Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Cynthia Brown, et al.,

Plaintiffs,

v.

David Yost, Ohio Attorney General,

Defendant.

Case No. 2:24-cv-1401

Judge Graham

Magistrate Judge Deavers

Opinion and Order

Citizens of Ohio have the power to amend the state constitution. Proponents of an amendment must follow a process that culminates in their proposal being placed on the ballot at a general election, with voters deciding the amendment's fate. One early step requires proponents to prepare a summary of the amendment. The summary, if certified by the Ohio Attorney General as "fair and truthful," appears on petitions circulated to the public as supporters attempt to gather enough signatures to place the amendment on the ballot. O.R.C. § 3519.01(A).

Plaintiffs are proponents of two amendments, and they have brought suit against Ohio Attorney General David Yost. This case presents the question whether plaintiffs' rights under the First Amendment to the United States Constitution are violated by the requirement that their summaries be examined and certified by the Attorney General as fair and truthful statements. The matter is before the Court on plaintiffs' motion for preliminary injunctive relief enjoining enforcement of the fair-and-truthful review requirement as to their summaries. For the reasons stated below, the Court grants the motion.

I. The Initiative Process

Ohio has reserved to the people the right to amend the Ohio Constitution by initiative. *See* Ohio Const. art. II, § 1a. Citizens who would exercise this right must form a committee of three to five individuals to represent them "in all matters relating to such petitions" for amendment. O.R.C. § 3519.02.

To advance a proposed constitutional amendment, the committee must submit a written initiative petition with the Attorney General for review. O.R.C. § 3519.01(A). The petition must be signed by 1,000 qualified electors and include the full text and a summary of the amendment. *Id.*

The Attorney General conducts "an examination of the summary" within ten days of receipt. *Id.* If he finds that "the summary is a fair and truthful statement" of the amendment, he "shall so certify" and forward the petition to the Ohio Ballot Board. *Id.* If the Attorney General rejects the summary, the committee may seek review in the Ohio Supreme Court. O.R.C. § 3519.01(C).

The Ballot Board must, within ten days of receipt of a certified petition, examine it to "determine whether it contains only one proposed law or constitutional amendment so as to enable the voters to vote on a proposal separately." O.R.C. § 3505.062(A). If the petition passes muster as having a single subject, the Ballot Board certifies its approval to the Attorney General, who then files with the Secretary of State a verified copy of the proposed amendment, "together with its summary and the attorney general's certification of it." *Id.*; *accord* O.R.C. § 3519.01(A).

After clearing these steps, the committee may begin collecting signatures. Proponents must submit "the signatures of ten per centum of the electors." Ohio Const. art. II, § 1a. According to the Secretary of State's office, "proponents seeking to qualify a citizen-initiated constitutional amendment for the November 2025 ballot must submit at least 413,487 valid signatures." Doc. 59-1, Burnett Decl., ¶ 5.

Petitions circulated to the public must contain a heading that states:

> INITIATIVE PETITION
>
> Amendment to the Constitution
>
> Proposed by Initiative Petition
>
> To be submitted directly to the electors

O.R.C. § 3519.05(A); *accord* Ohio Const. art. II, § 1a. The summary of the proposed amendment must be included in the petition. O.R.C. § 3519.05(A). The summary, it has been said, "arguably helps potential signers understand the content of the law more efficiently than if they had to rely solely on a review of the entire law." *Schaller v. Rogers*, No. 08AP–591, 2008-Ohio-4464, ¶ 46, 2008 WL 4078446, at *10 (Ohio Ct. App. Sept. 4, 2008). Certified summaries are also made available to the public on the Secretary of State's website. O.R.C. § 3519.07(A)(2).

Initiative petitions circulated to the public must contain several more items, including the Attorney General's certification of the summary, names and addresses of the committee members, a place for signatures, and the full text of the proposed amendment. O.R.C. § 3519.05(A). Petitions are also to include a notice above the signature lines warning that certain fraudulent conduct, such as signing a name other than one's own, is subject to prosecution. *Id.* And petitions must contain a declaration to be completed by the circulator before submission to the Secretary of State. *Id.*

Signatures must be received by the Secretary of State at least 125 days before the general election at which the amendment is to appear on the ballet. Ohio Const. art. II, § 1a. The Secretary of State oversees the verification of the signatures. *See*, *e.g.*, O.R.C. §§ 3519.10, 3519.14, 3519.15, 3519.16. If the signatures are approved, the Ballot Board prescribes and certifies the ballot language for the proposed amendment no later than 75 days before the election. Ohio Const. art. II, § 1g; O.R.C. § 3505.062(D). Arguments or explanations both for and against the amendment are prepared and published to the public. Ohio Const. art. II, § 1g; O.R.C. § 3519.03. The proposed amendment is then placed on the ballot at the next general election. Ohio Const. art. II, §§ 1a, 1g; O.R.C. § 3519.16.

II. Procedural Background

A. Original Proceedings and Appeal

Plaintiffs Cynthia Brown, Carlos Buford, and Jenny Sue Rowe are members of a committee who wished to place a citizen-initiated constitutional amendment on the ballot for the November 5, 2024 general election. Their proposed amendment, entitled Protecting Ohioans' Constitutional Rights, would create a private cause of action for money damages against state government actors who have deprived a person's rights under the state constitution. The defense of qualified immunity would not be available to government actors. *See* Doc. 47 at PAGEID 528–29.

Backers of the amendment have tried many times to obtain the Attorney General's certification of a summary of the proposed amendment.[1] One effort occurred on March 5, 2024, when plaintiffs submitted a petition to the Attorney General with their summary, proposed constitutional amendment, and 1,000 supporting signatures. The Attorney General issued a decision on March 14 declining to certify plaintiffs' summary as fair and truthful. *See* Doc. 58-7 at PAGEID 660–62. The Attorney General found, among other deficiencies, that the summary contained misleading statements about the scope of the proposed amendment and confusing language about a statute of limitations.

[1] The Attorney General rejected a total of eight petitions prior to the filing of this suit. One petition sought to amend the Ohio Revised Code, rather than the Ohio Constitution. *See* Doc. 58-2. Another petition failed because it lacked enough valid signatures. *See* Sept. 1, 2021 Attorney General Letter, available at https://www.ohioattorneygeneral.gov/getattachment/9baf2841-6816-4099-b75c-0b0b599df80e/Civil-Action-for-Deprivation-of-Constitutional-Rights-Amendment-(Re-Submission).aspx. Putting aside those two attempts, the Attorney General rejected six summaries as failing the fair-and-truthful standard. *See* Docs. 58-1, 58-3, 58-4, 58-5, 58-6, 58-7.

Plaintiffs believed that the reasons given by the Attorney General were flawed and contradicted an earlier decision, issued November 17, 2023, in which he declined to certify a prior summary. *See* Doc. 58-6 at PAGEID 648–53. Plaintiffs exercised their right to direct judicial review in the Ohio Supreme Court by filing a complaint for writ of mandamus on March 20, 2024. The complaint alleged that the Attorney General's March 14, 2024 decision was arbitrary, capricious, and an abuse of discretion. Plaintiffs requested a writ directing the Attorney General to certify plaintiffs' summary and forward their petition to the Ballot Board. They also moved for expedited judicial review, which the Ohio Supreme Court denied on March 26. *See State ex rel. Brown v. Yost*, 173 Ohio St. 3d 1436, 229 N.E.3d 1216 (Ohio 2024) (unpublished table decision).

On March 27, plaintiffs filed suit in this Court and moved for preliminary injunctive relief. They argued that they had a First Amendment right to timely and de novo judicial review and resolution of the Attorney General's adverse certification decision. Having been denied expedited review by the Ohio Supreme Court, plaintiffs sought an injunction from this Court requiring the Attorney General to certify their summary as fair and truthful.

On April 25, the Court denied plaintiffs' motion for a preliminary injunction. *See* Doc. 21. The Court found that plaintiffs had not established standing because they could not trace the alleged harm – the Ohio Supreme Court's refusal to provide expedited review – to the defendant, the Attorney General. The Court also found that plaintiffs were unlikely to succeed on the merits of their facial and as-applied First Amendment claims, in part because the denial of expedited judicial review did not severely burden plaintiffs' First Amendment interests.

Plaintiffs appealed and a panel of the Sixth Circuit reversed. *See Brown v. Yost*, 103 F.4th 420 (6th Cir.), *vacated* en banc, 122 F.4th 597 (6th Cir. 2024) (per curiam). The panel found that plaintiffs had established standing and had also demonstrated a likelihood of success on the merits. The panel enjoined the Attorney General from enforcing O.R.C. § 3519.01 against plaintiffs and ordered him to advance their petition to the Ballot Board.

The Attorney General petitioned for rehearing en banc. The full Sixth Circuit granted the petition, vacated the panel opinion, and scheduled the rehearing for October 30, 2024. *See Brown v. Yost*, 104 F.4th 621 (6th Cir. 2024).

B. Developments at the Ohio Supreme Court

Plaintiffs applied for voluntary dismissal of the action they had filed in the Ohio Supreme Court, which granted their application to dismiss on May 22, 2024. *See State ex rel. Brown v. Yost*, 174 Ohio St. 3d 1422, 234 N.E.3d 472 (Ohio 2024) (unpublished table decision).

Plaintiffs submitted another petition and summary to the Attorney General on July 5, 2024. The Attorney General rejected the summary on July 15 because it did not have a title. *See* Doc. 47 at PAGEID 545–47. On July 19, plaintiffs again filed for a writ of mandamus in the Ohio Supreme Court. Plaintiffs sought and were denied expedited judicial review. *See State ex rel. Brown v. Yost*, 175 Ohio St. 3d 1413, 239 N.E.3d 408 (Ohio 2024) (unpublished table decision).

Meanwhile, a decision in a separate case impacted plaintiffs' situation. The Ohio Supreme Court ruled that the Attorney General's certification authority under § 3519.01(A) does not extend to the title of the summary. *See State ex rel. Dudley v. Yost*, 177 Ohio St. 3d 50, 250 N.E.3d 50 (Ohio 2024) (per curiam).

The *Dudley* decision caused plaintiffs and defendant to file a joint motion for the issuance a limited writ of mandamus requiring the Attorney General to examine anew plaintiffs' July 5 summary. The Ohio Supreme Court granted the writ on November 14, 2024. *See State ex rel. Brown v. Yost*, 175 Ohio St. 3d 1535, 245 N.E.3d 798 (Ohio 2024) (unpublished table decision).

C. The Sixth Circuit's En Banc Decision

The en banc court issued a decision on November 21, 2024 dismissing the appeal as moot because plaintiffs' request for preliminary injunctive relief was directed at the November 5, 2024 election, which had just taken place. *See Brown v. Yost*, 122 F.4th 597 (6th Cir. 2024) (per curiam). The Sixth Circuit noted, however, that the underlying suit was not moot. *Id.* at 602 ("[T]he passing of the November 2024 election does not undercut the live nature of the dispute pending in the district court."). The court continued:

> On remand, Brown remains free to seek expedited resolution of the permanent injunction request. Nothing prevents either party from seeking expedited review of an adverse decision. And nothing prevents either party from seeking expedited en banc review. All of this by the way allows the district court to consider several other intervening developments: Brown's subsequent submission of a new summary intended for Ohio's November 2025 election, the Attorney General's rejection of it, a recent decision by the Ohio Supreme Court that undermines one of the Attorney General's prior rejections, *State ex rel. Dudley v. Yost*, —— Ohio St.3d ——, —— N.E.3d ——, 2024 WL 4610503 (Ohio 2024) (per curiam), a recent order by the Ohio Supreme Court requiring a response by the Attorney General, and the developing nature of both parties' theories with respect to the nature of the free-speech rights at issue. Because these issues all are "primarily if not entirely legal," the federal courts stand ready to resolve them quickly. [*Ohio v. EPA*, 969 F.3d 306, 309 (6th Cir. 2020)].

Id. at 603.

D. External Developments after the En Banc Decision

On November 25, 2024, the Attorney General certified plaintiffs' July 5 summary as a fair and truthful statement of the proposed amendment. *See* Doc. 58-8 at PAGEID 670–71. The petition then advanced to the Ballot Board, which certified on December 4, 2024 that the proposed amendment satisfied Ohio's single-subject requirement. *See* Doc. 59-1 at PAGEID 768. Thus, plaintiffs are currently permitted to gather signatures and attempt to place their amendment on the November 4, 2025 ballot. Signatures are due by July 2, 2025. *See* Burnett Decl., ¶ 5.

On January 8, 2025, Governor Mike DeWine signed a bill into law which responds to the Ohio Supreme Court's decision in *Dudley*. *See* Substitute H.B. No. 74, 135th Gen. Assemb. (Ohio 2025). The new law gives the Attorney General authority to examine both the summary and the title of a proposed constitutional amendment in determining whether they are fair and truthful statements. The new law goes into effect on April 9, 2025. For proponents, like the plaintiffs, whose petition lacked a title but whose summary received the Attorney General's certification prior to April 9, the new law provides that their initiative petition will not be invalidated on the ground that a title was not certified by the Attorney General. *See* O.R.C. § 3519.01(D) (eff. Apr. 9, 2025).

E. Proceedings on Remand

Following the issuance of the Sixth Circuit's mandate, the parties jointly moved for an extension until February 6, 2025 to file their report under Rule 26(f), Fed. R. Civ. P. The magistrate judge granted the motion. Plaintiffs then moved for leave to file an amended complaint, which defendant did not oppose. The magistrate judge granted leave, and the verified Amended Complaint was filed on January 30.

