would prevent them from circulating their petition in time to meet the July 3 deadline, Plaintiffs asked the Ohio Supreme

Court to exercise its discretion to expedite review. Yost opposed this request, even though he did not contest that expedition was necessary for Plaintiffs to obtain relief in time for the November 2024 election. *See* Opposition to Motion to Expedite, *State ex rel. Brown v. Yost*, No. 2024-0409 (Ohio Mar. 25, 2024). The Ohio Supreme Court denied expedited review. After nearly two months passed with no further action from that court, Plaintiffs dismissed the suit, as it was clear the Ohio Supreme Court would not act on it in time for Plaintiffs to meet the July 3 deadline.

Shortly after filing their original action in the Ohio Supreme Court, Plaintiffs filed this federal suit challenging Yost's exercise of gatekeeping authority under § 3519.01(A) as a violation of their First Amendment right "to speak and advocate for their proposed constitutional amendment." Panel Op. 8. Both the district court and the panel majority recognized that Plaintiffs' suit does not implicate state sovereign immunity because Plaintiffs seek only prospective injunctive relief. *Id.* at 7, 14-16. The district court nonetheless declined to enter an injunction on the ground that Plaintiffs were unlikely to succeed on the merits. *Id.* at 7. The panel disagreed, holding that Yost's exercise of his unilateral authority to block Plaintiffs' proposed amendment and summary without any meaningful opportunity for judicial review amounted to a "severe burden on Plaintiffs' ability to advocate for their initiative" that was not narrowly tailored to advance the State's interest in "voter education, fraud deterrence, and the integrity of the initiative process and election." *Id.* at 23, 25-26. The panel enjoined Yost from "enforcing § 3519.01 against Plaintiffs' proposed constitutional amendment" and

ordered Yost to "send Plaintiffs' proposed amendment and the most recent summary to the ballot board for the next phase of the process." *Id.* at 28.

The Court granted rehearing en banc and vacated the panel's injunction. Plaintiffs have now missed the July 3 deadline for putting their proposed amendment on the November 2024 ballot. On July 5, 2024, they resubmitted their summary and an additional 1,000 signatures to Yost for review, in hopes of having their proposal on the ballot in an upcoming election. On July 15, 2024, Yost once again rejected the summary.

ARGUMENT

I. The Requested Injunction Would Not Implicate Sovereign Immunity.

Yost's argument that an injunction against application of the summary provision would effectively grant retrospective relief, implicating sovereign immunity, Pet. 11-12, is fundamentally mistaken. As all parties agree, this Court can award Plaintiffs prospective relief for an ongoing violation of federal law under *Ex parte Young*, 209 U.S. 123 (1908). Plaintiffs are experiencing just that sort of ongoing violation—they continue to be barred from circulating and advocating for their ballot initiative in the manner they choose, and that injury is attributable to Yost's refusal to submit their proposed amendment and summary to the Ballot Board with the required certification. Indeed, Yost rejected *another* summary proposed by Plaintiffs on July 15. An injunction requiring Yost to forward Plaintiffs' proposed summary to the next phase of the review process would be forward-looking relief addressing Plaintiffs' ongoing injury and would not raise sovereign immunity concerns.

The only basis Yost identifies for characterizing the relief sought as retrospective is that he decided not to submit the filings in the past, *see* Pet. 12-13, but this confuses Plaintiffs' *claim* with their *injury*. It is true that—as in almost every case—Plaintiffs' First Amendment claim accrued because of Yost's past actions. But the harm caused by his enforcement of the unconstitutional statutory scheme remains ongoing. *See In re Flint Water Cases*, 960 F.3d 303, 334 (6th Cir. 2020) (rejecting sovereign immunity argument because the allegation was not that plaintiff's rights would be violated "again in the future," but that the past violation "has continuing effects" (internal quotation marks and citation omitted)). Plaintiffs do not seek to alter Yost's past certification decision—they seek to prevent him from continuing to restrict their speech and advocacy through enforcement of an unconstitutional provision moving forward.

