No. _____

In the Supreme Court of the United States

DAVID YOST, OHIO ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY,
Applicant,

v.

CYNTHIA BROWN, ET AL.,
Respondents.

EMERGENCY APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO AND FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDINGS BELOW

The applicant is Dave Yost, in his official capacity as Ohio Attorney General.

The respondents are Cynthia Brown, Carlos Buford, and Jenny Sue Rowe. This application refers to these individuals collectively as "the plaintiffs."

TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Under a longstanding Ohio ballot-initiative law, the Attorney General reviews initiative summaries—before those summaries are widely circulated to voters via petitions—to ensure that they fairly represent the constitutional amendment being proposed. Ohio Rev. Code §3519.01(A). Below, the United States District Court for the Southern District of Ohio concluded that such review violates the First Amendment. As a result of that conclusion, the District Court granted the plaintiffs a preliminary injunction, which will require the Attorney General to "immediately certify" the plaintiffs' desired summary language. App'x 17. The District Court stayed that preliminary relief to allow for an appeal. But today, a divided Sixth Circuit panel lifted the stay. In so doing, the Sixth Circuit "split with the Eighth, Tenth, and D.C. Circuits." App'x 44 n.3 (Bush, J., dissenting). And absent this Court's *immediate* intervention, the Attorney General will need to comply with the preliminary injunction and certify the plaintiffs' summary language.

Through this application, Ohio Attorney General Dave Yost moves this Court to stay the preliminary injunction pending Ohio's appeal in the Sixth Circuit. The Attorney General further requests an immediate administrative stay pending the Court's consideration of this application. Last year, the Attorney General concluded that the initiative summary that plaintiffs wish to circulate was *not* a fair and truthful representation of their proposed amendment. But, if the preliminary injunction goes forward, the plaintiffs will presumably begin circulating petitions to Ohio voters—that contain the unfair summary—within roughly ten days. *See below* at 6–7.

INTRODUCTION

It is "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). This Court has thus explained that "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 191 (1999).

But as things stand today, the leeway that the States actually receive varies across the country. *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616–17 (2020) (Roberts, C.J., concurring in the grant of a stay). Some circuits "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." *Id.* at 2616; *see, e.g.*, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–100 (10th Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002). Others say that regulation of the initiative process necessarily implicates the First Amendment. *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of a stay). Those circuits typically apply this Court's *Anderson-Burdick* balancing test to such laws. *See, e.g.*, *Schmitt v. LaRose*, 933 F.3d 628, 640–42 (6th Cir. 2019); *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012); *see also Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

Keeping all that in mind, turn to the Ohio law challenged in this case. As part of Ohio's ballot-initiative process, those seeking to amend Ohio's Constitution must

draft summaries of their proposed amendments. Ohio Rev. Code §3519.01(A). Those summaries eventually become a part of the petitions that initiative proponents circulate to voters during the signature-gathering phase of Ohio's process. *See* Ohio Rev. Code §3519.05(A). But before those summaries make it into official state petitions, the Attorney General reviews the summaries to ensure that they fairly represent the amendments being proposed. Ohio Rev. Code §3519.01(A). This commonsense measure protects the integrity of Ohio's initiative process. And it would have survived most forms of scrutiny under the First Amendment, including a traditional application of the *Anderson-Burdick* test. *See Schmitt*, 933 F.3d at 640–42 . But the District Court applied strict scrutiny, because it viewed Ohio's law as a content-based restriction on speech. App'x 14–16. That approach is wrong.

As Judge Bush's dissent ably explains, fair-and-truthful review does not infringe the Free Speech Clause. App'x 41–55. The First Amendment confers no positive "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). Nor does it limit the government's ability to dictate its own speech. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015). It follows that Ohio has far more latitude than the District Court allowed to monitor the summary language that goes into *the State's own* initiative process—summary language that guides Ohio voters who are deciding whether to sign their names to support an initiative.

Because the Court is reasonably likely to take this case, because the challenged Ohio law is constitutional, and because the District Court's preliminary injunction

risks harm and confusion in the meantime, the Court should grant this request to stay the injunction during the pending appellate proceedings in the Sixth Circuit and any petition for a writ of certiorari.

OPINIONS BELOW

The District Court granted the plaintiffs' motion for a preliminary injunction on March 14, 2025. *Brown v. Yost*, No. 2:24-cv-1401, 2025 WL 815754 (S.D. Ohio Mar. 14, 2025). The District Court's opinion is reproduced at App'x 1. The District Court's March 17, 2025 order staying the preliminary injunction is reproduced at App'x 18. The Sixth Circuit's order lifting the stay is reproduced at App'x 20.