The Amended Complaint asserts facial and as-applied First Amendment claims. Plaintiffs have adjusted their First Amendment theory, with the focus shifting away from the lack of expedited state court review of the Attorney General's adverse certification decisions to § 3519.01's fair-and-truthful provision itself. Plaintiffs assert that the grant of authority to the Attorney General to review and reject the content of their summaries violates the First Amendment. They allege that it unlawfully empowers the Attorney General to censor their political speech and restrict their access to the initiative process.

The factual underpinnings of the claims have also been reshaped. Plaintiffs recognize that the Attorney General and Ballot Board have certified and advanced their July 2024 petition. But plaintiffs allege that the Attorney General's rejections of their previous summaries caused them to make unwanted changes. The changes included omitting the title, deleting a reference to the title in

the body of the summary, moving the phrase "or any subset thereof," and rewording the description of the statute of limitations. *Compare* Doc. 47 at PAGEID 528–29 (March 5, 2024 summary) *with id.* at PAGEID 538–39 (July 5, 2024 summary). Plaintiffs seek relief in the form of an order requiring the Attorney General to certify the March 5, 2024 summary.

In addition, plaintiffs plan to support another proposed constitutional amendment, entitled the Ohio Wrongful Conviction and Justice Reform Amendment. They are now gathering the initial 1,000 signatures needed for submitting a petition to the Attorney General. *See* Doc. 59-2, Brown Dep. at 103. Plaintiffs seek a pre-enforcement injunction prohibiting the Attorney General from exercising fair-and-truthful review of plaintiffs' summary and title.[2]

Plaintiffs have again moved for a preliminary injunction. They argue that § 3519.01's fair-and-truthful provision severely burdens their First Amendment rights and should be subject to strict scrutiny. They further argue that § 3519.01 does not survive strict scrutiny because it is not narrowly tailored to serve a compelling state interest.

Defendant conducted limited discovery. Defendant took the depositions of plaintiff Cynthia Brown and Kyle Pierce, the executive director of the Coalition to End Qualified Immunity. They testified about the petitioning efforts, plans, and resources of the proponents of the amendments.[3] Brown testified that plaintiffs are not currently gathering signatures in support of the certified July 2024 petition. Brown Dep. at 61–62. Nor have they retained a consultant to manage circulation efforts. *Id.* at 58. Defendant has also submitted the declaration of Brandon Lynaugh, a public policy and political consultant with Strategic Public Partners. Though defendant does not formally offer him as an expert, Lynaugh says he was engaged to "opine" on plaintiffs' ability to place a proposed amendment on the November 2025 ballot. Doc. 59-4, Lynaugh Decl., ¶ 1. In light of the deposition testimony and available information about the proponents' resources, Lynaugh believes "there is no realistic possibility" they can collect enough signatures to place an amendment on the November 2025 ballot. *Id.*, ¶¶ 12–13 (citing plaintiffs' lack of time, resources, and manpower).

Plaintiffs dispute defendant's characterization as speculation. Brown testified that the committee has interviewed potential consultants, has a plan for collecting signatures, and is "able

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[2] Defendant has taken a preliminary position that plaintiffs' summary fails the fair-and-truthful standard. *See* Doc. 59 at PAGEID 699–700.

[3] Discovery primarily concerned the readiness of the committee backing the Protecting Ohioans' Constitutional Rights amendment, and not of the committee backing the Ohio Wrongful Conviction and Justice Reform Amendment.

and ready to go." Brown Dep. at 53, 58–59. Pierce testified that the committee has a budget plan and is collecting money. Doc. 59-3, Pierce Dep. at 29–31.

Despite these factual disputes, the relevant issues on remand are legal ones, as the Sixth Circuit anticipated. Plaintiffs' second motion for preliminary injunction is now fully briefed and ripe for adjudication.

III. Standard of Review

Preliminary injunctions are available under Rule 65(a) of the Federal Rules of Civil Procedure. Plaintiffs bear the burden of justifying preliminary injunctive relief. *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). A court balances four factors in considering a motion for preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012).

IV. Likelihood of Success on the Merits

A. The *Anderson-Burdick* Framework

The United States Constitution does not require states to create an initiative procedure. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). But when they do so, states "cannot place restrictions on its use that violate the federal Constitution." *Id.* According to plaintiffs, Ohio has violated the First Amendment by conditioning access to the initiative process on the Attorney General's certification of their summaries as fair and truthful statements of the proposed constitutional amendments. *See* O.R.C. § 3519.01(A). Courts in the Sixth Circuit examine First Amendment challenges to state election laws using the *Anderson-Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Daunt v. Benson*, 956 F.3d 396, 406–07 (6th Cir. 2020) (explaining the *Anderson-Burdick* test).

As a threshold matter, however, defendant proposes a departure from *Anderson-Burdick*. He argues that the fair-and-truthful review of plaintiffs' summaries does not even implicate the First Amendment. Defendant characterizes the requirement as a regulation of the lawmaking process. That is, plaintiffs' activity in submitting a summary of their proposed amendment represents an exercise of the legislative power reserved to the people. *See* Ohio Const. art. II, § 1a. Section 3519.01 should not be viewed as a restriction on political expression but as a procedural component akin to laws setting the number of signatures needed or limiting initiatives to a single subject.

Defendant cites as support Judge Thapar's concurring opinion in the *Brown* en banc decision, as well as authority from outside the Sixth Circuit. *See Brown*, 122 F.4th at 606 (Thapar, J., concurring) ("When initiative proponents submit their proposals for certification, they're like the legislators in the state house . . . . [W]hen the government regulates the content of initiative petitions and their summaries, it isn't regulating private speech based on content—it's regulating what sorts of laws citizens can enact."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc); *Marijuana Pol'y Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002).

If defendant is correct that this case does not implicate the First Amendment, then a court higher than this one must say so.[4] The Sixth Circuit has plainly required courts to apply the *Anderson-Burdick* framework to state election regulations such as § 3519.01. Notably, in *Thompson v. DeWine*, defendants contended that "*Anderson-Burdick* shouldn't apply to ballot initiative requirements because restrictions on the people's legislative powers (rather than political speech or voting) don't implicate the First Amendment." 959 F.3d 804, 808 n.2 (6th Cir. 2020) (per curiam). The court rejected the argument, stating that "until this court sitting en banc takes up the question of *Anderson-Burdick*'s reach, we will apply that framework in cases like this." *Id.*

Though bound to follow *Anderson-Burdick*, the Court would otherwise be inclined to consider an approach applying a diminished level of scrutiny. *See Schmitt v. LaRose*, 933 F.3d 628, 643 (6th Cir. 2019) (Bush, J., concurring) (arguing that even if the First Amendment applies to laws structuring the initiative process, a court should use rational basis review). Plaintiffs' activity involves more than ordinary petitioning or even ordinary lawmaking. They seek to amend the Ohio Constitution, the foundational document governing the state. Amendments to a constitution are of special importance and typically must satisfy heightened prerequisites because of the public's great interest in the stability of constitutional law. Having reserved for themselves the power to amend the constitution, the people of Ohio also provided a safeguard for those exercising the power. They gave the state's highest court exclusive and original jurisdiction over challenges to certain aspects of the initiative process. *See* Ohio Const. art. II, § 1g; O.R.C. § 3519.01(C). Federal courts should tread lightly before scrutinizing the state's own rules for amending its governing document.

The Court now turns to the *Anderson-Burdick* test. Substantial and sometimes competing interests are at issue when it comes to election regulations. Of "fundamental" and "vital" significance is a citizen's ability to engage in various forms of political expression, including access to

[4] In fairness to defendant, he recognized the Court would likely find itself obliged to apply *Anderson-Burdick*. *See* Doc. 59 at PAGEID 696.

the ballot. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Meanwhile, states have a significant interest in regulating "parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *see also Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'") (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Against this backdrop, the *Anderson-Burdick* framework provides flexibility for courts to consider the relevant interests and determine if a state's chosen means of pursuing its interests unreasonably burdens an individual's rights under the First and Fourteenth Amendments. *See Green Party of Tennessee v. Hargett*, 767 F.3d 533, 546 (6th Cir. 2014).

Under *Anderson-Burdick*, a court begins by weighing "the character and magnitude of the burden the State's rule imposes" on a plaintiff's First Amendment rights against "the interests the State contends justify that burden" and considers "the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358 (internal quotation marks omitted). The magnitude of the burden determines the level of scrutiny. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." *Id.*; *see also Thompson*, 959 F.3d at 808 (severe burdens include "exclusion or virtual exclusion from the ballot"). For regulations imposing minimally burdensome and "nondiscriminatory restrictions," courts apply rational basis review and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). For regulations imposing a burden somewhere between these two extremes, courts weighs the intermediate burden 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*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

B. The Burden Imposed on Plaintiffs

The Court starts with the character and magnitude of the burden imposed on plaintiffs. Section 3519.01's fair-and-truthful review requirement might appear at first glance to be a neutral regulation of election mechanics – a step that anyone attempting to amend the constitution must complete, irrespective of the person or purpose behind the amendment. But further examination raises a red flag. Section 3519.01 expressly directs the Attorney General to review the content of the summary written by plaintiffs. Though the certification requirement fits within an overall scheme

governing how to place an initiative on the ballot, it authorizes the Attorney General to evaluate the substance of plaintiffs' summary.

The summary is a statement or expression of the political change for which plaintiffs advocate. Section 3519.01 requires them to compose the summary and submit it to the Attorney General for review. Upon certification, plaintiffs communicate their summary to the public by including it on petitions circulated to potential signers.[5] The summary, even if intended by the statute to be objective and fair, unavoidably conveys a political message. It signals that plaintiffs want to change the state constitution and describes how they would do it. *See Meyer v. Grant*, 486 U.S. 414, 421 (1988) ("The 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."). Section 3519.01 thus regulates plaintiffs' speech and restricts an aspect of their petitioning activity, which itself is "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421–22 (footnote omitted).

The regulation is inherently content-based. The Attorney General must assess whether the summary is a fair and truthful statement of the proposed amendment. No express standards guide or restrain the Attorney General's consideration of what is fair or truthful. *Cf. New England Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1201 (1st Cir. 1979) ("What is fair is, basically, a subjective question."). The Attorney General's rejection letters commonly recited that he reviewed the summaries to determine if they contained "omissions and misstatements that, as a whole, would mislead a potential signer as the actual scope and effect of the proposed amendment." Doc. 58-3 as PAGEID 623. This confirms what would seem clear from the statute: the Attorney General reviews the substance of a summary and exercises significant discretion to reject it based on its content.

It is true that proponents who have had their summaries rejected can seek review in the Ohio Supreme Court. *See* O.R.C. § 3519.01(C). While this may provide due process protection, it does not remove the First Amendment burden. Proponents must craft, in the form of a summary, a statement of the constitutional change they desire and submit it for content-based review at the broad discretion of the Attorney General. If proponents fail and wish to challenge the denial of certification, they must pursue additional content-based examination at the broad discretion of another state governmental entity, the Ohio Supreme Court. *Cf. Schmitt*, 933 F.3d at 639 (finding

[5] Proponents must write the summary and later, if certified, communicate it to potential signatories regardless of whether they want to do so. It should be noted that plaintiffs do not allege they have been compelled to speak against their will.

that the Ohio Supreme Court's review of decisions by county boards of elections is "essentially" de novo).

Section 3519.01 on its face therefore imposes a severe burden on plaintiff's First Amendment interests. It subjects one component of plaintiffs' speech – the summary they compose and circulate to potential signers of their petition – to the state's editorial review. As even defendant acknowledges (albeit discussing a different point), the state "effectively controls the message because the Attorney General has final approval authority."[6] Doc. 59 at PAGEID 696 (internal quotation marks omitted). And the Attorney General's refusal to certify prevents plaintiffs from advancing their amendment to the next step of the initiative process.

As applied, plaintiffs' experience in having their summaries rejected multiple times exemplifies the burden. The Attorney General's reasons for rejecting the plaintiffs' attempts ranged from technical to substantive. He refused summaries based on them having duplicative language, placing a modifying phrase after a comma, not being "concise" enough, not adequately describing which courts would have venue of the right of action the amendment would create, not sufficiently explaining the amendment's impact on an award of attorney's fees to a prevailing plaintiff, and using the word "protect" in describing the amendment's purpose of protecting Ohioans' rights. *See* Docs. 58-1, 58-3, 58-4, 58-5, 58-6, 58-7. The Attorney General's written decisions establish that he did in fact review the content of the summaries and made subjective evaluations of what was fair and truthful.

The Attorney General's judgment calls over what could be misleading or confusing to potential signers led him to reject plaintiffs' summaries. *See Brown*, 122 F.4th at 623 (Kethledge, J., dissenting) ("Some eight times now, on grounds increasingly dubious, Ohio's Attorney General has refused to certify any iteration of the plaintiffs' summaries of their proposed amendment to the Ohio Constitution."). This left plaintiffs unable to begin their petitioning activity. *See id.* ("The result has been that, for about 21 months now, the plaintiffs have not been able to circulate their petitions—which is itself core political activity protected by the First Amendment."). In practical effect, each rejection caused plaintiffs to amend the content of their summary. The Attorney General's grounds for disapproval shaped the content of each successive version of the summary.

Defendant, however, argues that the end product – a summary certified to appear on petitions – represents government speech and not the speech of plaintiffs. This matters because

[6] Defendant's statement is inaccurate in that the Ohio Supreme Court has final authority if a committee challenges an Attorney General's adverse decision.