Yost asks the Court to hold that he enjoys sovereign immunity based on a mishmash of arguments that are both wrong and unrelated to sovereign immunity. Pet. 12. These arguments fail at the outset because they ignore the Court's obligation to "accept as valid the merits of" Plaintiffs' claim. *FEC v. Cruz*, 596 U.S. 289, 298 (2022). Plaintiffs argue that Yost's enforcement of his gatekeeping authority burdens their First Amendment rights because it allows Yost to unilaterally block them from advocating for their proposed amendment as they wish without any mechanism for timely and meaningful judicial review. Plaintiffs have therefore alleged an injury-in-fact traceable to Yost's refusal to submit the necessary filings to the Ballot Board and redressable by an injunction requiring Yost to make the submission immediately. Yost may disagree

with the merits of Plaintiffs' First Amendment claim, but that substantive disagreement does not call into question the court's jurisdiction to issue an injunction.

Although Yost suggests that Plaintiffs' claims about the inadequacy of § 3519.01(C)'s judicial review mechanism mean that the Ohio Supreme Court is the proper defendant, *see* Pet. 12, the unavailability of meaningful judicial review goes to the *merits* of Plaintiffs' claim that Yost's gatekeeping authority violates the First Amendment, not their standing to challenge that authority. Yost is the executive official responsible for enforcing § 3519.01(A) and therefore is the proper defendant for this suit. *See Whole Woman's Heath v. Jackson*, 595 U.S. 30, 45-46 (2021). The burden on Plaintiffs' First Amendment rights—their inability to advocate for their amendment as they wish and to circulate their petition—is directly caused by his enforcement of § 3519.01(A), not by the Ohio Supreme Court's rules or management of its docket. And the fact that Plaintiffs dismissed their mandamus action does nothing to solve this ongoing injury or moot their claims—they still lack the certification necessary to allow them to proceed with their ballot initiative, a continuing infringement on their First Amendment rights. Injunctive relief is necessary and appropriate to redress that harm.

II. Yost's Enforcement of the Summary Provision is Subject to First Amendment Scrutiny.

States have "broad power[s] to regulate the time, place, and manner of elections," but in exercising that power they have a "'responsibility to observe the limits established by the First Amendment.'" *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222

(1989) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). This principle extends to citizen-initiated ballot measures: Although states are not required to permit such initiatives, those that do so must comply with the First Amendment in regulating the initiative process. *See Meyer v. Grant*, 486 U.S. 414, 425 (1988) (rejecting Colorado's contention that "the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions").

Yost's exercise of his unilateral statutory authority to reject Plaintiffs' summary restricts their core political speech by preventing them from describing their proposed amendment during the circulation process in the manner they would prefer. And Yost's gatekeeping, combined with the lack of timely judicial review, further implicates Plaintiffs' speech rights by preventing them from discussing their proposal with voters during the circulation process. Yost's infringement on Plaintiffs' core political speech triggers strict scrutiny, and § 3519.01, as applied, fails that test because it is not tailored to advance any compelling government interest.

A. The summary provision restricts "core political speech" and fails strict scrutiny.

1. By preventing Plaintiffs from circulating their petition with their chosen summary, Yost has restricted their political speech. The First Amendment's protections are at their "zenith" when applied to "core political speech." *Buckley v. Am. Const. L. Found.* ("*ACLF*"), 525 U.S. 182, 186-87 (1999) (citing *Grant*, 486 U.S. at 421-22, 425). "[C]ore political speech" involves "both the expression of a desire for political change

and a discussion of the merits of the proposed change." *Grant*, 486 U.S. at 421-22. It "need not center on a candidate for office"; discussion surrounding "issue-based elections ... is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

As the Supreme Court and other circuits have long recognized, speech associated with the circulation of ballot-initiative petitions is core political expression. Ballot-initiative proponents "seek by petition to achieve political change," and "their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Grant*, 486 U.S. at 421. Petition circulators must "persuade [potential signatories] that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate," which will typically require "an explanation of the nature of the proposal and why its advocates support it." *Id.* Petition circulation therefore "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22; *see also ACLF*, 525 U.S. at 211 (Thomas, J., concurring) ("The aim of a petition is to secure political change, and the First Amendment, by way of the Fourteenth Amendment, guards against the State's efforts to restrict free discussions about matters of public concern."); *Lerman v. Bd. of Elections in City of N.Y.*, 232 F.3d 135, 146 (2d Cir. 2000) (holding that petition circulation activity "clearly constituted core political speech"). Plaintiffs' proposed speech pertaining to their ballot initiative on a "matter[] of public concern" is thus core political speech "at the heart of the First

