No. 20-3557

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN BEIERSDORFER, ET AL., Plaintiffs- Appellants, v. FRANK LAROSE, ET AL., Defendants-Appellees.	:	On Appeal from the United States District Court for the Northern District of Ohio Eastern Division
	:	District Court Case No. 4:19-cv-260

BRIEF OF DEFENDANT-APPELLEE FRANK LAROSE

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STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important constitutional issues regarding Ohio's initiative process, Defendant-Appellee Frank LaRose, Ohio's Secretary of State, requests oral argument.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the federal claims in this 42 U.S.C. §1983 suit under 28 U.S.C. §1331. The District Court dismissed all of the claims against the defendants through a series of decisions, the final of which it entered on April 30, 2020. Op., R.87, PageID#1075–76; *see also* Op., R.69, PageID#640; Order, R.77, PageID#927. The plaintiffs appealed on May 28, 2020. Notice, R.89, PageID#1078–79. This Court has jurisdiction under 28 U.S.C. §1291.

While the District Court had jurisdiction over the federal claims in this case, it lacked jurisdiction over an official-capacity claim against the Secretary alleging a violation of Ohio's Constitution. *See* Compl. ¶¶281–86, R.1, PageID#60–61. The District Court recognized as much and dismissed that claim based on the State's sovereign immunity from suit. Op., R.69, PageID#639–40. The Secretary addresses the sovereign-immunity doctrine's application to this case in greater detail below. *See* pp. 55–56.

STATEMENT OF THE ISSUES

1. Do the First, Ninth, or Fourteenth Amendments of the United States Constitution require States to put all proposed initiatives on the ballot, including those that the People lack authority to enact?

2. Do federal courts have jurisdiction to order state officials to comply with state law?

INTRODUCTION

The people of Ohio, in their Constitution, reserved to themselves the power to legislate through ballot initiatives. At the local level, Ohioans may adopt or amend county charters by initiative. Ohio Const., art. X, §3. They may also pass municipal ordinances by initiative. *Id.*, art. II, §1f. A collection of statutes—this brief calls them the "Initiative Authority Statutes"—require election officials to pre-screen such initiatives, and to exclude from the ballot any proposed initiative that the People lack the power to enact. *See* Ohio Rev. Code §§307.95, 3501.11(K), 3501.38(M), 3501.39(A). Anyone aggrieved by the decision to exclude an initiative may seek judicial review, either by suing for an injunction or by seeking *mandamus* relief.

The plaintiffs here argue that the Initiative Authority Statutes, by allowing election officials to pre-screen initiatives to assess ballot eligibility, violate the First, Ninth, and Fourteenth Amendments of the federal Constitution. The plaintiffs further argue that the statutes violate the separation-of-powers doctrine implicit in the Ohio Constitution. Their lawsuit gives rise to two questions on appeal.

First, do the Initiative Authority Statutes violate the First, Ninth, or Fourteenth Amendments? The answer is no. The federal Constitution leaves it "up to the people of each State, acting in their sovereign capacity, to decide whether and

how to permit legislation by popular action." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring); *accord Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). It follows that, when States choose to have an initiative process, they "enjoy considerable leeway to choose the subjects that are eligible for placement on the ballot." *Doe*, 561 U.S. at 212 (Sotomayor, J., concurring) (quotations omitted). The challenged laws simply ensure that all initiatives put to a vote are in fact eligible for ballot inclusion. Because the Constitution permits the States to deny ballot access to ineligible initiatives, the Initiative Authority Statutes pass constitutional muster. Indeed, this Court already upheld Ohio's prescreening process against a First Amendment challenge in *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019).

Second, do federal courts have jurisdiction to adjudicate state-law claims against state officials? The answer is no, as the Supreme Court and this Court have long made clear. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984); *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520–21 (6th Cir. 2007). Thus, this Court lacks jurisdiction to hear the plaintiffs' claim that the Secretary is violating the Ohio Constitution by enforcing the Initiative Authority Statutes.

The District Court correctly dismissed the plaintiffs' federal claims on the merits. And it correctly held that it lacked jurisdiction to adjudicate the state-law claims. This Court should affirm.

STATEMENT OF THE CASE

A. Ohio's Constitution reserves to the People the power to make law by initiative in limited circumstances.

1. The Ohio Constitution reserves to the People the right to make law by initiative across all levels of state government. Ohioans may use initiatives if they want to make statewide changes, either by amending the Ohio Constitution or Ohio's statutory laws. Ohio Const., art. II, §1a–b. They also have several options for using the initiative power to make local law. For example, Ohioans may adopt or amend a county or municipal charter by initiative. *Id.*, art. X, §3; art. XVIII, §§7, 9. They may enact municipal ordinances by initiative, too. *Id.*, art. II, §1f.