"[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Defendant's argument focuses on the asserted similarity between a ballot and a petition. The state, of course, has a substantial interest in maintaining voting-day order and integrity. The state may "speak" on the ballot by including instructions on how to vote and a notice of the consequences of voting fraud. *See*, *e.g.*, *Kennedy v. Benson*, 119 F.4th 464, 472 (6th Cir. 2024) (Thapar, J., dissenting from the denial of rehearing en banc) ("And parts of the ballot are government speech—like instructions on how to vote."); *see also* O.R.C. § 3505.12. Defendant argues that a petition, like a ballot, is an official election document and the certified summary contained therein is government speech.

The Court finds defendant's argument to be unconvincing in light of the factors which distinguish government speech from private speech: the degree of government control, the history of the type of expression, and public perception of who is speaking. *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). The state maintains tight control over ballots, but far less so with petitions. Ballots are prepared, printed, and distributed by the state. *See* O.R.C. Chapter 3505. Petitions, though regulated in form, *see* O.R.C. § 3519.05, are produced and circulated by citizens, and the summary itself is originally written by proponents of an amendment. Historically, ballots "serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363. A ballot is "not a bumper sticker," *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002), nor a "billboard for political advertising," *Timmons*, 520 U.S. at 365. Petitions have historically served at least two purposes. One is to demonstrate, by the gathering of a certain number of signatures, that a measure has a sufficient basis of support to warrant placement on the ballot. As importantly, petitioning gives proponents a natural opportunity to engage and persuade the public and thereby generate the needed basis of support. *See Meyer*, 486 U.S. at 421–22. Finally, citizens expect a certain sanctity to the polling place, free from intrusion by private speech. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) ("A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right."). But the petition circulator and the common citizen at a town square or public market carry no such expectation. A public forum by tradition allows for "uninhibited, robust, and wide-open debate on public issues." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (internal quotation marks omitted). Accordingly, for purposes of evaluating plaintiffs' likelihood of success on the merits, the Court finds that the certified summary is not government speech.

In sum, the Court concludes that Ohio's subjection of plaintiffs' summaries to fair-and-truthful review by the Attorney General imposes a severe burden on their First Amendment rights.

C. Strict Scrutiny

When a state severely burdens a core political right, it faces a "'well-nigh insurmountable' obstacle to justify it." *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008) (quoting *Meyer*, 486 U.S. at 425). The court applies strict scrutiny, and the state must show that the regulation is "justified by a compelling state interest" and "narrowly tailored in pursuit of that interest." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).

Defendant asserts an interest in maintaining the integrity of the initiative process by deterring fraud and confusion. The state's interest goes to the reliability of petitions circulated to the public – that individuals who might sign a petition would have the ability to know exactly what they are being asked to support and to discern if the petition is genuine and would have legal effect once signed. The state's interest in protecting the public from election-related fraud and confusion is one the Sixth Circuit has generally recognized as compelling. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473–74 (6th Cir. 2016) (citing cases).

The inquiry now turns to whether the fair-and-truthful certification requirement is narrowly tailored to advance the state's interest. Defendant must demonstrate it used "the least restrictive means" to achieve its compelling interest. *OPAWL - Bldg. AAPI Feminist Leadership v. Yost*, 118 F.4th 770, 784 (6th Cir. 2024). The regulation must be "necessary . . . to meet [the state's] concerns." *Meyer*, 486 U.S. at 426.

The Court finds that defendant has not met this burden for purposes of the motion for preliminary injunctive relief. A summary certified as fair and truthful is not necessary to ensure that potential signers can determine the nature of what they are being asked to support. The petition itself must contain the full text of the proposed amendment. *See* O.R.C. § 3519.05(A). Potential signers thus already have a way to determine what the amendment would accomplish. And they can engage in discourse with the circulator who is asking them to sign. The amendment's full text may not be as easy to digest as a summary and the circulator might make misleading statements to win support, but our democracy relies on its citizens to determine for themselves how much research they will conduct on election-related matters and which campaign speech to believe and which to

discredit. We rely on the electorate to be able to sift through political speech and decide what is fair, what is truthful, and what change is desirable.[7]

As applied, the Attorney General's denials of plaintiffs' summaries reached a level of hyper-correctness which went beyond ensuring that citizens could ascertain what they were being asked to support. For instance, the Attorney General rejected plaintiffs' November 2023 summary in part because it did not explain that the amendment would apply to immunities or defenses available to government actors or "any subset thereof." Doc. 58-6 at PAGEID 652. In their March 2024 version, plaintiffs included the "any subset thereof" language, but the Attorney General still rejected it because he thought the placement of a comma made the added language confusing. Doc. 58-7 at PAGEID 661. He also rejected the March 2024 summary because it contained language that "repeats itself" regarding the statute of limitations. *Id.* In practice the Attorney General has not used the least restrictive means of examining plaintiffs' summaries. The Attorney General, one might say, has played the role of an antagonistic copyeditor, striking plaintiffs' work on technical grounds. *See Brown*, 122 F.4th at 619 (Moore, J., dissenting) (describing the Attorney General's reasons for denying certification as "petty and self-contradictory").

Finally, a summary certified as fair and truthful is not necessary to ensure that potential signers can discern if a petition is genuine. The Court will assume for argument's sake that a state certification of some sort helps signers identify a real petition. But the certification need not say the summary is a fair and truthful statement in order to achieve the purpose. The Attorney General could just as well certify that the committee had submitted the initial petition with 1,000 valid signatures and the full text of the proposed amendment. A certification that proponents had

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[7] Two additional considerations, while not determinative, undercut defendant's position. An Ohio Supreme Court justice once expressed his belief that the summary obfuscates instead of educates: "[T]he public [should] be allowed to rely on the wording of the actual constitutional amendment, instead of a mere summary thereof. Such a summary restricts and circumvents, rather than facilitates, the people's important right to know what they are actually petitioning for." *State ex rel. Tulley v. Brown*, 29 Ohio St. 2d 235, 240, 281 N.E.2d 187, 191 (Ohio 1972) (Brown, J., dissenting). In *Tulley* the Ohio Supreme Court declined to consider the constitutionality of "the overall concept of the Attorney General's statutory power of preliminary examination concerning proposed constitutional amendments under R.C. Chapter 3519." *Id.*, 29 Ohio St. 2d at 236–37, 281 N.E.2d at 189 (per curiam).

Additionally, defendant himself has put forth opinion evidence that "[o]nly rarely will [a person] wish to read the summary for informational purposes." Lynaugh Decl., ¶ 17. If true, then summaries would appear to be an ineffective means of accomplishing the state's purpose.

satisfied a basic procedural requirement would be equally effective in giving potential signers confidence in the genuineness of the petition being presented to them.

The Court concludes that the fair-and-truthful certification requirement is not narrowly tailored to achieve a compelling state interest. Thus, plaintiffs have carried their burden of demonstrating a likelihood of success on the merits under the *Anderson-Burdick* framework.

D. Sovereign Immunity

Defendant contends that plaintiffs are unlikely to succeed on their claim regarding the rejected March 5, 2024 summary because it does not fall within the *Ex parte Young* exception to Eleventh Amendment immunity. *See S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008) (citing *Ex parte Young*, 209 U.S. 123 (1908)). The *Ex parte Young* exception permits a federal court to "issue prospective injunctive and declaratory relief compelling a state official to comply with federal law," but it does not "extend to any retroactive relief." *Id.* at 507–08. Defendant argues that any relief granted here would be backward-facing because it would entail reversing the Attorney General's March 14, 2024 decision that the summary was not fair and truthful.

The Court disagrees. Plaintiffs have not asked the Court to reverse or set aside the Attorney General's past decision. Rather, they seek relief to address an ongoing constitutional injury – that of their inability, due to the Attorney General's actions, to circulate to the public their petition with the summary containing their desired language. Injunctive relief would be forward-looking, requiring the Attorney General to advance plaintiffs' petition to the Ballot Board.

V. Remaining Preliminary Injunction Factors

When plaintiff establishes a likelihood of success on the merits in a First Amendment case, the other preliminary injunction factors "follow in favor of granting the injunction." *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 462 (6th Cir. 2003); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); *Bays*, 668 F.3d at 819 (stating that in First Amendment cases, "the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits" because "the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action") (internal quotation marks and alterations omitted).

Defendant nonetheless argues that plaintiffs will not suffer irreparable injury absent injunctive relief. He cites evidence developed in discovery, *see supra* Part II.E, tending to show that plaintiffs lack the time, resources, and manpower to collect the 413,487 signatures needed to put

their amendments on the November 2025 ballot. Not granting an injunction would cause no real harm because plaintiffs lack a realistic hope of making the November 2025 ballot anyhow. *See* Doc. 59 at PAGEID 705 (arguing that "it is Plaintiffs' conduct, not the Attorney General's review, that will cause them to miss this year's election").

The Court rejects this argument because it overlooks the injury to plaintiffs' access to the initiative process. Plaintiffs ultimately might not gather enough signatures, but they have a protectible First Amendment interest in having the opportunity to try. *See Meyer*, 486 U.S. at 421–23; *Schmitt*, 933 F.3d at 641 (examining the burden imposed by Ohio's initiative regulations on plaintiffs' access to the ballot). Though defendant tries to minimize the practical impact of denying injunctive relief, "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

VI. Conclusion

Accordingly, plaintiffs' motion for preliminary injunctive relief (doc. 40) is GRANTED. The Court enjoins the Ohio Attorney General from enforcing the requirement of a fair-and-truthful examination under O.R.C. § 3519.01(A) before certifying plaintiffs' March 5, 2024 summary of the Protecting Ohioans' Constitutional Rights amendment and plaintiffs' summary of the Ohio Wrongful Conviction and Justice Reform Amendment, *see* Doc. 47 at PAGEID 549. The Attorney General is further ordered to immediately certify plaintiffs' March 5, 2024 petition to the Ohio Ballot Board.

As part of the Court's equitable authority to mold injunctive relief to meet "changed conditions," *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932), the Court allows plaintiffs to update the March 5, 2024 summary to reflect the correct section number that an amendment would add to Article I of the Ohio Constitution (section 23 instead of section 22) and to remove reference to a now-past effective date of January 1, 2025.

The Court waives the posting of security under Rule 65(c), Fed. R. Civ. P., because the grant of relief does not pose a risk of economic harm to defendant. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (district courts have discretion to waive security).

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: March 14, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Cynthia Brown, et al.,

Plaintiffs,

v.

David Yost, Ohio Attorney General,

Defendant.

Case No. 2:24-cv-1401

Judge Graham

Magistrate Judge Deavers

Order

On March 14, 2025, the Court issued an Opinion and Order granting preliminary injunctive relief to plaintiffs. *See* Doc. 62. Defendant filed a notice of the appeal and has also moved for a stay of the preliminary injunction pending appeal. In deciding a motion for stay pending appeal, a court considers: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). Defendant bears the burden of justifying a stay. *See Kentucky v. Biden*, 23 F.4th 585, 593 (6th Cir. 2022).

Upon consideration of these factors, the Court finds that a stay is warranted. The first appeal in this action, including the rehearing en banc, demonstrated that jurists can reasonably disagree over the issues at stake. Although this Court is not in a position to predict whether defendant is likely to prevail on appeal, it is at least plausible.

The Court couples this consideration with the en banc court's statement that the Sixth Circuit would "stand ready" to ensure that plaintiffs' "First Amendment rights are aired in time for the November 2025 election." *Brown v. Yost*, 122 F.4th 597, 603 (6th Cir. 2024) (en banc).

Finally, a stay will serve the interests of the state and the public in that a long-standing requirement of Ohio law will continue be enforced until the court of appeals has an opportunity to consider the important issues presented in this case. *See Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam).

Accordingly, the Court grants the motion to stay (doc. 64) and hereby STAYS the March 14, 2025 preliminary injunction pending appeal.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: March 17, 2025

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0089p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CYNTHIA BROWN; CARLOS BUFORD; JENNY SUE ROWE,
Plaintiffs-Appellees,

v.

DAVID YOST, in his official capacity as Ohio Attorney General,
Defendant-Appellant.

No. 25-3179

On Motion to Lift the Stay

United States District Court for the Southern District of Ohio at Columbus.
No. 2:24-cv-01401—James L. Graham, District Judge.

Decided and Filed: April 9, 2025

Before: MOORE, BUSH, and MATHIS, Circuit Judges.

COUNSEL

ON MOTION TO LIFT THE STAY and REPLY: Mark R. Brown, CAPITAL UNIVERSITY, Columbus, Ohio, Oliver Hall, CENTER FOR COMPETITIVE DEMOCRACY, Washington, D.C., for Appellees. **ON RESPONSE:** T. Elliot Gaiser, Zachery P. Keller, Katie Rose Talley, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant.

MOORE, J., delivered the opinion of the court in which MATHIS, J., joined. BUSH, J. (pp. 21–35), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Ohio Attorney General Dave Yost has eight times rejected a proposed summary of a proposed constitutional amendment, preventing its proponents from circulating a petition and collecting signatures needed to place it on the ballot. Each time, Yost concluded that the petition summary was not a fair and truthful summary of the proposed constitutional amendment. The district court held that this likely violated the ballot-initiative proponents' First Amendment rights and entered a preliminary injunction ordering Yost to certify two ballot initiative summaries proposed by Plaintiffs here. However, upon Yost's request, the district court stayed the preliminary injunction pending appeal. Because we agree with the district court that Plaintiffs' First Amendment rights were likely violated here, and because the other stay factors do not weigh in Yost's favor, we GRANT Plaintiffs' motion to lift the stay and LIFT the stay entered by the district court.