JURISDICTION

This District Court had jurisdiction under 28 U.S.C. §1331. The Sixth Circuit has interlocutory jurisdiction to review the District Court's grant of a preliminary injunction under 28 U.S.C. §1292(a)(1). This Court has jurisdiction to resolve this application under 28 U.S.C. §2101(f).

STATEMENT

I. The Ohio Constitution reserves to the People the right to initiate constitutional amendments. Ohio Const. art. II, §1a. But before a proposed constitutional amendment makes it on Ohio's ballot, initiative proponents must satisfy a multi-step process. At the outset, initiative proponents must form a committee. Ohio Rev. Code §3519.02. To show initial support, proponents must then collect the signatures of 1,000 registered voters in favor of the proposal. Ohio Rev. Code §3519.01(A). Next, proponents must submit their proposed constitutional amendment, along with a summary of the proposal, to the Ohio Attorney General. *Id.* The "summary" within these

submissions must be "a short, concise summing up," which advises potential signers of a proposed measure's character and substance. *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 27 (1931).

Within ten days, the Attorney General must review the summary to determine if it is a fair and truthful statement of the proposed amendment. *Id.* This review does not consider whether the proposed amendment is wise policy, but only whether the summary fairly represents the proposal. *See State ex rel. Barren v. Brown*, 51 Ohio St. 2d 169, 171 (1977). Notably, in recent years, the Attorney General has certified initiative summaries proposing controversial amendments that he personally disagrees with. *E.g.*, Mar. 2, 2023 Ltr. from Att'y Gen. to D. McTigue, https://perma.cc/XPB4-SV73 (certifying summary proposing a constitutional right to abortion).

The above review process also offers judicial recourse. If the Attorney General determines that an initiative summary is unfair—and thus denies certification—the initiative proponent may file an original action in the Supreme Court of Ohio challenging the determination. Ohio Rev. Code §3519.01(C). The Supreme Court of Ohio may expedite such actions as it sees fit.

On the other hand, if an initiative summary clears the Attorney General's review, he must certify the initiative to the Ohio Ballot Board for its approval. The Ballot Board then has ten days to conduct a distinct review. *Id.* §3505.062. Specifically, Ohio law requires that each initiative petition contain only one law or constitutional amendment, so that voters may cast a separate vote on every proposal on the

ballot. *Id.* If the Ballot Board confirms that a proposal contains only a single law, then the Board certifies as much to the Attorney General. *Id.* At that point, the Attorney General's role is mechanical: He simply provides the Secretary of State a verified copy of the proposal and its summary. Ohio Rev. Code §3519.01(A).

After a proposed initiative clears these initial review stages, the proponents must circulate petitions to Ohio voters. For ballot access, proponents must gather signatures equaling at least 10 percent of the vote cast for the office of governor at the last gubernatorial election. Ohio Const. art. II, §1a. Proponents are required to gather these signatures by 125 days before Election Day. *Id.* For the November 2025 election, that deadline falls on July 2. As proves critical here, the petitions that proponents circulate to voters contain both the proposal itself *and* the summary language that the Attorney General previously reviewed. *See* Ohio Rev. Code 3519.05(A). That way, Ohioans can better understand the measure they are asked to support. *See State ex rel. Jacquemin v. Union Cnty. Bd. of Elections*, 147 Ohio St. 3d 467, 470 (2016).

Also notable is that a certified summary has no expiration date. Once the Attorney General certifies summary language, the summary does not expire if its proponents fail to obtain the requisite number of signatures to appear on the ballot in a particular election. *See* Ohio Const. art. II, §1a. Proponents may try again with the same certified language during the next election cycle, without having to repeat the initial steps in Ohio's initiative process.

II. The plaintiffs are three individuals who wish to amend the Ohio Constitution to subject government actors across the State to greater liability in court. Since February 2023, the plaintiffs have submitted their proposed amendment and summary (in varying title and form) seven times for the Attorney General's statutorily mandated review under Ohio Revised Code §3519.01(A).

Each time, the Attorney General was unable to certify the plaintiffs' summary. One submission did not include enough signatures. For the other submissions, including the plaintiffs' most recent submission, the Attorney General concluded that the plaintiffs' summaries were not fair representations of their proposed amendment. The last of these determinations occurred this March. On that occasion, the Attorney General declined to certify the plaintiffs' summary in part because it repeated misstatements and omissions that the Attorney General had identified in previously rejected summaries. *See* App'x 3.