In reserving to themselves a right to make local law by initiative, the People also put limitations and conditions on that right. That is, the Ohio Constitution requires the People exercising their right to direct democracy to adhere to certain rules. Consider first the rules governing initiatives to make or amend county charters. These initiatives, the Constitution says, "*shall provide* the form of government of the county and *shall* determine which of its officers shall be elected and the manner of their election." *Id.*, art. X, §3 (emphasis added). Further, each pro-

posed charter "*shall provide* for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law." *Id.* (emphasis added). Thus, at a bare minimum, a proposed county-charter initiative must lay out the form of government and detail the manner in which the charter will distribute power among the government and its officials. This information is the "sine qua non of a valid charter initiative." *State ex rel. Coover v. Husted*, 148 Ohio St. 3d 332, 334–36 (2016); *State ex rel. Walker v. Husted*, 144 Ohio St. 3d 361, 366 (2015).

Consider next the rules regarding municipal initiatives, which is to say, initiatives to make municipal *ordinances* (as opposed to municipal *charters*). A valid municipal initiative must take "legislative action." Ohio Const., art. II, § 1f. In other words, voters may not take "administrative" actions by initiative. *See, e.g.*, *State ex rel. Ebersole v. Del. Cnty. Bd. of Elections*, 140 Ohio St. 3d 487, 491 (2014); *State ex rel. City of Youngstown v. Mahoning Cnty. Bd. of Elections*, 144 Ohio St. 3d 239, 241 (2015). The distinction between legislative and administrative actions, while sometimes difficult to draw, reflects the familiar divide between legislative and executive power: a legislative action "enact[s] a law, ordinance, or regulation," while administrative action "execut[es] a law, ordinance, or regulation already in existence." *State ex rel. Ebersole*, 140 Ohio St. 3d at 491.

The Ohio Constitution imposes no unique substantive requirements on "municipal-charter initiatives"—that is, initiatives that propose adopting or amending a municipal charter. It dictates the process for adopting such charters, but it does not require such charters to address any particular topics. Ohio Const., art. XVIII, §§7–9.

2. The "Initiative Authority Statutes," Ohio Rev. Code §§307.95, 3501.11(K)(2), 3501.38(M), 3501.39(A), are the means by which election officials enforce these requirements. Relevant here, these statutes direct county boards of elections to "determine whether" proposed county-charter and municipal-ordinance initiatives "fall[] within the scope of authority to enact via initiative." Ohio Rev. Code §3501.11(K)(2); *see also* Ohio Rev. Code §§307.95, 3501.38(M), 3501.39(A). (The statutes create no pre-screening process for municipal-*charter* initiatives—the brief discusses that rule in greater depth below.) Under the pre-screening process dictated by the statutes, county boards function "as gatekeepers"; they have "an affirmative duty" to "ensure that only those measures that actually constitute initiatives … are placed on the ballot." *State ex rel. Walker*, 144 Ohio St. 3d at 363–64. For county charters, such review usually focuses on whether the proposed charter "set[s] forth the information required under" the Ohio Constitution—for example, information pertaining to the nature and distribution of

county power. *See State ex rel. Coover*, 148 Ohio St. 3d at 334–36. For municipal ordinances, review focuses on whether the initiative proposes legislative action rather than administrative action. *State ex rel. Ebersole*, 140 Ohio St. 3d at 491.

Two other things are worth mentioning about the Initiative Authority Statutes. *First*, many of the Initiative Authority Statutes were amended a few years ago. *See* H.B. 463, 133d Gen. Assemb. (Ohio 2017). Those amendments made express the duty of boards of elections to screen county-charter and municipal-ordinance initiatives. For example, the General Assembly added the language of Ohio Revised Code §3501.11(K)(2):

> Each board of elections … shall … [e]xamine each initiative petition, or a petition filed [to amend a county charter] to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, …. The petition shall be invalid if any portion of the petition is not within the initiative power.

By and large, the amendments are best viewed as a clarification rather than a change. Even before the amendments, boards of elections were already doing the pre-screening that these laws require. *See State ex rel. Bolzenius v. Preisse*, 155 Ohio St. 3d 45, 49 (2018).