I. BACKGROUND

A. Statutory Background

The Ohio Constitution affords Ohio citizens the right to amend the state constitution by way of the ballot initiative process. Ohio's Constitution and law require that citizens take several steps before they can place a proposed amendment on the ballot. First, the individuals proposing the amendment ("petitioners") must form a committee to "represent them in all matters relating to [their] petitions." Ohio Rev. Code § 3519.02. Petitioners must then submit the proposed amendment, a summary of the amendment, and 1,000 supporting signatures to the Ohio Attorney General for review. *Id.* § 3519.01(A). "Within ten days after the receipt of the written petition and the summary of it, the attorney general shall conduct an examination of the summary." *Id.* The Attorney General must determine if "the summary is a fair and truthful statement of the proposed . . . constitutional amendment." *Id.* "This factual determination is the extent of the role and authority of the Attorney General." *State ex rel. Barren v. Brown*, 365 N.E.2d 887, 888 (Ohio 1977) (per curiam). If the summary is fair and truthful, the Attorney General "shall so

certify," and then forward the petition to the Ohio ballot board for approval. Ohio Rev. Code § 3519.01(A). Following the ballot board's review and approval, *see id.* § 3505.062(A), the proposed amendment again returns to the Attorney General who "shall then file with the secretary of state a verified copy of the proposed . . . constitutional amendment together with its summary and the attorney general's certification," *id.* § 3519.01(A).

Only after the Attorney General files the proposed amendment, summary, and certification with the Secretary of State may petitioners create an "Initiative Petition" and begin collecting signatures in support of the petition. *See id.* § 3519.05. For a proposed amendment to qualify for placement on the ballot, petitioners must collect signatures equaling at least ten percent of the total number of votes cast for governor in the last gubernatorial election, amounting to more than 400,000 signatures. *See* Ohio Const. art. II, §§ 1a, 1g; *Brown v. Yost*, No. 2:24-cv-1401, 2025 WL 815754, at *1 (S.D. Ohio March 14, 2025) ("*Brown V*"). The signatures must be submitted to the Secretary of State for verification at least 125 days before the general election at which the amendment is to appear on the ballot. Ohio Const. art. II, § 1a.

Petitioners may seek review of the Attorney General's decision on the fair-and-truthful certification in the Ohio Supreme Court. Ohio Rev. Code § 3519.01(C). However, the statute does not provide for expedited review in the state court. *See id.* And because the signatures must be submitted 125 days before an election, that court's expedited procedure for election cases filed 90 days before the election date does not apply, and the timing of review is left to the discretion of the court. *See* Ohio S. Ct. R. Prac. 12.08(A)(1). The result is that petitioners may be unable to obtain review in time to collect signatures for the election in which they seek to participate.

B. Factual & Procedural Background

Plaintiffs are Ohio voters and members of an initiative petition committee who, together, seek to amend the Ohio Constitution through two ballot initiatives. The first, "Protecting Ohioans' Constitutional Rights," would create a private right of action against state government actors who deprive a person of state constitutional rights, without qualified immunity for the government actors involved. *Brown V*, 2025 WL 815754, at *2. The second, "Ohio Wrongful

Conviction and Justice Reform Amendment" would provide remedies for people who are wrongfully convicted and implement reforms aimed at reducing wrongful convictions. *See* R. 47 (Am. Compl., Ex. 7, Initiative Pet.) (Page ID #549–50).

Plaintiffs began collecting signatures for "Protecting Ohioans' Constitutional Rights" four years ago. Eight times over, Plaintiffs gathered 1,000 signatures in support of the proposed amendment and submitted a proposed summary to the Attorney General. *See* R. 47 (Amended Compl. ¶ 19) (Page ID #494–500). Eight times over, "on grounds increasingly dubious," the Attorney General rejected the summary as not fair and truthful. *Brown v. Yost*, 122 F.4th 597, 622 (6th Cir. 2024) (en banc) (per curiam) (Kethledge, J., dissenting) ("*Brown IV*"). Yost faulted the petition summary for myriad issues, including failing to convey clearly the venues in which public officials could be sued and using a title that suggested removing qualified immunity would protect citizens' constitutional rights. *See id.* at 614–15 (Moore, J., dissenting).

In March 2024, Plaintiffs challenged Yost's failure to certify in the Ohio Supreme Court. *See id.* at 600. After that court refused to expedite, Plaintiffs dismissed and filed an action in federal court, claiming that the fair-and-truthful certification requirement, coupled with the lack of timely judicial review, violated their First Amendment rights. *Id.* The district court denied preliminary injunctive relief. *Brown v. Yost*, No. 2:24-cv-1401, 2024 WL 1793008, at *13 (S.D. Ohio Apr. 25, 2024) ("*Brown I*"). A panel of this court reversed. *See Brown v. Yost*, 103 F.4th 420, 425–26 (6th Cir.) ("*Brown II*"), *vacated*, 104 F.4th 621, 622 (6th Cir. 2024) ("*Brown III*"). The panel held that the fair-and-truthful review process likely violated Plaintiffs' First Amendment rights by forcing them to alter the content of their petition summaries and limiting their ability to communicate about their petition with the public. *Brown II*, 103 F.4th at 437–41. The panel ordered Yost to certify the proposed amendment and the most recent summary to the ballot board for the next phase of the process. *Id.* at 446. Yost sought rehearing en banc, which this court granted, vacating the panel opinion. *Brown III*, 104 F.4th at 622.

While the en banc case was pending, Plaintiffs submitted yet another proposed summary to Yost, accepting Yost's latest edits and removing the disputed title from the petition. *See* R. 47 (Am. Compl., Ex. 6, July 15, 2024, Letter) (Page ID #545). Yost rejected it for lack of a title. *Id.* Plaintiffs sued again in the Ohio Supreme Court, which, once again, refused to expedite.

State ex rel. Brown v. Yost, 239 N.E.3d 408, 408 (Ohio 2024) (table). Meanwhile, in an unrelated case, the Ohio Supreme Court held that the Ohio Attorney General lacked statutory authority to review the titles of proposed ballot initiatives. *State ex rel. Dudley v. Yost*, 250 N.E.3d 50, 60 (Ohio 2024).[1] A few days later, this court heard en banc the appeal of the preliminary injunction. After the case was argued but before a decision issued, the Ohio Supreme Court remanded Plaintiffs' pending state court case to Yost for consideration of the title-less initiative. *State ex rel. Brown v. Yost*, 245 N.E.3d 798 (Ohio 2024) (table). This court then issued an en banc per curiam opinion holding that Plaintiffs' appeal was moot because the preliminary relief sought was targeted at the November 2024 election, which had already passed. *Brown IV*, 122 F.4th at 601–02. Shortly thereafter, Yost certified the title-less summary to the ballot board, which confirmed that it contained only one subject, enabling Plaintiffs to begin collecting signatures on that petition. *See* R. 47 (Am. Compl. ¶ 22) (Page ID #500).

Although the en banc court concluded that Plaintiffs' original motion for a preliminary injunction was moot, the court confirmed that the lawsuit remained live. *Brown IV*, 122 F.4th at 602. On remand, Plaintiffs filed an amended complaint relating to the ongoing dispute concerning the "Protecting Ohioans' Constitutional Rights" amendment, as well as the "Ohio Wrongful Conviction and Justice Reform" amendment, which Plaintiffs wished to propose without undergoing the fair-and-truthful review process. The amended complaint asserts that the fair-and-truthful provision facially violates the First Amendment by giving the Attorney General editorial control over petition summaries and inhibiting circulation until petitioners can achieve the Attorney General's approval or untimely judicial review. R. 47 (Am. Compl. ¶¶ 44–49) (Page ID #505–08). Plaintiffs also allege that the statute is unconstitutional as applied to their two ballot initiatives, noting that Yost's review of the "Protecting Ohioans' Constitutional Rights" has prevented them from circulating their initiative, and chilled their efforts to proceed with the "Ohio Wrongful Conviction and Justice Reform" amendment, due to concerns that Yost would do the same. *Id.* ¶ 50 (Page ID #508). Plaintiffs also moved for a second preliminary

[1]The Ohio legislature recently amended Ohio Revised Code § 3519.01 to clarify that the Attorney General's review does extend to titles. That amendment takes effect on April 9, 2025, although it will not affect summaries certified before that date. *See* Ohio Rev. Code § 3519.01(A), (D) (eff. April 9, 2025); *Brown V*, 2025 WL 815754, at *4.

injunction, arguing that immediate relief is needed to allow them the opportunity to collect signatures and place their initiatives on the November 2025 ballot. R. 40 (2d Mot. for Prelim. Inj.) (Page ID #447). Plaintiffs express concern that if they circulate the title-less petition, they might later find themselves facing legal challenges to its validity because the Ohio statutes seem to contemplate that any initiative petition *will* contain a title. R. 40-1 (Mem. of L. in Supp. of 2d Mot. for Prelim. Inj. at 3–4) (Page ID #453–54) (citing Ohio Rev. Code § 3519.05(A)).

Concluding that the fair-and-truthful statute likely violates Plaintiffs' constitutional rights facially and as applied, the district court granted the preliminary injunction. *Brown V*, 2025 WL 815754, at *8–12. The court enjoined Yost from applying the fair-and-truthful requirement to either of Plaintiffs' proposed constitutional amendment summaries. *Id.* The court further ordered Yost to certify immediately Plaintiffs' preferred versions of the "Protecting Ohioans' Constitutional Rights" and "Ohio Wrongful Conviction and Justice Reform" amendment summaries to the ballot board. *Id.* at *12. Yost immediately appealed and moved for a stay of the preliminary injunction. R. 63 (Notice of Appeal) (Page ID #1749); R. 64 (Mot. to Stay Pending Appeal) (Page ID #1751).

The district court granted the stay for reasons we can only describe as confounding. As the district court recognized, when deciding a motion for a stay pending appeal, the district court considers the same stay factors that apply when this court considers a stay pending appeal—likelihood of success on appeal, irreparable harm, and the balance of equities. *See* R. 66 (Order) (Page ID #1768). Those factors nearly mirror the factors relevant to determining whether a preliminary injunction is warranted, except that on a stay motion, the party who just *lost* on the preliminary injunction bears the burden. The district court has already concluded that the party seeking the preliminary injunction is likely to win the case and that, if immediate relief is not granted, the party will face imminent, irreparable harm. As the Second Circuit has observed, "the grant of a stay of a preliminary injunction pending appeal will almost always be logically inconsistent with a prior finding of irreparable harm that is imminent as required to sustain the same preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999).

Despite reciting the proper test for a stay pending appeal, the district court failed to follow that test. The district court admitted that it was "not in a position to predict whether defendant is likely to prevail on appeal" but instead concluded that this court's prior grant of en banc review suggested that "jurists can reasonably disagree over the issues at stake." R. 66 (Order) (Page ID #1768). The district court further failed to weigh the immediate, irreparable, constitutional harm that it recognized that Plaintiffs were likely to face in its preliminary injunction opinion issued just three days earlier. *Compare id.*, *with Brown V*, 2025 WL 815754, at *11 ("Plaintiffs ultimately might not gather enough signatures, but they have a protectible First Amendment interest in having the opportunity to try."). Finally, the district court rebalanced the equities, now concluding that the state had a strong interest in enforcing the law until the court of appeals could hear the case. R. 66 (Order) (Page ID #1768). Considering the district court's recent opinion recognizing that Plaintiffs were likely to succeed on the merits under existing circuit precedent, and that Plaintiffs were likely to face immediate, irreparable First Amendment harm, the district court's stay amounted to an abuse of discretion. Plaintiffs moved to lift the stay pending appeal. That motion is now fully briefed and ripe for resolution.

II. STANDARD OF REVIEW

We review the district court's decision to issue a stay of its preliminary injunction by weighing the traditional stay factors. *Doe 1 v. Thornbury*, 75 F.4th 655, 657 (6th Cir. 2023) (per curiam). "We ask four questions in evaluating whether to grant a stay pending appeal: Is the applicant likely to succeed on the merits? Will the applicant be irreparably injured absent a stay? Will a stay injure the other parties? Does the public interest favor a stay?" *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (per curiam). The applicant bears the burden of demonstrating entitlement to a stay. *See Nken v. Holder*, 556 U.S. 418, 433–34 (2009).

III. ANALYSIS

A. Likelihood of Success on the Merits

We begin with the question whether Yost has demonstrated a likelihood of success on the merits of this appeal. We consider this question both under the framework set forth by the

Supreme Court for burdens on "core political speech" relating to ballot amendments, *see Meyer v. Grant*, 486 U.S. 414, 422 (1988), and under the *Anderson-Burdick* balancing test that this court has applied to regulations on the ballot-initiative process, *see Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019). Either way, Yost is not likely to succeed on the merits of this appeal.