For the Attorney General's first six determinations, the plaintiffs did not exercise their statutory right to file an original action in the Supreme Court of Ohio. *See* Ohio Rev. Code §3519.01(C). After their seventh failed attempt in March, however, the plaintiffs filed such an action. *State ex rel. Brown v. Yost*, No. 2024-0409 (Ohio). The plaintiffs requested expedited consideration of that action—a request the Attorney General opposed and the Supreme Court of Ohio declined. The plaintiffs soon voluntarily abandoned their case. Notice of Voluntary Dismissal, No. 2024-0409 (May 20, 2024).

III. The plaintiffs filed their federal lawsuit in March 2024, shortly before they dismissed their just-discussed action in the Supreme Court of Ohio. They claimed that the review process outlined within Ohio Revised Code §3519.01(A) violates the First Amendment, facially and as applied. Their theory, at that point, was that Ohio's review process was unconstitutional because it did not require the Supreme Court of Ohio to conduct immediate, de novo review of the Attorney General's summary decision. *See* App'x 4.

The plaintiffs sought preliminary relief for the 2024 general election, which the District Court denied. The plaintiffs appealed that denial and a divided panel of the Sixth Circuit reversed. The panel ordered the Attorney General to send the plaintiffs' March 2024 summary language to Ohio's Ballot Board for further processing. *Brown v. Yost*, 103 F.4th 420, 446 (6th Cir. 2024). The full Court, however, granted the Attorney General's petition for en banc review and thus vacated that relief. *Brown v. Yost*, 104 F.4th 621 (6th Cir. 2024) (en banc).

After the Sixth Circuit granted en banc review, the plaintiffs submitted another initiative summary in July 2024. The Attorney General initially rejected that summary because it lacked a title. But the Supreme Court of Ohio then clarified that the Attorney General's certification role does not extend to review of a ballot proposal's title. *State ex rel. Dudley v. Yost*, 177 Ohio St. 3d 50 (2024). Based on that interpretation, the Attorney General certified the plaintiffs' July 2024 summary. App'x 6. (Ohio's General Assembly recently amended Ohio Revised Code §3519.01 to

clarify that, going forward, the Attorney General's review does extend to the titles of proposed initiatives. That amendment took effect today, on April 9, 2025.

IV. In late November 2024, the en banc Sixth Circuit ultimately dismissed the preliminary-injunction appeal (not the case) as moot. *Brown v. Yost*, 122 F.4th 597, 599 (6th Cir. 2024) (per curiam). The court reasoned that because the plaintiffs' "preliminary injunction focused on the 2024 election," the request for relief became moot after that election had "come and gone." *Id.*

Judge Thapar concurred in the denial of the preliminary injunction. He agreed with the majority that, to the extent the plaintiffs were seeking relief for the November 2024 election, the matter was moot. *Id.* at 603. But he further explained that, to the extent the plaintiffs were "seeking prospective relief for future elections," they were unlikely to succeed on the merits. *Id.* Judge Thapar observed that while the First Amendment protects private advocacy related to a state ballot-initiative process, it does not "give Americans a right to legislate." *Id.* at 605. It followed that States, which choose to have an initiative process, may "restrict what citizens can propose through the official initiative process." *Id.* at 606. And it followed from there that Ohio could regulate the content of its official petitions—including summary within those petitions—without having "to worry about the First Amendment at all." *Id.*

Judges Moore and Kethledge dissented. They disagreed that the case was moot. *Id.* at 615–17 (Moore, J., dissenting); *id.* at 622–24 (Kethledge, dissenting). Judge Moore also opined on the merits. In her view, Ohio's law required content-

based review that imposed a severe burden on core political speech. *Id.* at 618–19 (Moore, J., dissenting). She thus would have applied strict scrutiny and enjoined Ohio's law under that standard. *Id.* at 619.

V. On remand to the District Court, the plaintiffs amended their complaint. They adjusted their theory, arguing that the Attorney General's review of summary language directly violates the First Amendment. App'x 6–7. The plaintiffs indicated that rather than proceeding with their July 2024 summary language (which the Attorney General had approved due to the Supreme Court of Ohio's ruling) they preferred to proceed with their March 2024 language. App'x 7. In addition, the plaintiffs alleged that they were collecting the initial 1,000 signatures for a new initiative—about wrongful convictions—for which they wanted to avoid the Attorney General's review altogether. *Id.* The plaintiffs moved for preliminary relief as to both their old initiative (about state-actor liability) and their new wrongful-conviction initiative.