Amendment's protection." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

Yost's enforcement of the challenged summary provision restrains that speech in several ways, especially given the lack of timely judicial review. First, in giving the Attorney General unilateral authority and unfettered discretion to review and reject Plaintiffs' proposed summary of their ballot initiative, the provision offers the government editorial control over how Plaintiffs communicate with voters about their proposal. Unlike language that appears on the ballot or in the text of the proposed legislation, which might properly be considered government speech, the summary at issue here is used only during circulation of the petition. Written by Plaintiffs, the summary is their political speech advocating for their proposed change, and government review of that speech necessarily implicates the First Amendment. Second, Yost's denials—combined with the lack of timely judicial review by the Ohio Supreme Court—have categorically barred Plaintiffs from communicating their message, through both the summary and one-on-one conversations, to the Ohio electorate in the context of petition circulation. As *Grant* and its progeny recognize, that is an essential avenue for political speech. Third, by blocking circulation, the Attorney General makes it impossible for Plaintiffs to "garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion" and "reducing the total quantum of speech on a public issue." *Grant*, 486 U.S. at 423. This is a quintessential government restriction on political expression.

The Supreme Court's seminal case on this issue is instructive. In *Grant*, the Court

reviewed a Colorado law that made it a felony to pay petition circulators. *Id.* at 416. It concluded that the case "involve[d] a limitation on political expression subject to exacting scrutiny." *Id.* at 420. Because "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change," the Court explained, the "interactive communication concerning political change" associated with collecting signatures on a proposed ballot initiative fell within "core political speech." *Id.* at 421-22. It found that the ban on paid petition circulators restricted political expression by "limit[ing] the number of voices who will convey" the proponents' message and therefore "the size of the audience they can reach." *Id.* at 422-23. The restriction in this case is, if anything, more severe. No one can circulate Plaintiffs' petition until Yost approves the speech that Plaintiffs will use in the circulation process (or until the Ohio Supreme Court orders him to do so), by which time the deadline for getting on the ballot may pass again.

As in *Grant*, this restriction on speech is not permissible just because "other avenues of expression remain open" to the initiative's proponents. *Id.* at 424. The Supreme Court has explained that a provision that "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse" and prevents the proponents from "select[ing] what they believe to be the most effective means for" advocating for their cause violates the First Amendment. *Id.*; *see also SD Voice v. Noem*, 60 F.4th 1071, 1079 (8th Cir. 2023) (holding that an initiative petition filing deadline one year before the next general election unconstitutionally restricted

core political speech because it limited circulation and discussion of initiative petitions, even though other avenues of communication remained open). That is equally true here.

Grant and its progeny illustrate that core political speech restrictions are distinguishable from other types of generic ballot access regulations. Many ballot access regulations aim only to "control the mechanics of the electoral process" and thus do not directly implicate core political speech. *McIntyre*, 514 U.S. at 345-46; *see also Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996) (distinguishing regulations that affect circulation of initiative petitions and political discussion and therefore burden "core political speech" from general initiative regulations). These might be considered "typical" and "neutral regulations on ballot access." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring in the grant of a stay). In contrast, where, as here, a regulation "restrict[s] political discussion or petition circulation," it is not a "neutral, procedural regulation." *Id.* at 2616; *see also Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 142-43 (3d Cir. 2022) (explaining that laws burdening speech that is not on a ballot or at a polling place and which has "the potential to spark direct interaction and conversation" regulate core political speech, not the mechanics of the electoral process).