1. Meyer v. Grant

Yost is not likely to succeed on the merits of this appeal because the fair-and-truthful certification process allows the Attorney General to exercise editorial discretion over the contents of Plaintiffs' petition summaries. It is beyond question that the circulation of ballot-initiative petitions involves core political speech. *Grant*, 486 U.S. at 421–22. First Amendment protection is "at its zenith" where initiative petitions are concerned, for "[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." *Id.* at 421, 425 (internal quotation marks omitted). The state may not exercise editorial control over speech concerning initiative petitions. Intrusions on petitioners' exercise of "editorial control and judgment" over the content of those petitions severely infringe First Amendment interests. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The petition summary is a form of advocacy material used by initiative supporters to persuade electors to sign their petition. The petition summary is not the text of the initiative, nor is it the language that will appear on the ballot, *see* Ohio Rev. Code § 3505.06(E); it is a description of the proposed amendment that appears only on the petition that voters sign to place the measure on the ballot, *id.* § 3519.05(A). The summary follows the title but precedes the chart in which people can sign their names, as well as the full text of the proposed amendment. *Id.* It is accompanied by a certification from the Attorney General indicating that he has deemed it "fair and truthful" but expressing no opinion on the merits of the initiative itself. *Id.* Essentially, the summary is the leading description of the proposed amendment that initiative circulators can rely on to persuade the public to sign the petition. And, indeed, Plaintiffs tell us that "[i]nitiative supporters use the summary to advocate for their cause." D. 9 (Mot. to Lift Stay at 18).

Ohio's fair-and-truthful certification law *requires* that the Attorney General decide what goes into Plaintiffs' circulated petition summary. Certification of the summary depends on whether, "in the opinion of the attorney general, the summary is a fair and truthful statement of the proposed law or constitutional amendment." Ohio Rev. Code § 3519.01(A). In enforcing the statute, the Attorney General can take issue with how petition supporters characterize the proposed amendment, requiring them to include or exclude certain language based on whether, "in [his] opinion," the summary fairly and truthfully reflects the text of the proposed amendment. *Id.* As noted, the summary is the language on the face of the petition that Plaintiffs must circulate to collect signatures in favor of their cause. Effectively, the law allows the Attorney General to control the content of that petition.

As members of this court and the district court have commented, Yost has taken a heavy hand to revising Plaintiffs' "Protecting Ohioans' Constitutional Rights" petition summary. *See Brown IV*, 122 F.4th at 614 (Moore, J., dissenting) ("[E]ach time, Yost found a nit or two to pick."); *id.* at 622 (Kethledge, J., dissenting) (describing Yost's edits as "increasingly dubious"); *Brown V*, 2025 WL 815754, at *10 (characterizing Yost as an "antagonistic copyeditor"). For example, Yost rejected one proposed summary in part because it was "misleading to the extent that it falsely purports to set forth an exhaustive list of potential venues" when the summary addressed only the venue for lawsuits against one public employee but did not address venue for lawsuits against multiple public employees who do not live or work in the same county. R. 47 (Am. Compl., Ex. 2, November 17, 2023, Letter at 2) (Page ID #522). This was misleading, according to Yost, even though it was not in conflict with the proposed amendment itself. *See id.* Faced with another rendition of Plaintiffs' proposed amendment, Yost newly asserted that the title, which Plaintiffs included in prior submissions, was misleading because it "offers a subjective hypothesis (that eliminating [qualified immunity] defenses will 'protect' the constitutional rights of citizens) regarding the proposed amendment in lieu of an objective description of its character and purport (that it creates a cause of action notwithstanding those defenses)." R. 47 (Am. Compl., Ex. 4, March 14, 2024, Letter at 2) (Page ID #535). Basically, Yost rejected the title because he did not agree that removing qualified immunity would protect citizens' constitutional rights. This is the very definition of editorial control.

Yost's exercise of editorial control over the contents of Plaintiffs' petition summary implicates the First Amendment. The Supreme Court recently reiterated the central principles in this area of free speech law in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). That case concerned state laws that restricted the content-moderation policies of social-media platforms. *Id.* at 719–21. In remanding for the lower courts to consider further the scope of the laws' applications for purposes of facial challenges, the Court reminded those courts that the First Amendment is implicated when the state seeks to "alter or disrupt" a party's "own expressive activity." *Id.* at 728. The Court emphasized that "the First Amendment offers protection when an entity engaging in expressive activity . . . is directed to accommodate messages it would prefer to exclude." *Id.* at 731. The government cannot justify such intrusions "by asserting an interest in improving, or better balancing, the marketplace of ideas." *Id.* at 732. Those principles find application here. Here, the state acts as editor of the parties' private speech, deciding what can be excluded or included in the petition. Further, the justification is to ensure that the parties' speech is fair, in the view of the Attorney General. Accordingly, the fair-and-truthful certification raises serious First Amendment concerns.

The Supreme Court has applied these principles in the context of ballot initiatives, in Ohio, no less. In *McIntyre v. Ohio Elections Commission*, Ohio tried to defend a statute that prohibited the distribution of unsigned leaflets in connection with a ballot-initiative election. 514 U.S. 334, 337–38 (1995). The Court considered this to be a "direct regulation of the content of speech" because it required the supporters and opponents of a ballot initiative to include the names and addresses of the leaflets' sponsors, thereby altering the content of their advocacy materials. *Id.* at 345. Similarly, here, Ohio law requires petitioners to alter the content of their petition summaries—the leading piece of information on their circulated petitions—in accordance with the preferred speech of the Attorney General. Indeed, the intrusion is especially concerning here because the law provides no guidance to the Attorney General as to what constitutes a "fair and truthful" summary, leaving substantial room for the statute to be implemented in an arbitrary and discriminatory way. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132–33 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769–71 (1988). In sum, determining whether the summary is fair and truthful is an

inherently content-based, subjective judgment that leaves significant room for the exercise of arbitrary decision making.

Yost argues that the First Amendment is not implicated here because the fair-and-truthful certification requirement is just one of the "rules governing . . . the processes for enacting laws by direct democracy." D. 12 (Opp'n to Vacating the Stay at 8). But this rule is unlike most reasonable, nondiscriminatory rules affecting the ballot-initiative process because it concerns the content of a summary that is used as part of petitioners' advocacy in support of a proposed constitutional amendment. To be sure, the creation of a summary is technically part of the ballot-initiative process. A ballot-initiative sponsor cannot move forward with collecting signatures unless they produce a summary. But the summary is unlike many other regulations of the ballot-initiative process that affect how laws get made. The summary is much more like the protected advocacy documents that petition supporters use to promote initiatives, and which the Supreme Court has recognized are protected by the First Amendment. *See McIntyre*, 514 U.S. at 347. Whereas statutes that limit proposed initiatives to single subjects, set a minimum number of signatures that need to be gathered, or create verification processes arguably regulate how citizens can legislate, *see Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring), the petition summary more closely approaches how citizens can advocate for their proposed legislation. The petition summary is more akin to "speech *associated with* an initiative procedure" than "the state's creation of an initiative procedure." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc) (internal quotation marks omitted).

Yost further argues that the First Amendment is not implicated here because the petition summary is government speech. D. 12 (Opp'n to Vacating the Stay at 8). It is not. When ascertaining whether speech can be attributed to the government—and therefore is immune from First Amendment review—the Supreme Court has instructed us to look at (1) "the history of the expression at issue," (2) "the public's likely perception as to who (the government or a private person) is speaking," and (3) "the extent to which the government has actively shaped or controlled the expression." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). None of those factors cuts in Yost's favor here. Yost has not explained at all how summaries of proposed ballot initiatives have historically conveyed government messages. And, indeed, the whole purpose of

a petition seems to be that citizens wish to influence their government, not to parrot its words. Further, Yost's certification that a summary is fair and truthful hardly suggests that the summary expresses his approved message. *See Matal v. Tam*, 582 U.S. 218, 237 (2017) (rejecting the argument that the content of trademarks is government speech because the "PTO has made it clear that registration does not constitute approval of a mark"). The certification included alongside the summary states that the Attorney General has "certif[ied] that the summary is a fair and truthful statement of the proposed constitutional amendment" but "[w]ithout passing on the advisability of the approval or rejection of the measure to be referred." Letter from Dave Yost to Mark Brown (Nov. 25, 2024), https://perma.cc/2GJG-WTFH. Although Yost has edited the summary, it is still initially and fundamentally the work of the petitioners. The public is not likely to conclude that the summary on a petition seeking legal change can be attributed to the government.

Finally, Yost suggests that fair-and-truthful review is justified by the need to protect the "integrity and reliability" of the initiative process and "combating fraud." D. 12 (Opp'n to Vacating the Stay at 10) (quoting *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 191 (1999) ("*ACLF*"); then quoting *Reed*, 561 U.S. at 198). He suggests that the fair-and-truthful-review process is needed to ensure that Ohio voters, confronted with a petition for their signature, can trust the summary of the initiative they are asked to sign. *Id.* We do not question whether the state has a significant interest in combating fraud in the ballot-initiative process. But we have more difficulty concluding that the content-based review undertaken by the Attorney General is narrowly tailored to achieve this purpose. The bar for exercising editorial control over private speech is high. And the availability of alternatives here suggests that such an intrusion may not be warranted. As the Supreme Court noted in *McIntyre*, Ohio's "Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns." 514 U.S. at 349; *see* Ohio Rev. Code § 3517.22. The Supreme Court has recognized that disclosure provisions can have a similarly curative effect, too. *See Grant*, 486 U.S. at 426–27.

We need not weigh in at this juncture on whether the statute will ultimately survive a facial challenge. All that is required to lift the stay is a likelihood of success on Plaintiffs'

as-applied challenge. Here, Plaintiffs are likely to succeed on their claim that the fair-and-truthful certification process violated their First Amendment rights. As described above, the record reflects that Yost exercised significant editorial control over the content of Plaintiffs' proposed summary. And a review of the record makes it difficult to see how that review was tailored to Yost's interest in ensuring that a misleading or fraudulent summary was not conveyed to the public. This likely violates the First Amendment.

2. Anderson-Burdick

Yost is also unlikely to succeed on his claim that the fair-and-truthful certification requirement survives scrutiny under *Anderson-Burdick*. The Supreme Court has applied *Anderson-Burdick* balancing to regulations of the electoral process, including regulations of the ballot-initiative process. *See ACLF*, 525 U.S. at 192; *Reed*, 561 U.S. at 212–13 (Sotomayor, J., concurring).[2] As have we. *See, e.g.*, *Schmitt*, 933 F.3d at 639. The *Anderson-Burdick* framework requires us to weigh the "character and magnitude of the asserted injury" against the "precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The level of scrutiny we apply is determined by the magnitude of the burden. If the burden is severe, the regulation will be upheld only if it is "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted). By contrast, "[t]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

The Supreme Court has recognized that there is no "'litmus-paper test' that will separate valid from invalid restrictions" and that we must carefully "consider the character and magnitude of the asserted injury." *Id.* at 789. An election law may severely burden First Amendment rights when it affects a supporter's ability to engage in "core political speech." *See Grant*, 486 U.S. at

[2]Chief Justice Roberts's concurrence in the grant of an emergency stay in *Little v. Reclaim Idaho* has very little to say about the type of regulation at issue here. That case concerned the number of signatures required to place an initiative on the ballot, "the most typical sort of neutral regulation[] on ballot access . . . almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." 140 S. Ct. 2616, 2616–17 (2020) (Roberts, C.J., concurring in the grant of stay). That requirement looks nothing like the requirement at issue in this case.

422. Election laws may also impose severe burdens when they "exclude[] or virtually exclude[] electors or initiatives from the ballot." *Thompson v. DeWine*, 959 F.3d 804, 809 (6th Cir. 2020) (per curiam). When determining the character and magnitude of Plaintiffs' injury, we consider "the combined effect of the applicable election regulations." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006).

The fair-and-truthful certification law severely burdens Plaintiffs' access to the ballot. As discussed above, the fair-and-truthful law requires Plaintiffs to undergo content-based review of their proposed petition summary. This affects their core political speech by forcing them to alter the message that they wish to share on a key advocacy document—the initiative petition. Although Plaintiffs can challenge the Attorney General's decision in the state supreme court, there is no requirement that Plaintiffs receive timely review. Realistically, initiative proponents face a choice: accept the Attorney General's perspective on what constitutes a "fair and truthful" summary of their proposed constitutional amendment or refrain from circulating their petition at all. To be sure, Plaintiffs have no federal, constitutional right to amend Ohio's state constitution. *See Reed*, 561 U.S. at 212 (Sotomayor, J., concurring). But their First Amendment interests are burdened when the state subjects their participation in the ballot-initiative process to editorial review. *Cf. Grant*, 486 U.S. at 425 (rejecting the argument "that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions").

Yost argues that the fair-and-truthful certification imposes at most moderate burdens because the law does not restrict speech *outside* of the petition summary. D. 12 (Opp'n to Vacating Stay at 9). But the fact that supporters of a ballot initiative "remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection." *Grant*, 486 U.S. at 424. Particularly so when petition supporters may need to circulate a summary that conflicts with their view of the proposed constitutional amendment. Moreover, the ability to advocate on the importance of the issue at the heart of their proposed amendment is cold comfort if the petition is not certified at all.

Because the burden is severe, strict scrutiny applies. *See Burdick*, 504 U.S. at 434. As we have explained above, Yost seeks to justify the law by the need to protect election integrity

and combat fraud. D. 12 (Opp'n to Vacating Stay at 10). But for the same reasons previously expressed, we are doubtful that he can meet his "well-nigh insurmountable" burden to justify such severe intrusions into core political speech. *Grant*, 486 U.S. at 425.