The District Court granted that relief. Though acknowledging persuasive contrary arguments, the court applied *Anderson-Burdick* review under the Sixth Circuit's existing precedent. App'x 9. The District Court found the Ohio law "content-based" and a "severe burden" on the "plaintiffs' speech." App'x 11–12. The court thus applied strict scrutiny to find a likely constitutional violation. App'x 14–16. The court preliminarily enjoined the Attorney General from executing the Ohio law, ordering him to immediately certify the plaintiffs' March 2024 summary language once the plaintiffs made certain updates (removing dates tailored to the 2024 election). App'x 17. The injunction also forbids the Attorney General from reviewing the

plaintiffs' new ballot initiative—regarding wrongful convictions—whenever the plaintiffs submit that new initiative. *Id.*

VI. The Attorney General sought to stay the preliminary injunction on the same day that the District Court granted the injunction. The District Court granted a stay on the next business day. App'x 18. But just after 5 p.m. today, a panel of the Sixth Circuit lifted the stay. App'x 21.

In lifting the stay, the majority did not choose a single analytical approach but instead found Ohio's law directly infringed speech under *Meyer v. Grant*, 486 U.S. 414, 422 (1988), App'x 27, and constituted a severe incidental burden on speech under the *Anderson-Burden* balancing framework. App'x 32.

Judge Bush dissented. In his view, "[n]othing in the Ohio statute challenged here prevents petition circulators from engaging in their own speech." App'x 45. The dissent also warned that the decision to lift the stay "resurrects, breathes new life into, and radically transforms the political process doctrine into a far reaching First Amendment tool that calls into question almost any content- or viewpoint-based limitation on the exercise of legislative power at the state and federal level." App'x 47 n.8.

The Ohio Attorney General thus brings this application seeking to stay the preliminary injunction. He also requests an administrative stay so that the Court may give this application full consideration.

REASONS TO GRANT THE APPLICATION

In deciding whether to issue a stay, this Court considers "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on

the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *cf. Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers). With respect to the first merits factor, some Justices of this Court also consider the likelihood of whether the Court will ultimately grant review in the case. *Doe v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, concurring in the denial of application for injunctive relief) (citing *Hollingsworth v. Perry*, 558 U. S. 183, 190 (2021) (per curiam)). Here, all of these considerations favor a stay.

I. This case implicates an entrenched circuit split on an important issue, so there is a strong probability that the Court will grant certiorari.

The plaintiffs here claim that Ohio's review process for ballot initiatives violates their First Amendment rights. But what First Amendment standard, if any, governs laws regulating state initiative processes? In answering this question, the courts of appeals "diverge in fundamental respects." *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of a stay).

Multiple circuits hold that laws regulating the initiative process do not normally implicate the First Amendment. *Id.* More precisely, these circuits say that laws "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." *Id.* The D.C. and Tenth Circuits are squarely in this category. *Marijuana Policy Project*, 304 F.3d at 83; *Walker*, 450 F.3d at 1099–100. And decisions from

several other courts are in accord. *See, e.g.*, *Morgan v. White*, 964 F.3d 649, 652 (7th Cir. 2020) (per curiam); *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d. Cir. 2009); *Dobrovolny v. Moore*, 126 F. 3d 1111, 1113 (8th Cir. 1997); *Pony Lake Sch. Dist. 30 v. State Comm. for the Reorganization of Sch. Dists.*, 271 Neb. 173, 191 (Neb. 2006); *Port of Tacoma v. Save Tacoma Water*, 422 P.3d 917, 924–25 (Wash. Ct. App. 2018).

Other circuits, however, automatically apply some form of First Amendment scrutiny to ballot-initiative laws. *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of a stay). The Sixth and the Ninth Circuit, for example, apply the *Anderson-Burdick* balancing test to laws governing the initiative process. *See, e.g.*, *Schmitt*, 933 F.3d at 639; *Angle*, 673 F.3d at 1132; *see also Miller v. Thurston*, 967 F.3d 727, 739 (8th Cir. 2020). The First Circuit also applies an intermediate level of First Amendment scrutiny to laws regulating the initiative power. *Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005). But that court of appeals imports the expressive-conduct test from *United States v. O'Brien*, 391 U.S. 367 (1968). *Galvin*, 412 F.3d at 279.