Second, as mentioned above, in addition to county charters and municipal ordinances, Ohioans also have the power to adopt or amend municipal charters by initiative. Ohio Const., art. XVIII, §§7, 9. But, the Initiative Authority Statutes do

not apply to pre-screening of municipal-charter amendments. For a short time, the Ohio Supreme Court had "confused the law" in this area by suggesting that boards of elections had authority to review proposed municipal charters. *State ex rel. Maxcy v. Saferin*, 155 Ohio St. 3d 496, 499 (2018) (discussing *State ex rel. Flak v. Betras*, 152 Ohio St. 3d 244, 247 (2017)). In 2018, however, the Ohio Supreme Court clarified that the Initiative Authority Statutes do not apply to municipal-charter proposals. *Id.* at 499–500. Thus, as it stands today, the Initiative Authority Statutes permit pre-screening *only* of proposed county charters and municipal ordinances.

3. Initiative proponents are entitled to judicial review of any adverse decision made by county boards under the Initiative Authority Statutes. This is true regardless of whether the challenged ballot-access determination relates to a county-charter initiative or a municipal-ordinance initiative.

The proponent of a county-charter initiative has two options for challenging an adverse ballot-access determination. *See State ex rel. McGinn v. Walker*, 151 Ohio St. 3d 199, 205–06 (2017) (DeWine, J., concurring in judgment only). First, the proponent can sue in a common-pleas court, where the board must justify its decision to exclude the proposed charter. Ohio Rev. Code §307.94. Alternatively, an initiative proponent may protest the county board's decision to the Secretary.

Ohio Rev. Code §307.95. If the Secretary agrees with the county board's decision, a proponent may then seek a writ of *mandamus* from the Ohio Supreme Court. *See, e.g.*, *State ex rel. Coover*, 148 Ohio St. 3d at 333. On *mandamus* review, the Supreme Court of Ohio's analysis of legal question is "essentially" *de novo*. *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019).

In the municipal-ordinance context, initiative proponents have two similar options. First, they may challenge a board's decision by seeking a writ of *mandamus*. *See, e.g.*, *State ex rel. Citizens for Responsible Green Gov't v. City of Green*, 155 Ohio St. 3d 28 (2018); *State ex rel. Norwood v. Hamilton Cnty. Bd. of Elections*, 148 Ohio St. 3d 176 (2016); *State ex rel. City of Brecksville v. Husted*, 133 Ohio St. 3d 301 (2012). That is by far the most common option. But Ohio courts have also entertained ballot-access challenges in suits brought by aggrieved plaintiffs seeking injunctions in common-pleas courts. *See, e.g.*, *Myers v. Schiering*, 27 Ohio St. 2d 11, 11–12 (1971); *Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 295 (1921).

Given these options for judicial review, Ohio courts—the Ohio Supreme Court, especially—are quite experienced in resolving ballot-access disputes concerning initiatives. In considering these disputes, the Ohio Supreme Court has recognized a "duty to liberally construe" initiative proposals "to permit the exercise of the power of initiative." *State ex rel. Citizen Action v. Hamilton Cnty. Bd. of*

Elections, 115 Ohio St. 3d 437, 445 (2007) (quotations omitted). And, consistent with this principle, initiative proponents have often succeeded in winning ballot access through *mandamus* actions. *See, e.g.*, *State ex rel. Harris v. Rubino*, 155 Ohio St. 3d 123 (2018); *State ex rel. Khumprakob v. Mahoning Cnty. Bd. of Elections*, 153 Ohio St. 3d 581 (2018); *State ex rel. Citizen Action*, 115 Ohio St. 3d 437; *State ex rel. N. Main St. Coalition v. Webb*, 106 Ohio St. 3d 437 (2005); *State ex rel. DeBrosse v. Cool*, 87 Ohio St. 3d 1 (1999). (Unlike in federal court, where *mandamus* is an extreme, rarely-sought remedy that courts almost never award, it is frequently sought and often awarded in the state system.) The Ohio Supreme Court handles these cases very quickly: under a special rule for expedited election proceedings, ballot-access disputes are often decided in mere weeks. *See* Ohio S.Ct.Pract.R. 12.08(A).