In addition to restricting core political speech, the summary provision is content based. A provision is a "direct regulation of the content of speech" if "the category of covered [speech] is defined by [its] content" or if the provision requires the speech to contain certain information. *McIntyre*, 514 U.S. at 345-46. The summary provision is content based because the Attorney General decides whether to approve the summary

based on its content. *See* Ohio Rev. Code § 3519.01 (authorizing the Attorney General to "conduct an examination of the summary" and determine whether it is "a fair and truthful statement of the proposed law or constitutional amendment"). And in practice, the Attorney General *has* prevented Plaintiffs from using their chosen summary based on content: For instance, he objected to the title of Plaintiffs' proposed amendment—"Protecting Ohioans' Constitutional Rights"—based on its content, characterizing that title as a "subjective hypothesis." When Plaintiffs deleted that title, Yost rejected the summary for not including one.

2. As a restriction on core political speech—especially a content-based restriction on that speech—the summary provision is subject to strict scrutiny. The First Amendment's broad protections "reflect[] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Cruz*, 596 U.S. at 302 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Governmental restrictions on "the discussion of political policy generally or advocacy of the passage or defeat of legislation" are "wholly at odds with the guarantees of the First Amendment." *Grant*, 486 U.S. at 428 (citation omitted). Accordingly, restrictions that burden this First Amendment right are "always subject to exacting judicial review." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981); *accord Grant*, 486 U.S. at 420. The content-based nature of the restriction independently triggers strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

Under strict scrutiny, "'the State may prevail only upon showing a subordinating

interest which is compelling,' 'and the burden is on the Government to show the existence of such an interest.'" *Bellotti*, 435 U.S. at 786 (citations omitted); *see also ACLF*, 525 U.S. at 207 (Thomas, J., concurring) (laws that "directly regulate[] core political speech" have always been subject to "strict scrutiny" and must be "narrowly tailored to serve a compelling governmental interest"). A law restricting speech that "does not 'avoid unnecessary abridgment'" of the First Amendment "cannot survive 'rigorous' review." *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (quoting *Buckley*, 424 U.S. at 25).

Yost's rehearing petition argues only that First Amendment scrutiny does not apply to the summary provision, not that his enforcement of the provision satisfies such scrutiny. It does not. As a general matter, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control*, 454 U.S. at 299. Although "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process," the provision here "significantly inhibit[s] communication with voters about proposed political change, and [is] not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *ACLF*, 525 U.S. at 191-92.

The State's purported interest in monitoring the truth of ballot-initiative summaries does not justify Yost's repeated, functionally unreviewable rejections of Plaintiffs' summary. It is "the people in our democracy," not the government, who are "entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791. This is consistent with more general

"interpretations of the First Amendment," which "have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964); *see also Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 475-76 (6th Cir. 2016). That is particularly true here given that the summary is used only to assist in collecting signatures to get the initiative on the ballot, the point when political speech interests are at their "zenith." *ACLF*, 525 U.S. at 186-87. Voters receive a different title and summary, prepared by the Ballot Board, when ultimately deciding whether to vote for the initiative.

Nor is the provision narrowly tailored to serve the purported state interests at issue here. Section 3519.01 allows the Attorney General to categorically bar Plaintiffs from advocating for their proposed ballot initiative to voters through the circulation process, with no provision for timely judicial review. There are no limitations on the Attorney General's discretion. His review is not restricted to fraud but extends to whether in his view Plaintiffs' summary is "fair," a term so capacious it can give rise to any number of interpretations. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 21-22 (2018). And nothing prevents him from raising new purported concerns each time he reviews a summary, even if he could have raised them previously. For example, here Plaintiffs used the same title for multiple iterations of the proposed amendment but Yost did not reject it until his sixth review. This unfettered discretion can lead to repeated rejections that trap proponents in an infinite loop from which their speech cannot escape.