Applying First Amendment scrutiny to state initiative laws has proven difficult and unpredictable. Consider, for example, the *Anderson-Burdick* framework. To reconcile the tension between state authority over elections and the right to vote, the *Anderson-Burdick* test requires courts to balance the burdens a law places on First Amendment rights against the State's justification for a law. *Burdick*, 504 U.S. at 433–34. But there is no First Amendment right to an initiative process. *See Reclaim Idaho*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of a stay); *Doe*, 561

U.S. at 212 (Sotomayor, J., concurring). So, it becomes difficult (or impossible) to identify what burdens laws regulating the initiative process place on First Amendment rights. Asking whether those evasive burdens outweigh the government's interests then becomes rather like asking "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

Given those conceptual difficulties, the *Anderson-Burdick* test makes for a "dangerous tool" in the initiative context, as it gives courts little guidance for making "sensitive, policy-oriented" decisions. *See Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring the judgment); *cf. Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). And the Sixth Circuit has proven a hotbed for initiative-related litigation. *See, e.g.*, *Beiersdorfer v. LaRose*, 2021 WL 3702211 (6th Cir. 2021); *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 596-98 (6th Cir. 2020); *Thompson v. DeWine*, 959 F.3d 804, 808 (2020) (per curiam); *Schmitt*, 933 F.3d 628; *Comm. to Impose Term Limits on the Ohio Sup. Ct. v. Ohio Ballot Bd.*, 885 F.3d 443, 448 (6th Cir. 2018). That court's frequent resort to *Anderson-Burdick* balancing represents the kind of "federal-judges-know-best vision of election administration" that this Court has rejected in recent years. *See Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 35 (2020) (Kavanaugh, J., concurring in the denial of application to vacate stay). The decision below will only make matters worse. It suggests that if an initiative law is content based in some sense (because of the State's desire to regulate the content of its own electoral legal documents, official initiative petitions), that justifies strict

scrutiny. App'x 29–30. Initiative proponents in the Sixth Circuit will no doubt seize on that broad reasoning in future cases to argue that other initiative laws must also meet strict scrutiny.

Whatever the right answer is here, the States need "clear and administrable guidelines from the courts." *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of a stay). Current guidelines are anything but. Many circuits would have held that the law challenged here—a law that directly regulates the mechanics of Ohio's legislative process—does not even implicate the First Amendment. *See Marijuana Policy Project*, 304 F.3d at 83; *Walker*, 450 F.3d 1082, 1099–100. But, in the Sixth Circuit, the challenged law apparently needed to satisfy strict scrutiny. App'x 33. On such an important constitutional issue, that level of variation is unacceptable. This Court, it follows, is at least "reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election administration." *Reclaim Idaho*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of a stay).

II. States have considerable leeway to structure their initiative processes, so the Attorney General has a strong likelihood of success on the merits.

There is also a high likelihood that the Attorney General will succeed by the end of this case. The plaintiffs say that Ohio's process for ballot-initiative summaries violates their First Amendment rights. That argument fails because laws that regulate the initiative process itself (as opposed to laws that regulate supporters' speech about initiatives) do not implicate the First Amendment. Even assuming otherwise,

Ohio's review process satisfies the flexible *Anderson-Burdick* test that applies to associational and voting rights claims.

A. The challenged law does not implicate the First Amendment.

1. The First Amendment's Free Speech Clause prohibits laws "abridging the freedom of speech." U.S. Const., Am. I. But the First Amendment confers no positive "right to use governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127. Nor does the First Amendment promise that States will even have an initiative process. *Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). For those States that do, the Constitution affords them "considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley*, 525 U.S. at 191.

True, States that adopt an initiative process must run it without violating rights the Constitution *does* guarantee. Relevant here, under the First Amendment's Free Speech Clause, States that choose to have an initiative process cannot abridge private speech during the process. Thus, laws that "restrict the communicative conduct of persons advocating a position" on an initiative—such as laws regulating *who* may advocate for an initiative's passage—implicate the Free Speech Clause. *Walker*, 450 F.3d at 1100; *see, e.g., Meyer*, 486 U.S. at 415–16; *Buckley*, 525 U.S. at 187.

But while the "freedom of speech" includes the right to communicate during an initiative campaign or circulation drive, it does not include the freedom to ignore rules governing the mechanics of the initiative process. Nor does it include the freedom to embed one's own private message into official government materials like ballots, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), or initiative petitions.