At the very least, the burden of Yost's enforcement of the fair-and-truthful certification has imposed a severe burden as applied to the Plaintiffs in this case, which suffices for purposes of lifting the stay. As discussed above, Yost rejected *eight* proposed summaries for reasons that judges on this court and the district court have reviewed and deemed dubious. Moreover, Plaintiffs have been unable to obtain timely review from the Ohio Supreme Court on two separate instances after Yost opposed expedited consideration. Plaintiffs have alleged that Yost's intervention caused them to make unwanted changes to their "Protecting Ohioans' Constitutional Rights" amendment summary and has chilled them from submitting the "Ohio Wrongful Conviction and Justice Reform" amendment summary for his review. R. 47 (Am. Compl. ¶¶ 23, 50) (Page ID #500–01, 508). Yost's assertion that "[P]laintiffs are free to proceed with signature collection on summary language they submitted in July 2024," D. 12 (Opp'n to Vacating Stay at 9), hardly diminishes the burden, considering that summary contains language that Plaintiffs added at Yost's insistence, and that it lacks a title, a fact that may well affect their advocacy and leave the initiative subject to challenge later in the process, *see* R. 47 (Am. Compl. ¶ 23) (Page ID #500–01).

Further, Yost has failed to show that his fair-and-truthful review is justified as applied to these Plaintiffs. Yost is presently objecting to Plaintiffs' circulation of a version of the proposed petition that contains seven of his eight rounds of edits and a title that he disagrees with. Yet, the title—seemingly a significant consideration—did not even present itself in his rejection letters until the seventh one. This record casts significant doubt on whether the version of the petition that Plaintiffs seek to certify and begin circulating is, in fact, any more likely to mislead, confuse, or defraud potential signatories than the version he finally approved. The justification fails the smell test. For these reasons, Plaintiffs are likely to succeed on their facial and as-applied challenges under *Anderson-Burdick*.

B. Remaining Stay Factors

In First Amendment cases, the remaining stay factors usually fall in line with the party who demonstrates a likelihood of success on the merits. *See Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012). That logic applies here.

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Plaintiffs face irreparable, First Amendment harm with each day the stay remains in place. While the stay is in place, Yost need not send Plaintiffs' preferred initiative summary to the ballot board for approval, leaving Plaintiffs unable to begin circulating their petition and collecting signatures in support of the proposed ballot amendment. This is itself an irreparable harm. Beyond this, Plaintiffs face irreparable harm based on the diminished likelihood with each passing day that they can qualify this amendment for the November 2025 ballot. We observe once again that Plaintiffs need to collect more than 400,000 signatures in less than three months to have a chance at making the ballot. Even if Plaintiffs have no First Amendment right to put their proposed constitutional amendment on the ballot, they are unquestionably, irreparably harmed by the limitation on the time in which they can try. Yost asserts that the preliminary injunction threatens irreparable harm to the state's "interest in creating and enforcing its own laws." D. 12 (Opp'n to Vacating Stay at 15) (quoting *Thornbury*, 75 F.4th at 657). But there is no valid state interest in enforcing unconstitutional laws.

Yost raises a few additional considerations, none of which are persuasive. First, he argues that allowing Plaintiffs to begin circulating a petition that may be canceled midstream if Ohio prevails could "confuse and mislead voters." D. 12 (Opp'n to Vacating Stay at 15). That seems to be a risk assessment that Plaintiffs can make for themselves. Next, he argues that removing the stay risks presenting voters with a summary that Yost "rejected on fair-and-truthful grounds." *Id.* at 15–16. But for the reasons discussed earlier, we find this dubious considering Yost's editing process. Finally, he argues that the delay in beginning the signature gathering process is not that significant, especially if this court grants expedited review, since this case will draw attention to the petition. *Id.* at 16. Worst-case scenario, if Plaintiffs prevail but lack sufficient time to collect signatures, they can proceed in the next election, Yost says. *Id.* This

argument also fails because Plaintiffs have a First Amendment interest in circulating their preferred petition. Moreover, under the reasoning adopted by the en banc court's last per curiam opinion in this case, Plaintiffs' case may be moot again before long, sending Plaintiffs on another cycle through the district court before we might finally reach the merits in time. Plainly, Plaintiffs prevail on the equities here.

C. Response to the Dissenting Opinion

The dissenting opinion raises several arguments in response. None persuades. First, the dissenting opinion argues that the First Amendment is not implicated here, because the fair-and-truthful certification requirement regulates "the process by which the people act in a public, sovereign capacity to amend the Ohio constitution." Dissenting Op. at 24. That is *not* the law in this circuit. *See* Dissenting Op. at 28 (acknowledging that "existing precedent" calls for application of *Anderson-Burdick*); *Schmitt*, 933 F.3d at 639. So, we fail to see how the dissenting judge's "question[s] [about] whether *Anderson-Burdick* applies" in the ballot-initiative context make Yost likely to succeed on the merits at this stage. Dissenting Op. at 28 (internal quotation marks omitted). Likewise, we note that the dissenting opinion does not at all contend with (or even address) the district court's misapplication of the stay factors.

Second, the dissenting opinion insists that regulation of the petition summary "does not regulate the communicative conduct of persons advocating a position on the initiative." Dissenting Op. at 24. In the dissenting opinion's view, all ballot-initiative challenges can be categorized as internal or external to that process. Unfortunately, this law does not fall neatly on one side of the line or the other. Approval of the summary is unquestionably a step toward placing an initiative on the ballot under Ohio law. But it is also the language on a petition that proponents circulate in their attempts to advocate and collect signatures for their initiative. *See Reed*, 561 U.S. at 195 (rejecting the position that the legal effect of expressive activity strips it of First Amendment protection).

That this law affects both sides of the line is not a barrier to First Amendment review. *Grant* and *ACLF* demonstrate that the First Amendment applies even if the speech is made within the lawmaking part of the ballot-initiative process. In *Grant*, the Court considered a law

prohibiting proponents of an initiative from paying circulators to seek signatures. 486 U.S. at 417. In *ACLF*, the Court considered a law requiring those petition circulators to wear identification badges while they collected signatures. 525 U.S. at 197–98. Under the dissenting opinion's theory, such laws impose no First Amendment burden, for the circulators are simply engaged in the lawmaking process. Because they are actively collecting signatures, not simply discussing the merits of the issue, they warrant no First Amendment protection under the dissenting opinion's theory. But the Court has already rejected that sweeping position, holding in *Grant* that the state's creation of the ballot-initiative process does not give the state unlimited power to regulate speech connected with that initiative. 486 U.S. at 424–25. Applying that principle in both *Grant* and *ACLF*, the Court recognized that the First Amendment limited state law because the proponents and petition circulators were engaged in speech, even though their speech was in service of the ballot initiative. *Id.*; *see ACLF*, 525 U.S. at 197–200. Indeed, in *ACLF*, the Court drew a comparison with *McIntyre*, a case concerning the distribution of anonymous handbills "urging voters to defeat a ballot issue." *ACLF*, 525 U.S. at 199. The Court considered the "restraint on speech in [*ACLF*] more severe than [] the restraint in *McIntyre*" because the circulator must engage in a lengthy encounter to persuade an elector to sign a petition, an encounter that "'of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.'" *Id.* (quoting *Grant*, 486 U.S. at 421). Similarly, here, even if the petition summary is part of the lawmaking process, that fact does not necessarily draw it outside of the First Amendment.

Third, the dissenting opinion claims that our stance draws us into conflict with other circuits. But the out-of-circuit cases cited by the dissenting opinion are easily distinguishable. Those cases considered limitations that states have placed on the subject matter of allowable ballot initiatives. *See Initiative & Referendum Inst.*, 450 F.3d at 1103–04; *Marijuana Pol'y Project v. United States*, 304 F.3d 82, 85–86 (D.C. Cir. 2002); *Wellwood v. Johnson*, 172 F.3d 1007, 1009–10 (8th Cir. 1999). In effect, those states dictated the types of laws that can be enacted by initiative. The Ohio law here, by contrast, concerns the text of a summary that petitioners use as part of their advocacy efforts, making it more like the laws at issue in *McIntyre*, *Grant*, and *ACLF*, which affected the ability of ballot-initiative proponents and opponents to share their message. The dissenting opinion's suggestion that we have

"resurrect[ed]" the "political process doctrine," Dissenting Op. at 27 & n.8, is similarly misplaced because we have not passed on Ohio's ability to decide what kinds of laws that can be enacted through the initiative process. *See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary*, 572 U.S. 291 (2014).

Fourth, the dissenting opinion characterizes our opinion as suggesting that the Attorney General violates the First Amendment by exercising "power to exclude certain topics or viewpoints from the ballot." Dissenting Op. at 25. To be sure, we are concerned that Yost has not implemented the fair-and-truthful certification in "neutral" way. *Little*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of stay); *cf. Thompson*, 959 F.3d at 808 (applying *Anderson-Burdick* to "nondiscriminatory, content-neutral ballot initiative requirements"). And we are surprised by the dissenting opinion's eagerness to endorse Yost's dubious conduct here. But this case does not present the straightforward question whether Ohio law violates the First Amendment by giving the Attorney General largely unfettered discretion to deny petitioners access to the ballot-initiative process. Here, as we have explained, state law authorizes the Attorney General to control the text of the summary, a document that is an essential part of petitioners' advocacy. Moreover, approval of that summary is a required condition that Plaintiffs must achieve if they are to begin circulating their petition at all and sharing their speech in favor of the proposed amendment, rather than just the issue on which the amendment is predicated. That is why the law here likely burdens Plaintiffs' private speech directly under *Grant* and places a severe burden on their ability to participate in the ballot-initiative process under *Anderson-Burdick*.

Fifth, reluctantly applying *Anderson-Burdick* to this case, the dissenting opinion contends that Yost can edit the summary as he sees fit because the summary is government speech, analogizing the petition here to an electoral ballot. Dissenting Op. at 28–29. But the dissenting opinion's analogy to a ballot only underscores its differences. A voter receives a ballot from a polling official within a government-sponsored polling place. That ballot is replete with official language and warnings. By contrast, an elector confronts a ballot-initiative petition in public, in the hands of a proponent of that measure. As the dissenting opinion acknowledges, the petition

might even be accompanied by additional materials advocating in favor of the measure. Further, electoral ballots, like the license plates at issue in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, "have traditionally been used for government speech," indicating that the government "explicitly associates itself with the speech." 576 U.S. 200, 216 (2015). Contrast that with a circulated petition, which more closely resembles the pamphlets and surveys recognized as core private, political speech. *See McIntyre*, 514 U.S. at 347.

Sixth, the dissenting opinion argues that even if the summary is construed as private speech, it involves at most speech within a public-benefit program. Dissenting Op. at 31–32. The unconstitutional-conditions cases upon which the dissenting opinion relies are largely inapposite. That line of case law recognizes limits on the government's ability to condition funding on the recipient's speech. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). Although the government may impose "conditions that define the limits of the government spending program," the government may not impose "conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214–15. Those cases arise in the context of government funding programs and rest principally on the government's ability to define the scope of its own initiatives, compared with the recipient's ability to use the government's program to advance its own, private aims. *See, e.g.*, *id.* at 217–19 (HIV/AIDS funding); *Rust v. Sullivan*, 500 U.S. 173, 196–99 (1991) (family-planning funding); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549–51 (1983) (tax breaks for charitable organizations). In stark contrast here, the "program," so to speak, is a state constitutional right to advance legislation by citizen initiative. The state plainly does not seek to advance an initiative as the government did in those cases. In any event, the speech here does not sit neatly "'inside' the government program," as the dissenting opinion suggests. Dissenting Op. at 32 (quoting *Agency for Int'l Dev.*, 570 U.S. at 215). As we have discussed, the petition summary is at once part of the initiative process and part of petitioners' advocacy. Its connection to the formal process does not deprive it of First Amendment protection.

IV. CONCLUSION

For the foregoing reasons, we GRANT the motion to lift the stay and LIFT the district court's stay.

DISSENT

JOHN K. BUSH, Circuit Judge, dissenting. I would deny the motion to vacate the stay of the district court's injunction. All the relevant legal factors support continuance of the stay. The driving consideration here is that the Ohio Attorney General is likely to prevail in this action because the First Amendment does not bar the State from regulating the content of a certified initiative summary. The summary is a legislative action that, at most, constitutes government, not private, speech. But even if it were private speech, the Attorney General's regulation of its content would still be permissible because the summary would constitute speech that occurs within a discretionary government benefit program, which the Supreme Court has held may be subject to content-based regulation. I explain these points more fully below.

I.

Plaintiffs are members of petition committees that seek to advance two different state constitutional amendments through Ohio's initiative process. They object, however, to Ohio's requirement that a petition may proceed only if it first receives a certified summary from the Attorney General. In their view, that content-based restriction on the initiative process is inconsistent with the First Amendment's prohibition, applied through the Fourteenth Amendment, on laws "abridging the freedom of speech." U.S. Const. amend. I; *see also* U.S. Const. amend. XIV, § 1. So, they want to compel the Attorney General to certify two particular summaries that have been or will be submitted alongside their petitions without determining whether the summaries are fair and truthful under Ohio law.

Plaintiffs' two proposed amendments have taken distinct paths from each other so far. One proposed amendment, which seeks to address wrongful convictions, has not yet been submitted to the Attorney General. But the second proposed amendment, which aims to expand state-law remedies for violations of state constitutional rights, has gone to the Attorney General for review on numerous occasions. For the most part, the Attorney General has refused to certify Plaintiffs' submissions because, in his view, the proposed summaries failed to comply with Ohio

law. Plaintiffs disagree. They claim their submissions do comply and that the Attorney General's rejections of their submissions suggest a viewpoint-based restriction on their exercise of Ohio's initiative process.