B. The District Court dismissed the plaintiffs' challenges to the Initiative Authority Statutes' constitutionality.

1. This case began early last year when the plaintiffs sued Secretary of State Frank LaRose, in his official capacity, along with members of several different boards of elections. Compl., R.1, PageID#1–62. The plaintiffs are individuals who have participated in local-initiative efforts—efforts pertaining to county charters, municipal charters, and municipal ordinances—and who say they will "continue[] to be" involved in future initiative efforts. *Id.*, PageID#4–8. The plaintiffs sought to enjoin the defendants from carrying out the pre-screening process required by

the Initiative Authority Statutes, which they claimed violates the federal and Ohio constitutions. The plaintiffs' complaint invoked four distinct constitutional theories. *First*, the plaintiffs argued that the Initiative Authority Statutes' pre-screening process violates the First Amendment by imposing a prior restraint or a content-based restriction on speech, and also by violating the Amendment's Assembly Clause in unspecified ways. *Id.*, PageID#51–56. *Second*, they argued that the statutes violated the Fourteenth Amendment under the substantive-due-process doctrine. *Id.*, PageID#56–58. *Third*, they alleged that the pre-screening process violated the Ninth Amendment by burdening the "fundamental right of local, community self-government." *Id*, PageID#58–60. *Finally*, they argued that the Initiative Authority Statutes, by allowing election officials to pre-screen initiatives, offend the Ohio Constitution's separation of judicial and executive power. *Id.*, PageID#60–61.

2. The District Court dismissed this case on the pleadings.

The court first determined that it lacked jurisdiction to consider some of the plaintiffs' claims. For example, the plaintiffs seeking to pursue municipal-charter initiatives lacked standing to challenge the Initiative Authority Statutes, since the statutes do not apply to such initiatives. Op., R.69, PageID#625–29. Further, the court held that sovereign-immunity principles prevented it from adjudicating the

question whether the Initiative Authority Statutes violate the Ohio Constitution: even assuming a violation, it explained, federal courts lack jurisdiction to enjoin state officials from violating state law. *Id.*, PageID#639–40 & n.9.

The District Court rejected the remaining claims on the merits. The First Amendment claims failed because the Initiative Authority Statutes' pre-screening process imposes neither a prior restraint nor an impermissible content-based restriction on speech. The Sixth Circuit, the court determined, had already rejected the argument that pre-screening laws like these impose prior restraints. *Schmitt*, 933 F.3d at 638. And rightly so: ballot-access rules regulate "the process by which initiative legislation is put before the electorate" and do not "directly restrict[] core expressive conduct." Op., R.69, PageID#632. *Schmitt* also defeated the plaintiffs' argument that the Initiative Authority Statutes impose an impermissible content-based restriction by allowing pre-screening of proposed initiatives. Pre-screening processes pertaining to ballot access, *Schmitt* held, must be assessed under the *Anderson-Burdick* test—a balancing test that requires courts to weigh the burdens a state law imposes on First Amendment rights against the state interests it furthers. Courts will generally defer to the States unless the burden on First Amendment interests is severe. *Id.*, PageID#632–33. On the burden side of the scale, the pre-clearance process did not severely burden the plaintiffs' First

Amendment rights, because the First Amendment does not entitle anyone to "exercise the initiative power" or "to add initiatives to the ballot that plainly exceed the scope of the initiative power." *Id.*, PageID#634. In contrast, the challenged process promoted "significant" state interests. By preventing ballots from becoming "overcrowd[ed]" with "initiatives that constitute a legal nullity," the preclearance process prevented voter confusion and promoted "voter confidence" in Ohio's election process. *Id.*, PageID#635 (quotations omitted). Because the Initiative Authority Statutes imposed a moderate-at-most burden on First Amendment rights while advancing significant state interests, the District Court held, they survived *Anderson-Burdick* scrutiny.

The District Court made short shrift of the Due Process and Ninth Amendment claims. The substantive component of the Due Process Clause, the Court explained, protects only "fundamental" rights from abridgment. *Id.*, PageID#637–38. Since there is no right (fundamental or otherwise) to pass laws by initiative, the due-process claim necessarily failed. And the Sixth Circuit had already determined that the Ninth Amendment "'does not confer substantive rights.'" *Id.*, PageID#639 (quoting *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991)). That precedent foreclosed the plaintiffs' argument that the Ninth Amendment confers a right to legislate by initiative.

After the District Court dismissed the Secretary (along with other defendants who had initially moved for judgment on the pleadings), the remaining defendants moved for judgment on the pleadings. The District Court dismissed the plaintiffs' claims against the other defendants for the same reasons just discussed. Op., R.87, PageID#1060–76; Order, R.77, PageID#916–27.

The plaintiffs timely appealed.

SUMMARY OF ARGUMENT

The plaintiffs seek to enjoin the defendants from enforcing the Initiative Authority Statutes. The plaintiffs argue that these statutes, by allowing election officials to pre-screen initiatives for ballot eligibility, violate the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Ninth Amendment, and state law. The District Court correctly rejected each argument.