This flows from the fact that the initiative power is a legislative power; the "power of direct legislation by the electorate." *Marijuana Policy Project*, 304 F.3d at 85 (quotations omitted); *see Pfeifer v. Graves*, 88 Ohio St. 473, 488 (1913) (recognizing Ohioans "power to legislate directly by the initiative"). That means the People act "as a legislator" when they make law by initiative. *Reed*, 561 U.S. at 221 (Scalia, J., concurring in judgment); *see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814 (2015); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672–73 (1976). And lawmaking is not "a prerogative of personal power." *Raines v. Byrd*, 521 U.S. 811, 821 (1997). The First Amendment does not confer on legislators (or anyone else) a "right to use governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127; *see also Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283–84 (1984). Just as the First Amendment has no bearing on rules dictating the processes for enacting laws in Congress or state legislatures, the Amendment has no bearing on rules governing the processes for enacting laws by direct democracy. *Marijuana Policy Project*, 304 F.3d at 85.

In sum, courts must distinguish between laws "that regulate or restrict the communicative conduct of persons advocating a position" as to an initiative, which implicate the First Amendment, and laws "that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1100. Laws within the latter category limit legislative power, not expression, and such laws do not implicate the First Amendment. Thus, while the First Amendment applies to state laws restricting

what initiative proponents may say to the public, it does not apply to laws that govern the process by which initiatives gain ballot access and become law.

2. The challenged law here belongs to the second camp. Any speaker may spread any message about their initiative's policy value, about the initiative process, or even about the Attorney General's fair-and-truthful decision. *Cf.* Press Release, *The Ohio Coalition To End Qualified Immunity Responds To Attorney General Dave Yost's Rejection Of The Protecting Ohioans' Constitutional Rights Amendment* (Aug. 18, 2023), https://oceqi.org/press/press-release-2023-08-18. That is a fundamental right. What is more, those advocating for a ballot initiative may accompany the circulated petition with their own unvetted leaflets (or verbal representations) about the initiative. But Ohio law qualifies initiative proponents' right to *advance* through the legislative process. Relevant here, the proponent must satisfy the Attorney General (on his own, or at Ohio Supreme Court's behest) of a fair and truthful petition summary. Ohio Rev. Code §3519.01(A), (C). This activity (legislating) is "nonsymbolic conduct." *Carrigan*, 564 U.S. at 127. The expressive component of petition circulation is "not created by the conduct itself but by the speech that accompanies it." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

It perhaps helps to think of things through the lens of the government-speech doctrine. Government speech does not normally trigger First Amendment protection. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015) ("*SCV*"). That holds true when the government accepts public suggestions. *Id.* at

204–05. Distinguishing between government speech and public forums for private speech is not always easy; it involves multiple factors, including the speech's level of association with the government, the degree of control the government retains, and history. *Id.* at 209–10; *see also Shurtleff v. Boston*, 596 U.S. 243, 252 (2022).

Here, the challenged law regulates Ohio's own speech in Ohio's own legislative process. That is to say, an initiative proponent's summary is not private speech once it is submitted. At that point, the summary becomes part of an official initiative petition with the power to place binding legal consequences on the State (once enough voters sign). In other words, a citizen-legislator "generates a medium of expression and transfers it to the government." *Shurtleff*, 596 U.S. at 270 (Alito, J., concurring in the judgment). Indeed, "the certification of the attorney general" immediately follows the summary, Ohio Rev. Code §3519.05(A), conveying to voters the State's imprimatur.

The petition's "governmental nature" is visually apparent. *SCV*, 576 U.S. at 212. Anyone handed an initiative petition will see a "boldface type" legal warning that "[w]hoever knowingly signs this petition more than once; except as provided [by statute], signs a name other than one's own on this petition; or signs this petition when not a qualified voter, is liable to prosecution." Ohio Rev. Code §3519.05(A). Reasonably, such a warning is "closely identified in the public mind with the government," not with private advocacy. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009).

Ohio, moreover, retains "control" over its official petitions after they are certified. *SCV*, 576 U.S. at 213. Ohio law dictates the exact format the petition takes, down to the font size, typeface, and capitalization. *See* Ohio Rev. Code §3519.05. Those strictures surely curtail room for creativity, and thus expression, but not in a manner that triggers First-Amendment review. Likewise, Ohio may insist the petition summaries circulated to voters are fair and true, and it may deputize its chief law officer (subject to Ohio Supreme Court review) for the task. These incidental speech burdens are not the objects of the Free Speech Clause's ire.