Notably, the Attorney General, acting pursuant to an Ohio court order, has certified one of the proposed summaries for the second proposed amendment. That certified submission contains the exact same proposed amendment at issue in Plaintiffs' other rejected submissions. So, the certification permits Plaintiffs to move forward in the initiative process with their proposed amendment and solicit the signatures necessary to place the amendment on the ballot. But, despite their ability to do so, Plaintiffs have refused to gather signatures in support of their proposed amendment. They prefer to proceed with their First Amendment challenge.

And this dispute has been proceeding for quite a while. The case previously came before this court after the district court initially denied Plaintiffs' motion to preliminarily enjoin the Attorney General from enforcing the certification provision. *See Brown v. Yost*, 122 F.4th 597, 600–01 (6th Cir. 2024) (en banc) ("*Brown II*"). After the en banc court held that subsequent events rendered the motion moot, *id.* at 601–03, Plaintiffs returned to the district court and renewed their motion, this time requesting preliminary relief not exclusively tied to a particular election cycle.

Reversing course, the district court granted Plaintiffs' motion, holding that the certification provision violated the First Amendment. *Brown v. Yost*, No. 2:24-CV-1401, 2025 WL 815754 (S.D. Ohio Mar. 14, 2025) ("*Brown III*"). The court first concluded that the summaries, even when they are made part of the official initiative petition after the Attorney General's certification, constitute core political speech of the petition committee members. It then held that the law requiring the Attorney General to certify the summary for the petition to advance in the initiative process could not survive First Amendment scrutiny.

II.

To decide whether to maintain the stay of the preliminary injunction, we address the four factors of likelihood of success on the merits, irreparable harm, balance of the equities, and the

public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009). The key issue here is the first one: which side is likely to prevail on the merits?

To address this question, we should begin by going back to relevant first principles in our American system of governance. The federal Constitution creates no right for citizens at the state level to act in a sovereign capacity and make state law by ballot initiative. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). Instead, the federal Constitution leaves to each state a near-limitless authority to structure, distribute, and regulate the exercise of that state's legislative power as the state sees fit. *See* U.S. Const. art. IV, § 4.

Through its own sovereign choice, the people of Ohio chose to vest the State's legislative power primarily in the hands of the General Assembly, its body of elected representatives. *See* Ohio Const. art. II, §1. But the Ohio Constitution also permits the people—as an electorate and subject to regulations that the State's elected officials may impose—to act in a sovereign, legislative capacity to make law, including constitutional law, through an initiative process. Ohio Const. art. II, §§ 1a, 1b. When the people of Ohio choose to avail themselves of that power, they do not act in a private capacity; they act like a legislature, as the sovereign's lawmaking body. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 805–08, 813–24 (2015). And importantly, "a legislator has no right to use official powers for expressive purposes." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011).

The Ohio General Assembly implemented a framework for the people to engage in the direct exercise of legislative power via the initiative process. Citizens interested in enacting a constitutional amendment through an initiative must first designate a committee of three to five people to act as their representatives. Ohio Rev. Code § 3519.02. To begin a petition's movement through the legislative process, the committee must submit a petition for the Attorney General's review. Ohio Rev. Code § 3519.01(A). It must contain the proposed amendment, a summary, and supporting signatures from at least 1,000 qualified Ohio electors. *Id.* A petition may only advance through the legislative process if, upon submission, the Attorney General examines the summary and determines that it is a "fair and truthful statement of the proposed . . . constitutional amendment." *Id.* Once certified, the summary forms part of the official

"petition," a state form that Plaintiffs must use to gather the signatures required to place an initiative on the ballot.

The First Amendment poses no barrier to the Ohio Attorney General's involvement in the certification process. That is because the First Amendment has little to say about the power of a state government to structure the exercise of its legislative power and, in particular, to establish and regulate a fundamental aspect of that power—its state constitutional amendment process. As federal judges, we might not agree with the merits of the Ohio Attorney General's actions. But it is *state* law—through its constitutions, statutes, and rules—not federal law that regulates the Attorney General's conduct.

And Ohio law does, in fact, prescribe the process by which the people act in a public, sovereign capacity to amend the Ohio Constitution. As an original matter, Ohio law governing the initiative process does not impinge upon any First Amendment right held by initiative proponents, particularly where, as here, the law does not regulate the communicative conduct of persons advocating a position on the initiative. *See Brown II*, 122 F.4th at 605–13 (Thapar, J., concurring); *Brown v. Yost*, 103 F.4th 420, 454 (6th Cir. 2024) (Bush, J., dissenting) ("*Brown I*"); *Schmitt v. LaRose*, 933 F.3d 628, 644, 648–49 (6th Cir. 2019) (Bush, J., concurring in part & concurring in the judgment); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098–1104 (10th Cir. 2006). "[A]lthough the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Marijuana Pol'y Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002). Because that is Plaintiffs' fundamental complaint here—that the Attorney General's summary approval power makes it more difficult to enact particular initiatives—their Free Speech Clause claim must fail. Any redress against the Attorney General lies in state, not federal, court, based on state, not federal, law.

Meyer v. Grant is not to the contrary. 486 U.S. 414 (1988).[3] Unlike the law at issue there, Ohio law does not regulate private speech that occurs within the initiative circulation

[3]In extending *Grant* to this case, the majority creates a split with the Eighth, Tenth, and D.C. Circuits, all of which have held that *Grant* does not apply to content-based restrictions on the initiative process. *See, e.g.*, *Wellwood v. Johnson*, 172 F.3d 1007, 1009–10 (8th Cir. 1999); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996); *Walker*, 450 F.3d at 1099, 1103–04; *Marijuana Pol'y Project*, 304 F.3d at 86–87.

process itself. Nothing in the Ohio statute challenged here prevents petition circulators from engaging in their own speech that the Attorney General objects to or considers "unfair" or "untruthful." "Indeed, proponents can say whatever they please to get their message out." *Brown II*, 122 F.4th at 608 (Thapar, J., concurring). They just may not say it on an official state form, which is what the certified petition, including the summary, is.

So, unlike in *Grant*, the law here does not place "a limitation on communication with voters" by private citizens. *Taxpayers United for Assessment Cuts*, 994 F.2d at 295. In fact, nothing in Ohio law prevents Plaintiffs from handing a potential signatory Plaintiffs' own preferred summary at the same time they present the petition, which includes the Attorney General's certified summary.[4] Plaintiffs may even tell the signatories that the Attorney General's certified summary is not a truthful description of their petition and that their own private summary provides the voter with more accurate information.[5]

Plaintiffs and the majority also suggest that the Attorney General's exercise of his statutory review power towards Plaintiffs' own initiatives raises First Amendment concerns because he is exercising his power to exclude certain topics or viewpoints from the ballot. But the Free Speech Clause creates no constitutional right to place initiatives of particular topics or viewpoints on state ballots. That makes sense because laws are filled with content- and viewpoint-based restrictions on the exercise of legislative power. *See Walker*,

[4]If it did, that is the type of law that *McIntyre v. Ohio Elections Commission* would prohibit. *See* 514 U.S. 334 (1995) (holding an Ohio law that prohibited the distribution of unsigned leaflets in connection with a ballot-initiative election was inconsistent with the First Amendment). But since Ohio law leaves Plaintiffs free to engage in any speech regarding initiatives that they wish, the majority's reliance on *McIntyre* is misplaced. The same is true for *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). *See Brown II*, 122 F.4th at 611–12 (Thapar, J., concurring) ("*Buckley* thus stands for the unremarkable proposition that regulations of political expression trigger First Amendment scrutiny. Ohio's law, by contrast, does not regulate political expression. Plaintiffs here remain free to make the same amount of political expression, using the same methods, as they would be able to make without the certification provision.").

[5]Nonetheless, the majority suggests the certification provision limits communication with voters because proponents, allegedly, rely on the certified summary to advocate for their initiative. But Plaintiffs point to no clear evidence of such reliance, and the affirmative evidence in the record is to the contrary. *See Brown III*, 2025 WL 815754, at *10 n.11 (noting record evidence claiming potential signatories rarely read the certified summary for informational purposes). Even if the solicited signers did rely on the summary, as explained below, Plaintiffs have failed to explain how they have a constitutional right to commandeer an official government document to communicate their own private message.

450 F.3d at 1100–01; *Brown II*, 122 F.4th at 606–07 (Thapar, J., concurring); *Schmitt*, 933 F.3d at 646–47 (Bush, J., concurring in part & dissenting in part).[6]

Take, for example, rules regarding what legislation can be enacted via congressional reconciliation procedures, which make it easier to pass legislation with a bare majority in each House of Congress. The Byrd Rule prevents using that process to enact "extraneous" legislation—legislation that does not impact spending or revenue—and delegates to the Senate Parliamentarian the power to determine whether a provision fits within that category. No one thinks that when the Parliamentarian's ruling prevents a provision from moving forward in the reconciliation process that a First Amendment violation has occurred, even though those rulings are content based and prevent certain types of legislation from moving forward. Ohio's certification law places the Attorney General in a similar position: he stands as an arbiter of which petition submissions may move forward in the legislative process. That he may regulate this process based on content or viewpoint offends no First Amendment principle.[7]

In concluding otherwise, the majority creates a circuit split with the Tenth and D.C. Circuits, both of which have squarely rejected First Amendment claims against laws erecting barriers that prevented initiatives of particular viewpoints from reaching the ballot. *See, e.g.*, *Walker*, 450 F.3d at 1103–04; *Marijuana Pol'y Project*, 304 F.3d at 85–87; *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996). And it also departs from the Supreme Court's decision in *Gordon v. Lance*, where the Court held that a West Virginia viewpoint-based

[6]*Walker* and the *Brown II* concurrence primarily discussed content- and viewpoint-based barriers to the exercise of legislative power that are found in state constitutions. But from a First Amendment perspective, there is no meaningful distinction between 1) state constitutional provisions that erect content- or viewpoint-based barriers to placing initiatives on the ballot and 2) state statutory or regulatory provisions that impose the same barrier. The Fourteenth Amendment applies First Amendment principles to all state action, no matter what source of state law that action was taken pursuant to. So, as far as the First Amendment is concerned, there is no meaningful distinction between 1) a state constitutional provision that permits an initiative to be placed on the ballot only if the legislature, by a majority vote, first deems it to be "in the public interest" and 2) Ohio's requirement that the petitions be placed on the ballot only if the Attorney General first finds a summary to be "fair" and "truthful." In other words, nothing in the Free Speech Clause would preclude the Ohio legislature from granting the Attorney General, as a matter of state law, a veto-like power to prevent legislation proposed by initiative from advancing in the legislative process.

[7]Whether the Attorney General is acting within the scope of his statutory authority is a question of state law over which the federal Constitution is agnostic. *See Brown II*, 122 F.4th at 608 (Thapar, J., concurring) ("[T]he First Amendment doesn't stop a state from delegating discretion to an executive official like the state Attorney General to limit or prohibit citizen lawmaking.").

limitation on its referendum process that made it more difficult to enact policies raising taxes, but not lowering them, did not violate the Fourteenth Amendment "or any other provision of the Constitution." 403 U.S. 1, 8 (1971).[8]

Stripped of any Free Speech Clause significance, Plaintiffs' content- or viewpoint-discrimination claim boils down to nothing more than an argument that the Attorney General is incorrectly interpreting and applying state law. As noted, the remedy for that is to go to state court. Sovereign immunity typically precludes federal courts from awarding injunctive relief against state officials based upon alleged violations of state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104–06 (1984). And there is no general federal constitutional right to have state officials properly interpret and apply state law, even in the election context. *Cf. Moore v. Harper*, 600 U.S. 1, 34–36 (2023). Even apart from the merits, *Pullman* abstention would stand as a serious barrier to litigating the merits of the underlying state-law question in federal court. *See R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Harrison v. NAACP*, 360 U.S. 167, 176–78 (1959).[9]

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[8]The novelty of Plaintiffs' viewpoint-discrimination reasoning is its striking resemblance to the now largely interred "political process doctrine." Under one view of that doctrine, a state violated the Constitution any time it erected a structural barrier that made it more difficult to advance a particular viewpoint held by a disfavored group through the legislative or electoral process. The Supreme Court rebuked this court's expansive application of that doctrine in *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary*, 572 U.S. 291 (2014), where the plaintiffs challenged a Michigan constitutional amendment that made it more difficult to advance pro-affirmative action policies.

What fools, it turns out, the plaintiffs were in *Schutte*. If only they had styled their claims as First Amendment viewpoint-discrimination claims, then, under the majority's rule, they would be entitled to strict scrutiny and an all-but-assured victory. That would have been a much more straightforward theory than the highly circumscribed political process doctrine.

That the Supreme Court has erected an independent doctrine to address scenarios where political actors make it more difficult for groups seeking to legislatively advance particular viewpoints, and then severely circumscribed the scope of that doctrine, suggests that the First Amendment does not provide an alternative, simpler avenue to advance the same types of arguments. *Cf. Wellwood*, 172 F.3d at 1009–1010 (rejecting the extension of the political process doctrine in the context of a First Amendment challenge to a state law that imposed a content-based restriction on the initiative process). Today's majority 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.

[9]It is notable that, when this case was previously before us, Plaintiffs did not challenge the Attorney General's interpretation and application of the statutory provision to their summaries. *See Brown I*, 103 F.4th at 446 & n.1 (Bush, J., dissenting). A conclusion that the district court had found was essential to stave off *Pullman* abstention. *See Brown v. Yost*, No. 2:24-CV-1401, 2024 WL 1793008, at *3–4 (S.D. Ohio Apr. 25, 2024).

