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' OPPOSTITION TO DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

Defendant, Ohio Attorney General David Yost, asks this Court to convene en banc to consider "at least two questions of exceptional importance that warrant the full Court's immediate attention." Pet. 1. Neither question is exceptionally important or otherwise worthy of the Court's en banc review.

The first—whether sovereign immunity bars the panel's order enjoining Yost from continuing to refuse to forward Plaintiffs' proposed ballot initiative to the Ohio Ballot Board, Pet. 1—is squarely resolved by *Ex parte Young*'s longstanding sovereign immunity exception for prospective relief. *See* Op. 14-16.

The second—"whether First Amendment review applies to state laws that regulate the initiative power and process itself (as opposed to laws that regulate speech about initiatives)," Pet. 2—is not presented here because the challenged statutory provision does not merely regulate the initiative process, but rather "imposes a severe burden on Plaintiffs' 'core political speech'" about their proposed constitutional amendment. Op. 23 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). As Yost concedes and all circuits agree, laws that "regulate or restrict the communicative conduct of persons advocating a position in a referendum … implicate the First Amendment." Pet. 16 (internal quotation marks omitted). Accordingly, even if this Court were interested in reconsidering en banc the *Anderson-Burdick* test's applicability to ballot initiatives, this case would be an exceedingly poor vehicle for doing so.

The petition for rehearing en banc should be denied.

STATEMENT

The People of Ohio have "reserve[d] to themselves the power to propose … amendments to the constitution, and to adopt or reject the same at the polls." Ohio Const. art. II, § 1. The Ohio Constitution provides that when a petition proposing a constitutional amendment is signed by 10 percent of electors, with significant numbers of signatories in at least half of Ohio's counties, the proposed amendment shall be placed before voters in the next general election occurring at least 125 days after the petition is finalized. *Id.* §§ 1a, 1g. These constitutional provisions are "self-executing"; the legislature may enact laws "to facilitate their operation" but cannot "limit[] or restrict[] either such provisions or the powers herein reserved." *Id.* § 1g.

By statute, the Ohio legislature has added numerous requirements that sponsors of constitutional amendments must meet. First, they must obtain 1,000 signatures and submit a summary of their proposed amendment to the Attorney General, 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). If so, he "shall so certify" and then "forward" the petition to the Ohio Ballot Board for approval. *Id.* Upon that approval, those sponsoring the amendment can start to collect the hundreds of thousands of signatures they need by circulating both the full text of the amendment and the summary approved by the Attorney General. *See* Ohio Rev. Code § 3519.05. To get a constitutional amendment on the

ballot for the November 2024 election, these signatures must be submitted by July 3, 2024.

Plaintiffs seek to propose a constitutional amendment. They collected the 1,000 signatures initially required by § 3519.01(A) and then submitted their proposed amendment and summary to Yost for approval. Yost rejected the summary and refused to forward the filings to the Ballot Board. 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. Plaintiffs tried again, and Yost blocked them again. After this happened *six times*, with Yost asserting a shifting series of supposed shortcomings with the summary, Plaintiffs filed suit in the Ohio Supreme Court. *See* Ohio Rev. Code § 3519.01(C) (allowing a person aggrieved by the Attorney General's decision under § 3519.01(A) to seek direct review in the Ohio Supreme Court).

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 that must be completed *125* days before the election. Without expedited review, Plaintiffs would be unable to start collecting the signatures they need to place their proposed amendment on the November 2024 ballot before the July 3, 2024, deadline. Plaintiffs thus 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, which had become futile.

Shortly after filing the 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." 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 requiring Yost to forward their proposed amendment and summary to the Ballot Board. Op. 7, 14-16. The district court nonetheless declined to enter the injunction on the ground that Plaintiffs were unlikely to succeed on the merits. 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." Op. 23, 25-26. The statutory scheme instead, for example, could provide for prompt, meaningful judicial review of the Attorney General's determination, or it could limit the summary requirement to particularly long or complicated amendment proposals. *See* Op. 26. As currently constituted, however,

§ 3519.01(A) allowed Yost to act as a gatekeeper and unilaterally block Plaintiffs from garnering public support for their proposed amendment and summary "*regardless of whether it was fair and truthful.*" *Id.* (emphasis in original). Concluding that the remaining preliminary injunction factors also weighed in favor of granting Plaintiffs' equitable relief, 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." Op. 28.

ARGUMENT

I. The panel decision does not implicate sovereign immunity.

Yost does not contest the panel's authority to award Plaintiffs prospective relief for an ongoing violation of federal law per *Ex parte Young*, 209 U.S. 123 (1908). *See* Op. 14 (explaining the *Ex parte Young* sovereign immunity exception). Yost's sovereign immunity argument instead rests on his claim that the panel's injunction awards retrospective relief. *See* Pet. 11-13. It does not.