Certification is the key step. The Attorney General exercises no editorial control over uncertified petition summaries printed on unofficial documents. All the Attorney General may do is accept and certify the summary as fair and truthful, or reject it. The Attorney General cannot redline a submitted summary; his options are binary. His certification decision is much like whether to accept privately created monuments "in completed form" for display in a public park, *Summum*, 555 U.S. at 472, or to "accept and display" license plate designs generated by private designers, *SCV*, 576 U.S. at 217. So when the government certifies a proposed summary, it becomes its own summary—and the Attorney General's name follows it. Ohio Rev. Code §3519.01(A).

Admittedly, the Attorney General cannot conduct fair-and-truthful review without reviewing the summary's content. But that review is a legislative function. That is no different than, for example, the rule in the Ohio House that the Reference Committee reject a bill that "conflict[s] with" a "statute without making proper

provision for the repeal or amendment of such existing statute." Ohio G.A. House R. 64. The Committee obviously has to read the bill's content. To the extent internal communication by legislators and legislative committees involves "speech" at all, it is government speech. Ohio's Speech and Debate Clause, not the First Amendment, protects lawmakers floor advocacy during sessions of the General Assembly, Ohio Const. art. II, §12. And just as legislative debate procedures do not govern what a legislator says at a press conference outside the legislative chamber, the Attorney General's fair-and-truthful review does not affect what signature gatherers say on the public square.

B. The challenged law satisfies *Anderson-Burdick* review.

Even assuming that some form of First Amendment scrutiny does apply, the challenged law is likely constitutional. For circuits that say First Amendment scrutiny necessarily attaches to initiative laws, the most common approach is to apply *Anderson-Burdick* review. The challenged law easily survives any traditional application of that balancing test.

The *Anderson-Burdick* is a "flexible" balancing test—and one that is normally deferential to state election laws. *Burdick*, 504 U.S. at 434. The test requires courts to "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.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The test operates on a sliding scale. Laws that impose "severe"

burdens receive strict scrutiny. *Id.* Laws that impose "lesser burdens" receive far more deference. *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005). For those less-than-severely-burdensome laws, the *Anderson-Burdick* test presumes that the State's important interests in regulating elections will "usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 587 (quotations omitted).

Burden. The first step of the *Anderson-Burdick* analysis is to decide whether a challenged law imposes a severe burden or something less. A burden qualifies as "severe" only if it makes it "virtually impossible" to exercise the First Amendment right at stake. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring in the judgment) (quoting *Storer v. Brown*, 415 U.S. 724, 728–29 (1974)); *accord Williams v. Rhodes*, 393 U.S. 23, 24 (1968). For instance, laws addressing the ballot access of candidates will impose severe burdens if they have the effect of excluding, or virtually excluding, candidates from the ballot. *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016).

Here, Ohio's review process for initiative summaries imposes at-most moderate burdens. At the risk of undue repetition, the plaintiffs do not have a First Amendment right to an initiative process. But even setting that point aside, Ohio's review process does nothing to exclude or virtually exclude any proposed initiative from the ballot. Indeed, everyone here agrees that the plaintiffs are free to proceed with signature collection on summary language they submitted in July 2024, App'x 6; so Ohio's review process has not amounted to virtual exclusion as applied to these plaintiffs.

Ohio's review process, moreover, is entirely "agnostic as to [the] content" and subject matter of any given amendment. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022). It requires only that a summary be a fair representation of the corresponding proposed amendment. *State ex rel. Barren*, 51 Ohio St. 2d at 170. And to the extent initiative proponents disagree with the Attorney General's determination, they have a statutory right to challenge that determination directly in the Supreme Court of Ohio. Ohio Rev. Code §3519.01(C).

Other considerations further confirm the lack of any severe burden. Ohio's review process does nothing to limit who may circulate initiative petitions or otherwise advocate in favor of a proposed amendment. Ohio's review process does not limit what supporters may communicate—whether orally or in writing—to voters about initiatives. Rather, Ohio's review process simply prevents initiative proponents from embedding their own (unfair) descriptions of proposals within the *official* summaries that voters read at the petition-circulation stage of Ohio's initiative process. *See* Ohio Rev. Code 3519.05(A). That limit cannot be a severe burden to anyone's First Amendment rights, because the Amendment confers no "right to use governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127.