Put simply, Plaintiffs are not likely to succeed on the merits because the First Amendment does not inhibit the State's power, through the Attorney General, to control the content of the official government summary as part of its regulation of the initiative process.

III.

This court's existing *Anderson-Burdick* precedent does not change this conclusion that the Attorney General's role is consistent with the First Amendment. Like many other members of this court, I have "questioned whether *Anderson-Burdick* applies to anything besides generally applicable restrictions on the right to vote." *Thompson v. DeWine*, 959 F.3d 804, 808 n.2 (6th Cir. 2020); *see, e.g.*, *Schmitt*, 933 F.3d at 644, 648–49 (Bush, J., concurring in part & concurring in the judgment). But even under our existing precedent, and even were *Anderson-Burdick* applicable here, a plaintiff must first establish under that doctrine that the challenged law imposes a burden on the plaintiff's First Amendment rights. *See Schmitt*, 933 F.3d at 639 (majority).[10] Plaintiffs have not done so.

A.

First, to the extent that a certified summary constitutes anyone's "speech" under the First Amendment, it is the government's speech, not Plaintiffs' private protected speech. The certified summary forms part of the official "petition," a government document that Plaintiffs must use to gather the signatures required to place an initiative on the ballot. Ohio Rev. Code § 3519.05. And Plaintiffs have failed to explain why they have a First Amendment right to express whatever speech they would like on the State's own official election document. *Cf. Colorado v. Griswold*, 99 F.4th 1234, 1240–42 (10th Cir. 2024).

An analogy to ballots confirms this point. As we and the Supreme Court have both held, a ballot is not a forum for private political speech. *See Timmons v. Twin Cities Area New Party*,

[10]The majority claims I acknowledge that "existing precedent calls for application of *Anderson-Burdick*." Majority Op. at 17. But as a matter of stare decisis, I am aware of no case in which this court has held that the *Anderson-Burdick* framework applies to a content-based regulation on the scope of the initiative process. And for the reasons I've explained, extending *Anderson-Burdick* to this context would conflict with core principles of state sovereignty and the precedent of several other circuits. In any event, as I explain below, even under *Anderson-Burdick*, Plaintiffs are not likely to succeed on the merits because they have not established that the challenged law imposes a burden on their First Amendment rights.

520 U.S. 351, 363 (1997) (holding political parties have no First Amendment "right to use the ballot itself to send a particularized message"); *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 336 (6th Cir. 2016) (holding that "a political party has no First Amendment right to use the general-election ballot for expressive activities"). So, the language that a state chooses to place on a ballot constitutes government speech, not private speech.

Similar logic applies here. Just as candidates cannot say whatever they want on the official ballot, petition circulators likewise cannot say whatever they want on the official petitions, of which the certified summaries are a part. And likewise, no First Amendment issues arise because both groups remain "free to provide . . . a plethora of information" about the candidates or initiatives in any other conceivable way. *Ohio Council 8 Am. Fed'n of State*, 814 F.3d at 335. Plaintiffs are free to lobby, petition, and engage in all First Amendment-protected activities to advocate for their proposed amendment. The regulation of the certified summary does not affect this private speech in any way.[11]

Nor, at this stage, have Plaintiffs demonstrated that the public would perceive the certified summary as private speech. *See Shurtleff v. City of Boston*, 596 U.S. 243, 252, 255 (2022). In fact, the certified summary explicitly states that it is the Attorney General—not any private citizen—who has certified the summary.[12] This is reiterated by the fact that the first name listed on or below the petition summary is the Attorney General. *See, e.g.*, Ex. 1 to Am. Compl., R. 47, PageID 515–16. There is no indication in the certified summary that the petition

[11]The majority claims the possibility that a petition might be accompanied by additional materials advocating in favor of an initiative somehow suggests that the public would perceive the certified summary as Plaintiffs' own speech. *See* Majority Op. at 19–20. How that is so is quite unclear. If anything, the presence of materials in addition to the certified summary would suggest that the certified summary does not convey Plaintiffs' message. If it did, there would be no need for additional materials.

[12]Nor does it matter, as the majority suggests, that the summary states that the Attorney General has certified the summary "without passing on the advisability of the approval or rejection of the measure to be referred." When a petition or candidate ends up on a general election ballot, no one necessarily thinks that the existing state government thinks it is a good idea to elect the candidate or approve the petition. In fact, since the ballot offers alternatives to the status quo, one might reasonably think the existing government is against those alternatives. And yet the ballot language itself is government speech.

committee originally drafted it or even that the committee necessarily agrees with the summary.[13]

Additionally, like a ballot, the certified petition, including the summary portion, "is replete with official language and warnings." Majority Op. at 19. 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 in section 3501.382 of the Revised Code, signs a name other than one's own on this petition; or signs this petition when not a qualified voter, is liable to prosecution." *See* Pet. for Initial Hearing En Banc, Dkt. 13, at 10. Likewise, as explained above, when one flips to the part of the petition displaying the certified summary, one will be met with the official language concerning the Attorney General's certification. As the majority recognizes, these are qualities that the public often associates with government, not private, speech. *See* Majority Op. at 19.

True, the initiative proponents themselves initially draft the summaries, and the Attorney General typically adopts what the proponents propose. But the public doesn't know that from the summary. Although private involvement is sometimes relevant in the government speech analysis, the Supreme Court has made clear that it is not always so. *See Shurtleff*, 596 U.S. at 252 ("[T]o determine whether the government intends to speak for itself or to regulate private expression . . . we conduct a holistic inquiry" that "is driven by a case's context rather than the rote application of rigid factors."); *id.* at 262 (Alito, J., concurring in the judgment) (noting the factors outlined in the Court's government speech precedents "d[o] not set forth a test that always and everywhere applies"). Thus, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court held that specialty license plates constituted government speech, even though the messages on them were proposed by private entities. 576 U.S. 200 (2015). The Court held that the government speech label applied even though private parties created the specialty plate designs in the first instance and, as the dissenters discussed at length, the government almost always approved what the private parties submitted and did not edit them further. *See id.* at 231–32 (Alito, J., dissenting).

[13]The final portion of the summary merely lists the members of the petition committee. *See, e.g.*, Ex. 1 to Am. Compl., R. 47, PageID 516.

Also, the claim that the certified summary constitutes Plaintiffs' own protected speech is undermined by the fact that, as the district court acknowledged, *Brown III*, 2025 WL 815754, at *7 n.5, Plaintiffs do not argue the summary requirement or the placement of the Attorney General's certification on the summary raises compelled speech concerns. In our constitutional tradition, parties often object when the government requires them to convey a political message. *See, e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). And I have no doubt average citizens would be quite alarmed at the prospect of having to carry a government message—here, at the very least, the Attorney General's certification—on their own core political speech, particularly speech that is alleged to be "an essential part of [a person's political] advocacy," Majority Op. at 19. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). Put simply, Plaintiffs have not demonstrated that the certified summary constitutes their own private protected speech.

B.

Second, even if the summary were not government speech, Ohio's law still would not involve any direct regulation of private speech. It would, at most, trigger a line of First Amendment precedent dealing with unconstitutional conditions where the government creates a public benefit—here, the right to make law through the initiative process—and then limits a private party's ability to use that benefit to convey a private message. *See United States v. American Library Assn., Inc.*, 539 U.S. 194, 210 (2003) (plurality op.). In such scenarios, governments retain significant leeway to limit a private party's speech that occurs when the party seeks to use the government benefit to magnify their own speech, even when the limitation imposes content- or viewpoint-based restrictions. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 192–200 (1991); *Garcetti v. Ceballos*, 547 U.S. 410, 417–26 (2006).

That is what the Ohio law at issue does. Ohio's initiative process is a discretionary government program, and the State retains the right to define the program's content- or viewpoint-based contours. *See, e.g.*, *Rust*, 500 U.S. at 192–200. For First Amendment analysis, the state initiative process is a benefit, not a right, because, as noted, neither the First

Amendment nor any other provision of the federal Constitution requires that it exist. The citizens of Ohio may amend the State's Constitution via an initiative process only because state, not federal, law allows it. From the vantage point of the First Amendment, therefore, state constitutional initiatives are state-law benefits not federal constitutional rights.[14]

So, even assuming the summary constitutes Plaintiffs' "speech," the certification provision merely limits Plaintiffs' ability to use the government benefit—the petition process—to magnify their own speech, without constraining their ability to speak without aid of the benefit. *Cf. Carrigan*, 564 U.S. at 127 ("This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message."). Or, put differently, Ohio law merely imposes a restriction on Plaintiffs' speech when they are operating "inside" the government program, created by state law, rather than attempting to use the benefit to restrict Plaintiffs' speech "outside the contours of the program itself." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215 (2013). Accordingly, to the extent Plaintiffs wish to offer their own summary of their proposed amendments, "they are free to do so without [Ohio's] assistance." *American Library Assn., Inc.*, 539 U.S. at 212. That type of restriction sits well within a state's power.

* * *

To summarize, whether the initiative process is viewed as government speech or a government program, the First Amendment poses no bar to the Attorney General's involvement in that process. Therefore, the Attorney General is likely to prevail in his defense of Ohio's longstanding election regulation.

[14]This is not to suggest that, under this view, the federal Constitution falls entirely out of the picture. *See Grant*, 486 U.S. at 424–25; *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 59 (2006). But here, as explained below, the nature of the government program means that any restriction on Plaintiffs' speech is consistent with the First Amendment because Ohio law merely restricts Plaintiffs' ability to leverage instrumentalities of the government program—here, the certified petition, a government document—to magnify their own speech. Ohio does not "limit discussion of political issues raised in initiative petitions" when Plaintiffs seek to do so outside of a government document. *Grant*, 486 U.S. at 425.

IV.

Not only is the Attorney General likely to win this lawsuit, but the remaining factors also favor keeping the district court's stay of the preliminary injunction in place. The harm imposed on Ohio in lifting the stay is immense. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). That is particularly true in the election administration context, where an injunction "seriously and irreparably harm[s]" a state any time it wrongly "bar[s] the State from conducting . . . elections pursuant to a statute enacted by the Legislature." *Abbott v. Perez*, 585 U.S. 579, 602 (2018); *see also Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring in the grant of stay) ("[T]he State is likely to suffer irreparable harm absent a stay" because "the preliminary injunction disables [the State] from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment."). And likewise, the public interest "always" favors permitting states to promptly execute their laws, absent a clear showing of unconstitutionality. *Labrador v. Poe*, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring in the grant of stay) (quoting *Nken*, 556 U.S. at 436).

V.

One final note. When a court preliminarily enjoins a state official from enforcing a statute, it does not suspend or revoke the statute's requirements. "The statute remains in effect; the injunction simply forbids the named defendants to enforce the statute while the court's order remains in place." Jonathan F. Mitchell, *The Writ-Of-Erasure Fallacy*, 104 Va. L. Rev. 933, 987 (2018). When a court dissolves an injunction, the enjoined official (or any other state actor) is free to enforce the statute again—both against those who will violate it in the future and against those who violated it in the past, including while the preliminary injunction was in effect. *See id.* at 938–40, 948, 986–92; *cf.* Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193, 209 (noting that "[i]f the final judgment holds the statute valid, dissolves the interlocutory injunction, and denies permanent relief, state officials would be free to prosecute any violation" that occurred while the interlocutory injunction was in effect).

So, if Plaintiffs proceed to collect signatures in support of their petitions without presenting a summary that has been certified by the Attorney General under Ohio Rev. Code § 3519.01(A), they do so at their own peril. If this court or the Supreme Court later concludes that Ohio's longstanding election regulation does not conflict with federal law, it's possible that, as a matter of Ohio law, any signatures obtained using Plaintiffs' preferred summaries would be invalid. As a matter of federal law, the district court's preliminary injunction would not provide a defense. That the majority's remedy has the potential to unleash such a "chaotic and disruptive effect" on Ohio's legislative and electoral process is yet another reason to keep the stay in place. *Benisek v. Lamone*, 585 U.S. 155, 161 (2018) (per curiam) (citation omitted).

VI.

As Judge Thapar has explained, "[w]hen Attorney General Yost enforces the fair-and-truthful certification provision, he isn't directly regulating speech; he's restricting what sorts of citizen initiative proposals can become law." *Brown II*, 122 F.4th at 608 (Thapar, J., concurring). And whether Ohio law wishes to make it more difficult to advance certain messages through its legislative process is fundamentally a question of public policy that is committed to "the near-limitless sovereignty of each State to design its governing structure as it sees fit." *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary*, 572 U.S. 291, 327 (2014) (Scalia, J., concurring in the judgment). Because "there is no authority in the Constitution of the United States . . . for the Judiciary to set aside [Ohio] laws that commit this policy determination to the" Ohio legislature and Attorney General, *id.* at 314 (plurality op.), I see no option but to let the stay remain in place.

Contrary to what the majority claims, this result would not be an "eager[]" endorsement of "dubious conduct" by the Attorney General. Majority Op. at 19. Absent a clear command to the contrary, the structure of the state initiative process is a choice the federal Constitution leaves to the people of each state. Whether the state action before us is uncommonly silly or of the upmost piety, our duty as federal judges here is to faithfully apply the First Amendment. That federal constitutional provision poses no bar to the Attorney General's challenged actions. Only state law regulates that conduct.

Therefore, I respectfully dissent.