As the panel explained, Plaintiffs are currently experiencing the ongoing injury of being unable to advocate for the public support necessary to place their proposed amendment on the November 2024 ballot—an injury attributable to Yost's continuing refusal to submit their proposed amendment and summary to the Ballot Board with the required certification. *See* Op. 9-12. The injunction entered by the panel simply requires

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

Yost does not offer any serious argument that requiring him to move forward with the submission of those filings is anything but quintessential prospective relief under *Ex parte Young*. He ignores altogether the panel's finding that Plaintiffs are experiencing an ongoing harm due to his continued refusal to allow their proposed amendment to proceed to the next phase of the initiative process. *See* Op. 9-10, 14. And the only basis he identifies for characterizing the relief as retrospective is that he already decided not to submit the filings. *See* Pet. 12-13. But almost any injunction issued under *Ex parte Young* inevitably requires the defendant state official to do something he has already determined he will not or cannot do, because otherwise the injunction would be unnecessary. Indeed, Yost does not even attempt to distinguish or challenge the case law the panel identified as foreclosing his sovereign immunity argument. *See* Op. 15-16 (discussing *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474-75 (6th Cir. 2008), and *Boler v. Earley*, 865 F.3d 391, 413 (6th Cir. 2017)).

Instead, Yost asks the en banc Court to hold that he enjoys sovereign immunity based on a mishmash of arguments that have nothing to do with sovereign immunity and that are wrong in any event. 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' claim is that Yost's enforcement of his gatekeeping authority under § 3519.01 burdens their right to political expression in

violation of the First Amendment because it allows Yost to unilaterally block Plaintiffs from advocating for their proposed amendment as they wish, without any mechanism for timely and meaningful judicial review. *See* Op. 9-10. Based on this claim, Plaintiffs have alleged an injury-in-fact that is traceable to Yost's refusal to submit the necessary filings to the Ballot Board and that is redressed by the panel's injunction requiring Yost to make the submission now so that Plaintiffs can proceed with their efforts to garner the public support necessary for their proposed amendment. *See* Op. 10-13. Yost may disagree with the merits of Plaintiffs' First Amendment claim, but that substantive disagreement does not implicate standing.

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 under § 3519.01(A) violates the First Amendment, not their standing to challenge that authority. As the panel recognized, it is *Yost's* exercise of his § 3519.01(A) authority to block Plaintiffs' initiative that injures Plaintiffs by preventing them from advocating for their proposed amendment, and the injunction redresses that injury. *See* Op. 9-13. As the executive responsible for enforcing § 3519.01(A), Yost is the proper defendant for this suit. *See Whole Woman's Heath v. Jackson*, 595 U.S. 30, 45-46 (2021). That Plaintiffs dismissed their mandamus action does nothing to solve their ongoing injury or moot their claims—they still lack the certification necessary to allow them to proceed with their ballot

initiative, a continuing infringement of their First Amendment rights. *See* Op. 12-14, 22 n.11.

Yost fares no better with his belated invocation of *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam), which requires courts to consider election-specific harms when evaluating requests for last-minute changes to voting rules relating to an imminent election. He did not raise this argument before the panel (thereby forfeiting it, *see Ga.-Pac. Consumer Prods. LP v. NCR Corp.*, 40 F.4th 481, 483-84 (6th Cir. 2022)), and for good reason: the *Purcell* rule applies to changes to the rules governing election administration, *see Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam), not to the earlier step of trying to get a measure on the ballot.

The panel's injunction does not cause the type of voter confusion that *Purcell* directs courts to consider. 549 U.S. at 4-5. In fact, it does not affect voters at all, nor does it change any aspect of how the State will administer the November election. If Plaintiffs' initiative is eventually placed on the ballot, the voting procedures will be governed by state laws that remain unaffected by this injunction. Indeed, Yost's opposition to expedited proceedings in the Ohio Supreme Court argued that there was no need for prompt resolution of this issue because the amendment process was "in its infancy" and it was "entirely speculative" whether the amendment would make it onto the ballot. Opposition to Motion to Expedite at 4, *State ex rel. Brown v. Yost*, No. 2024-0409 (Ohio Mar. 25, 2024). He cannot reverse course at this late stage. *See Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022) (rejecting *Purcell* argument that the secretary of

state "could not fairly have advanced himself in light of his previous representations" that the briefing schedule was sufficient).