Justifications. The next step in the *Anderson-Burdick* analysis is to consider the state interests that a challenged law furthers. On that front, States that choose to allow legislation through direct democracy have a compelling interest in protecting "the integrity and reliability of the initiative process." *Buckley*, 525 U.S. at 191; *accord* App'x 14. States also have strong interests in "avoiding voter confusion" and

protecting the "fairness … of their ballots." *Timmons*, 520 U.S. at 364. And States have strong interests in "combating fraud" and "promoting transparency" in the initiative processes. *Reed*, 561 U.S. at 197–98. States that fail to account for these interests risk driving "honest citizens out of the democratic process" and breeding "distrust of our government." *Cf. id.* at 197 (quotations omitted). And Ohio's interests are particularly weighty here, given that this case is about the process by which Ohioans may transform the state constitution.

Ohio's review process for initiative summaries furthers these interests. Initiative summaries play an important role in the signature-gathering stage of Ohio's initiative process. The summaries help voters "fairly and accurately" understand what proposals will do, without having to comb the full legalese of every proposal. *See Jacquemin*, 147 Ohio St. 3d at 470. Armed with fair and accurate summaries, voters can then "make free, intelligent, and informed decisions" as to whether to support any given proposal. *See id.* It thus makes perfect sense that Ohio screens these summaries to make sure that they are fair descriptions of what is being proposed. Consider things from the perspective of Ohio voters. Because initiative summaries appear as part of official petitions, *see* Ohio Rev. Code §3519.05(A), voters can reasonably infer that these summaries have the State's blessing. Voters would quickly grow distrustful of Ohio's process if misleading summaries, appearing within official initiative materials, tricked them into supporting proposed amendments.

Balancing. At day's end, Ohio's interest in the integrity of its initiative process significantly outweighs any burden the summary-review process places on

initiative proponents. That should come as no surprise. The challenged law sets a reasonable, generally applicable requirement. That is precisely the type of requirement that normally survives the *Anderson-Burdick* test. *Clingman*, 544 U.S. at 586–87 (quotations omitted).

C. The District Court's preliminary injunction analysis is flawed.

To the extent *Anderson-Burdick* applies, the District Court did not apply that test properly. In measuring the burden, the court did not consider whether the plaintiffs were being excluded or virtually excluded from the initiative process. The court instead focused on whether the challenged law was "content-based." App'x 11. Because the challenged law requires the Attorney General to "review the content" of proposed summaries on some level, the District Court applied strict scrutiny. App'x 14–16.

Although some areas of First Amendment review largely turn on whether a challenged law is content-based, that is not how the *Anderson-Burdick* test works. Rather, the standard is supposed to operate as a more practical, flexible balancing test. Tellingly, the Sixth Circuit—which currently applies *Anderson-Burdick* review to state initiative laws—has repeatedly applied less than strict scrutiny to initiative laws that required government officials to conduct some form of review of an initiative's content. *See Schmitt*, 933 F.3d at 634, 640–42; *Comm. to Impose Term Limits*, 885 F.3d at 447–48. If *Anderson-Burdick* applies, the challenged law here should receive similar deference under that test's flexible approach. Or, to repeat this Court's words, state laws receive "considerable leeway" in this area. *Buckley*, 525 U.S. at 191; *Reed*, 561 U.S. at 197.

III. Ohio will suffer irreparable harm absent a stay, and the balance of the equities tips against this injunction of a state election law.

Judicial reconstruction of an initiative process for amending the state Constitution (which dates to the Progressive Era in Ohio) would irreparably harm Ohio and its citizens.

The States are always "seriously and irreparably harm[ed]" by court orders that mistakenly enjoin their laws. *Abbott v. Perez*, 585 U.S. 579, 602–03 (2018). But injunctions against state election laws are especially problematic because "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) (quotations omitted). The same presumably goes for injunctions against state initiative laws, given that the States are not even required to allow for state lawmaking through direct democracy. *See Reclaim Idaho*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of a stay).

If left in place, the injunction will irreparably harm Ohio. That injunction alters Ohio's near century-old process for amending its own Constitution, even though the federal Constitution does not require such a process. It is hard to envision a greater affront to Ohio's sovereignty than that. And practically speaking, the preliminary injunction will result in the plaintiffs scrambling in the closing days of Ohio's signature-gathering stage (for 2025) to convince voters to sign petitions—based on a summary that the Attorney General has deemed unfair. That scramble might be just the start of the confusion. What happens, for example, if the proposal makes it on the ballot but the Attorney General ultimately prevails in this case? And what are

Ohio voters who support the plaintiffs' proposal (based on an unfair summary) to think of Ohio's initiative process in the end? *Cf. Reed*, 561 U.S. at 197. A stay will prevent these harms, which are a bell that cannot be unrung later.

CONCLUSION

The Court should re-instate the District Court's stay of its injunction pending appeal through disposition of any petition for certiorari.

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