By giving the Attorney General essentially unlimited discretion to prevent circulation of an initiative petition, the summary provision restricts speech to a far greater extent than similar laws in other states, further illustrating the lack of narrow tailoring. For instance, Ohio could dispense with the summary requirement altogether, as many states do. *See, e.g.*, Ark. Code Ann. § 7-9-107; Colo. Rev. Stat. Ann. § 1-40-106; Idaho Code Ann. § 34-1804(2). If the State prefers to retain the summary at the petition stage, it could allow sponsors to circulate the petition and accompanying summary without prior restraint from the government, *see, e.g.*, 10 Ill. Comp. Stat. 5/28-3, potentially with a disclaimer stating that the summary is "prepared by the sponsor" and "may not include every provision contained in the measure," Ariz. Rev. Stat. Ann. § 19-102. Or, rather than allowing the Attorney General to act as a gatekeeper for the sponsor's summary, he could write a summary of his own, which would be government speech. *See, e.g.*, Cal. Elec. Code § 9050; S.D. Codified Laws § 12-13-25.1.

At the very least, Ohio must provide for expedited judicial review to ensure that an initiative's proponents will have sufficient time to collect the necessary signatures after the issue has been adjudicated. *See, e.g.*, Me. Stat. tit. 21-A, § 905; Or. Rev. Stat. Ann. § 250.085. Judicial review in the ordinary course, which can take months or years, will invariably prevent sponsors of a petition from circulating in time for the next election, even if they start well in advance. Here, Plaintiffs began the process in early 2023 and are still waiting for approval to circulate their petition almost a year and a half later. This review must also be under a de novo standard to ensure that a single

"administrative official[]" is not given sole authority to administer a "test of truth." *Sullivan*, 376 U.S. at 271; *cf.* Respondent's Brief at 5, *Dudley*, No. 2024-0161 (Yost arguing that "the Attorney General's fair-and-truthful determination" may only be reviewed for abuse of discretion). These alternatives would be "adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Grant*, 486 U.S. at 426-28.

B. At a minimum, the summary provision is subject to—and cannot survive—the *Anderson-Burdick* balancing test.

Even if Ohio's summary provision were not subject to strict scrutiny as a content-based restriction on core political speech, it would still be subject to the *Anderson-Burdick* balancing test, which it would fail. Under the *Anderson-Burdick* framework, a court assessing the constitutionality of an election regulation must "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 v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The Supreme Court has held that "[w]hen a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest," whereas "lesser burdens trigger less exacting review."

ACLF, 525 U.S. at 206-07. When an election regulation imposes neither a "severe" nor a "minimal" burden, it is subject to intermediate scrutiny. *Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019).

Because Ohio's summary provision restricts both political speech and Plaintiffs' ability to circulate their petition, the circuit split over when *Anderson-Burdick* applies to neutral, procedural regulations of ballot-initiative processes is not relevant here—all circuits would agree that this provision implicates the First Amendment. *See Little*, 140 S. Ct. at 2616-17 (Roberts, C.J., concurring in the grant of stay) (describing split). And in any event, the Sixth Circuit has correctly held that even neutral, procedural ballot-initiative regulations are subject to *some* degree of First Amendment scrutiny. Therefore, even if it disagrees that the provision is subject to strict scrutiny under *Grant* and its progeny, the Court should nevertheless enjoin the summary provision as unconstitutional under the *Anderson-Burdick* framework.

1. It is uncontested that restrictions on political discussion and petition circulation burden First Amendment rights even if they do not reach core political speech. As Yost concedes, such regulations are unquestionably subject to the *Anderson-Burdick* balancing test. *See* Pet. 16 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006) (en banc)). The circuit split over *Anderson-Burdick* identified in *Little v. Reclaim Idaho* involves a different question: whether a "neutral, procedural regulation" of the initiative process that *does not* "restrict political discussion or petition circulation" is subject to First Amendment scrutiny. *See* 140 S. Ct. at 2616-17 (Roberts,