II. The panel decision does not implicate a circuit split or create an intra-circuit conflict.

Yost also contends that en banc review is warranted because the circuits are divided on "whether First Amendment review applies to state laws that regulate the initiative power and process itself (as opposed to laws that regulate speech about initiatives)." Pet. 2. But the panel's decision does not implicate that circuit split. The panel held that the restrictions at issue, as applied to Plaintiffs, do not merely regulate the initiative process, but rather "impose[] a severe burden on Plaintiffs' 'core political speech'" about their proposed initiative. Op. 23 (quoting *Grant*, 486 U.S. at 422). As Yost concedes and all circuits agree, laws that "'regulate or restrict the communicative conduct of persons advocating a position in a referendum' … implicate the First Amendment." Pet. 16 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006)). That uncontested principle resolves this case.

The panel's decision represents a straightforward application of the Supreme Court's binding decision in *Grant*. That case concerned a challenge by the proponents of a ballot initiative to a Colorado law banning payment of petition circulators. 486 U.S. at 417. The Supreme Court held that the law violated the First Amendment by "impos[ing] a burden on political expression that the State ha[d] failed to justify." *Id.* at 428.

The Supreme Court explained that "the circulation of a petition involves the type of interactive communication concerning political change"—including "both the expression of a desire for political change and a discussion of the merits of the proposed change"—"that is appropriately described as 'core political speech.'" *Id.* at 421-22. Banning the payment of petition circulators restricts that political speech in two ways. First, "it limits the number of voices who will convey [organizers'] message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Id.* at 422-23. Second, "it makes it less likely that [organizers] will 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." *Id.* at 423.

Because the State's law infringed protected political expression, it was subject to "exacting scrutiny," which the State's purported interest in safeguarding the "integrity" of the initiative process failed to satisfy. *Id.* at 420, 425. The Supreme Court reached that conclusion even though "other avenues of expression" remained open to the organizers of the petition and even though "the power of the initiative is a state-created right." *Id.* at 424.

So too here. Yost's exercise of his authority under § 3519.01(A) to unliterally block Plaintiffs from proceeding with their advocacy efforts, coupled with the lack of meaningful judicial review, denied Plaintiffs the opportunity to engage in the sort of "interactive communication concerning political change" that "the circulation of a petition involves." *Id.* at 421-22. As the panel explained, "[w]ithout timely review,

§ 3519.01 allows the Attorney General to reject a summary in perpetuity such that the petitioners are never able to begin collecting signatures in support, much less garner the number of signatories required." Op. 23. As in *Grant*, that restriction both deprives Plaintiffs of the time they would otherwise have to engage in "direct one-on-one communication" with voters—which is the "most effective … avenue of political discourse"—and undermines their chances of gathering the requisite signatures to make their proposal a subject of "statewide discussion." *Grant*, 486 U.S. at 423-24. If anything, the restriction on "core political speech" in this case is more severe than in *Grant*. Whereas the ban on paid circulators had an incremental "effect of reducing the total quantum of speech on a public issue," *id.* at 423, Yost's effectively unreviewable order rejecting Plaintiffs' proposed amendment summary cuts off this avenue of political speech entirely. And as in *Grant*, the availability of "other avenues" is immaterial. *Id.* at 424.

Because the Supreme Court's binding precedent in *Grant* governs this case, the circuit split over the applicability of the *Anderson-Burdick* framework to First Amendment claims challenging initiative-petition restrictions is irrelevant. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616-17 (2020) (Roberts, C.J., concurring in the grant of stay) (describing split). On both sides of that split, regulations targeting the "ability to advocate for initiative petitions … amount[] to regulation of political speech" under *Grant*. *Schmitt v. LaRose*, 933 F.3d 628, 644 (6th Cir. 2019) (Bush, J., concurring in part and concurring in the judgment).

Nor did the panel majority's decision to organize its analysis around the *Anderson-Burdick* framework affect the substantive outcome of its decision, which would have been the same even in a circuit that does not apply *Anderson-Burdick* to ballot initiative processes. The panel majority recognized that Plaintiffs would prevail under *Grant* standing alone, even if *Grant* and *Anderson-Burdick* were mutually exclusive tests. Op. 20 n.10. Yost's repeated and practically unreviewable rejection of Plaintiffs' petition summary under § 3519.01(A) "is precisely the type of regulation that triggers application of *Grant*." *Id.* And *Grant* itself, like *Anderson-Burdick*, requires a two-step inquiry. Under *Grant*, a court must first determine whether a law restricts "core political speech" and then, if so, apply "exacting scrutiny." 486 U.S. at 420. Accordingly, regardless of whether a circuit applies *Anderson-Burdick* to ballot initiatives, *Grant* would still mandate the same outcome in the circumstances of this case. The bottom line is that Yost "burden[ed] Plaintiffs' choice of speech when advocating on behalf of the proposed amendment." Op. 20 n.10.