C.J., concurring in the grant of stay). That question is not implicated here. As the panel majority correctly recognized, Ohio's summary provision restricts both political discussion and petition circulation by forcing Plaintiffs "to alter their proposed summary," "restrict[ing] one-on-one communication between Plaintiffs and potential voters," and impeding Plaintiffs' ability to "make the matter the focus of statewide discussion." Panel Op. 22-23 (quoting *Grant*, 486 U.S. at 423). The summary provision directly impacts Plaintiffs' ability to engage with voters and discuss their proposal—indeed, Yost's unreviewable abuse of the review process has made it impossible for Plaintiffs to circulate their proposal at all. No court has held that such a law is exempt from First Amendment scrutiny. To the extent that other circuits have concluded that some subset of election regulations fall outside the First Amendment's domain because they are far removed from the speech and expressive conduct involved in advocating for or circulating a ballot measure, those regulations are nothing like the provision at issue here. *See Dobrovolny v. Moore*, 126 F.3d 1111, 1112-13 (8th Cir. 1997) (emphasizing that the provision at issue did not impact the initiative proponents' circulation of their petitions or the content of their political speech).

Yost's contention that the First Amendment is flatly inapplicable to laws regulating ballot initiatives, Pet. 14, is mistaken. The process of circulating a ballot-initiative petition involves the same expressive elements as any other kind of election-related speech, even though a ballot campaign includes the additional element of legislative power. The act of signing an initiative petition, as with signing any other type

of political petition, "expresses a view on a political matter." *Doe v. Reed*, 561 U.S. 186, 194-95 (2010). Even when signing an initiative petition may have a "legal effect" on the legislative process, that effect does not "deprive[] that activity of its expressive component" or "tak[e] it outside the scope of the First Amendment." *Id.* at 195. As the Supreme Court has made clear, "[p]etition signing remains expressive even when it has legal effect in the electoral process." *Id.* And under Ohio law, signing a petition to place Plaintiffs' measure on the ballot does not itself have any immediate legislative effect, such that it is primarily an act of political expression. *Compare id.* at 221 (Scalia, J., concurring) (noting that Washington suspended the operation of a state law once a referendum petition against it was placed on the ballot) *with* Ohio Rev. Code § 3519.01.

As discussed above, Plaintiffs' advocacy in support of their ballot initiative is expressive in the same way as any other political speech, and it thus falls within the scope of the First Amendment. Indeed, the Supreme Court has held that petition circulation is even more expressive than distributing handbills opposing a proposed ballot measure, a form of expressive speech unquestionably afforded First Amendment protection. *See ACLF*, 525 U.S. at 199 (citing *McIntyre*, 514 U.S. at 347, 357). As compared to handbill distribution, petition circulation "is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition." *Id.* And because an interaction between a circulator and a voter "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change," their communications are undeniably expressive. *Id.* (quoting *Grant*, 486 U.S.

at 421). It is exactly this sort of ongoing political discussion and engagement with the community that Plaintiffs have been barred from as a result of Ohio's summary provision. Yost's repeated denials of Plaintiffs' summary prevent them from communicating with voters about their initiative in the manner they would like and from circulating their petition at all. This imposes a significant burden on Plaintiffs' First Amendment rights.

Indeed, unlike initiative restrictions upheld by other circuits, Ohio's summary provision restricts legislative *advocacy* rather than legislative *authority*. States have considerable discretion to limit citizens' legislative authority to propose and pass ballot initiatives. *See Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). For example, they may restrict the subjects an initiative can address, *see Marijuana Pol'y Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002); limit the number of referenda on a ballot, *see Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 936-37 (7th Cir. 2018); or require that initiatives addressing particular subjects reach higher vote thresholds, *see Walker*, 450 F.3d at 1099-1100. But states cannot curtail speech advocating for a ballot measure any more than speech arising in any other electoral context. *See Reed*, 561 U.S. at 195. The summary provision here affects such advocacy because it regulates Plaintiffs' communication about their initiative rather than the subject matter of their proposal. Ohio cannot restrain that advocacy simply because it occurs in the initiative context.