In any event, this circuit is correct to apply First Amendment scrutiny to laws regulating ballot initiatives, just like other "laws that target political association or voting." Op. 16. Although States need not provide a ballot initiative process, once they do, that process must protect constitutional rights, as Yost concedes. Pet. 15. The Supreme Court has repeatedly emphasized that the First Amendment shields expression in connection with ballot initiatives. The act of signing a referendum petition "expresses a view on a political matter." *Doe v. Reed*, 561 U.S. 186, 194 (2010). And although signing

the petition is technically a legislative act, the Supreme Court has noted that it "do[es] not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment." *Id.* at 195. The same goes for Plaintiffs' advocacy in connection with the circulation of their proposed initiative petition. Indeed, the Supreme Court has suggested that the expressive nature of circulating initiative petitions exceeds that of distributing handbills opposing a ballot measure, since petition circulation "is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 199 (1999).

Precedent thus forecloses Yost's bold claim that "the First Amendment does not apply *at all* to laws regulating the initiative process." Pet. 14. Even the courts on his preferred side of the circuit split have not gone that far. Those courts "have held that regulations that may make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation." *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of stay).

The intra-circuit conflict that Yost asserts, Pet. 16-18, is illusory. According to Yost, "[t]he panel's approach contradicts" three prior Sixth Circuit cases, all of which also involved Ohio statutes restricting the ballot initiative process. Pet. 17 (citing *Comm. to Impose Term Limits on Ohio Supreme Ct. & to Preclude Special Legal Status for Members & Emps. of Ohio Gen. Assembly v. Ohio Ballot Bd.*, 885 F.3d 443 (6th Cir. 2018) (*Term Limits*);

Schmitt, 933 F.3d 628; and *Beiersdorfer v. LaRose*, No. 20-3557, 2021 WL 3702211 (6th Cir. Aug. 20, 2021)). Unlike Yost's one-man blockade of Plaintiffs' political organizing, however, the restrictions challenged in those cases did not preclude "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Grant*, 486 U.S. at 421-22. Those laws thus did not trigger exacting scrutiny, unlike in *Grant* and in this case.

Term Limits concerned Ohio's single-subject rule, which limits each initiative petition to only one proposed law or constitutional amendment. *See* 885 F.3d at 445. Enforcement of the single-subject rule under Ohio law differs in significant ways from enforcement of the requirement that summaries be fair and truthful. The Ballot Board simply evaluates whether a proposed amendment contains a single subject and then splits proposed initiative petitions containing more than one subject into multiple single-subject petitions before certifying them. *Id.* (citing Ohio Rev. Code §§ 3505.062(A), 3519.01(A)). This Court explained that operation of this single-subject rule is "minimally burdensome" because it requires only that organizers present separate amendments rather than the one they had initially planned, allowing them to proceed immediately with circulation. *Id.* at 448. Accordingly, the single-subject rule does not implicate "core political speech." *Id.* at 446.

Schmitt and *Beiersdorfer* concerned a parallel initiative process in Ohio for amending municipal ordinances and county charters. Ohio law gives local election boards authority to review municipal initiative petitions to determine whether they

address an appropriate subject for local legislation. *Schmitt*, 933 F.3d at 634. Again, there are significant differences between that process and the one at issue in this case. First, as the panel majority noted in distinguishing *Schmitt*, local authorities review initiative petitions at the end of the process rather than the beginning, allowing petition supporters to engage in protected expression about their proposal on the front end. *See* Op. 24 (explaining that "proponents of municipal-ordinance initiatives had nothing left to do following the board's transmittal to the secretary of state"). Second, rejection of a petition by a local election board is subject to "essentially … de novo" judicial review, with "expedited briefing and decision." *Schmitt*, 933 F.3d at 640, 642. Here, by contrast, automatic expedited review will "never apply to challenges to the Attorney General's failure to certify the summaries of citizen-initiated constitutional amendments," given that petitions are due 125 days before an election and the Ohio Supreme Court is not required to review election cases on an expedited basis until 90 days before the election. Op. 5. Because of the greater availability of judicial review, the court in *Schmitt* held that the burden imposed was "somewhere between minimal and severe," falling in the middle of the *Anderson-Burdick* framework. *Schmitt*, 933 F.3d at 641. Here, without either prompt judicial review or an opportunity to gather the 400,000 required signatures until after the summary is approved, if it ever is, the burden is far greater.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing en banc.

Dated: June 3, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, in accordance with Federal Rule of Appellate Procedure 32(g), the foregoing Opposition to Petition for Rehearing En Banc contains 3,872 words in accordance with Federal Rules of Appellate Procedure 35(b)(2) and 40(b). 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 3rd day of June 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.

/s/ Mark R. Brown
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