2. Even if this case did implicate the circuit split about whether neutral, procedural regulations of ballot initiatives are subject to First Amendment scrutiny, the

Sixth Circuit is on the correct side of that split. The Supreme Court has clearly and consistently held that a state's power to regulate elections does not "extinguish" its "responsibility to observe the limits established by the First Amendment." *See Tashjian*, 479 U.S. at 217. Indeed, the Court has admonished that "[c]onstitutional challenges to specific provisions of a State's election laws … cannot be resolved by any 'litmus-paper test.'" *Anderson*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Instead, a court must apply "an analytical process that parallels its work in ordinary litigation." *Id.* That is just as true for procedural regulations as it is for any other kind of election regulation—political speech can be burdened even by facially neutral election laws. *See Burdick*, 504 U.S. at 433 ("Election laws will invariably impose some burden upon individual voters."); *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring) ("[S]tructural decisions 'inevitably affect[ ]—at least to some degree—the individual's right' to speak about political issues." (quoting *Anderson*, 460 U.S. at 788)).

Anderson-Burdick provides courts with a framework for balancing the government interests these regulations serve with the First Amendment interests they burden. It does not demand strict scrutiny of every election law, no matter how minor its effect on political speech, nor does it require courts to ignore the important interests that election regulations often serve. *See Burdick*, 504 U.S. at 433. Instead, the test is built for balancing: the weighing-of-the-interests framework directs courts to account for both "the character and magnitude" of the asserted burden on a plaintiff's First Amendment exercise and "the extent to which [the State's] interests make it necessary to burden the

plaintiff's rights." *Id.* at 434 (internal quotation marks and citation omitted). It offers a means of weeding out election laws whose burdens on constitutional rights far outweigh their benefits, however neutral and procedural those laws may look on their face.

If the *Anderson-Burdick* test did not apply to procedural regulations, a facially neutral ballot access restriction that imposes a severe burden on First Amendment rights would face *no* scrutiny at all. That cannot be right. As the Supreme Court has made clear, and as Yost concedes, states are not required to adopt initiative petition processes, but they must adhere to constitutional commands if they choose to do so. *See* Pet. 14-15; *ACLF*, 525 U.S. at 191-92. It cannot be true that, for example, a state law setting a deadline for submission of initiative petitions years in advance of an election would be exempt from any First Amendment scrutiny, even though such a regulation would be procedural in nature. *Cf. Anderson*, 460 U.S. at 792-94 (invalidating a deadline for candidate nominating petitions set several months before the election as violative of the First Amendment). Indeed, the ban on paid petition circulators in *Grant* could itself be portrayed as a procedural regulation, but that did not exempt it from review under the First Amendment. Some measure of scrutiny is necessary to ensure that these rules do not impermissibly undermine citizens' First Amendment rights.

Absent scrutiny under *Anderson-Burdick*, states would have unfettered discretion to effectively abrogate the First Amendment so long as their chosen vehicle for doing so is procedural and generally applicable. That would fundamentally undermine the purpose of election laws, which are intended to facilitate access to the democratic

process and encourage, rather than hinder, "interactive communication concerning political change." *Grant*, 486 U.S. at 421-22. The *Anderson-Burdick* test is an essential tool by which judges balance the need for "substantial regulation" to ensure that elections are "fair and honest," *Storer*, 415 U.S. at 730, with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *Anderson*, 460 U.S. at 794 (quoting *Sullivan*, 376 U.S. at 270). The Sixth Circuit has understood as much, repeatedly applying the *Anderson-Burdick* inquiry to ballot-initiative procedures. It should reaffirm that principle here.

3. Because the summary provision severely burdens Plaintiffs' First Amendment rights and makes it impossible for them to circulate their petition, let alone get it on the ballot, it would be subject to strict scrutiny under the *Anderson-Burdick* test. *See Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot."). As already discussed, it cannot survive that exacting review. *See supra* Section II.A.2. And even if the provision were subject to intermediate scrutiny, the burden on Plaintiffs' speech far outweighs the State's claimed interests given that Yost's unilateral, standardless enforcement of the provision is subject only to deferential and untimely judicial review. The summary provision therefore cannot survive under the *Anderson-Burdick* framework.

CONCLUSION

The Court should reverse the judgment of the district court denying Plaintiffs' motion for preliminary injunction and reinstate the injunction entered by the panel.

Dated: July 17, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing En Banc Supplemental Brief contains 25 pages in accordance with the briefing order entered on June 21, 2024 (Dkt. 41). I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

/s/ Mark R. Brown
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 2024, this brief 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.

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