I. The Initiative Authority Statutes do not violate the First Amendment. This follows for two reasons. The first, which is the subject of a concurrently filed petition for initial *en banc* review, is that laws governing the ballot eligibility of initiatives do not implicate the First Amendment *at all*. The second is that the Initiative Authority Statutes satisfy the First Amendment even under now-binding circuit precedent that subjects ballot-eligibility laws to First Amendment scrutiny.

A. The First Amendment guarantees a right to free speech—a right that includes the right to speak about initiatives. But it confers no "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). And it confers no right to an initiative process at all. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *accord Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018) (compiling authority). These principles give rise to a distinction between laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum," which implicate the First Amendment, and laws "that determine the process by which legislation is enacted, which do not." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (*en banc*). The Tenth and D.C. Circuits have correctly held that laws regulating the initiative process do not implicate the First Amendment at all. *Id.*; *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002). Laws regulating the ballot-eligibility of initiatives—for example, laws granting ballot access *only* to those initiatives that satisfy certain prerequisites or that purport to take specific types of action—regulate the process by which legislation is enacted. And such laws, because they regulate the legislative process rather than speech, do not implicate the First Amendment at all. Because the Initiative Authority Statutes regulate the process

for making law, and impose no restrictions on speech itself, they do not even implicate the First Amendment.

While circuit precedent forecloses this approach, the *en banc* Court should overrule that precedent, as the Secretary argues in his petition for initial *en banc* review. In so doing, the Court would side with the Tenth and D.C. Circuits. And it would heed calls from four Supreme Court Justices, Judge Bush, and a unanimous Sixth Circuit panel, all of whom have suggested that the cases applying First Amendment scrutiny to these laws are either wrong or worthy of reconsideration. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., joined by Justices Alito, Gorsuch, and Kavanaugh, concurring in the grant of stay); *Schmitt v. LaRose*, 933 F.3d 628, 648–50 (6th Cir. 2019) (Bush, J., concurring in part and in the judgment); *Thompson v. DeWine*, — F.3d —, 2020 U.S. App. LEXIS 30651, at *5–6 n.4 (6th Cir. Sept. 16, 2020) (*per curiam*).

B. Even under now-binding circuit precedent, the Initiative Authority Statutes survive constitutional scrutiny. This Court's cases review laws regulating the ballot eligibility of initiatives under the *Anderson-Burdick* test. *See Schmitt*, 933 F.3d at 639–42; *Thompson*, 2020 U.S. App. LEXIS 30651, at *5–6 n.4. That test requires balancing the burdens a law imposes on First Amendment rights against the state interests it serves. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v.*

Celebrezze, 460 U.S. 780, 789 (1983). The test operates on a sliding scale. Laws that impose severe burdens—that is, laws that make it actually or virtually impossible to exercise the First Amendment right at issue—receive strict scrutiny. *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016); *Thompson*, 2020 U.S. App. LEXIS at *8–10. In contrast, laws that "impose lesser burdens" receive deference, and the State's important interests in regulating elections will usually carry the day. *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005).

Any burden on First Amendment rights imposed by the Initiative Authority Statutes is moderate at most. Because neither the First Amendment nor anything else in the Constitution requires States to permit initiatives at all, *Taxpayers United for Assessment Cuts*, 994 F.2d at 295, there is no First Amendment right to ballot access. Thus, the question for *Anderson-Burdick* purposes is not whether the Initiative Authority Statutes keep some initiatives off the ballot—every ballot-access law does that. The relevant question is instead whether the Initiative Authority Statutes impose a severe burden in their application to *valid* initiatives—in other words, initiatives that state law allows. They impose no such burden. *Anyone* may say or write *anything* about initiatives without even implicating the Initiative Authority Statutes. And the Initiative Authority Statutes do not actually or virtually exclude any valid initiatives from the ballot: anyone aggrieved by an adverse ballot-

access determination may demand immediate judicial review in the State's highest and most authoritative tribunal. *See Schmitt*, 933 F.3d at 640.

While the Initiative Authority Statutes impose at-most-moderate burdens on First Amendment rights, they promote three compelling government interests. *Schmitt*, 933 F.3d at 641–42. *First*, ballot-access laws prevent ballot overcrowding and thereby promote informed participation in the political process. "Limiting the number of" initiatives improves the likelihood that viable proposals "will receive enough attention, from enough voters, to promote a well-considered outcome." *Jones*, 892 F.3d at 938; *see also Schmitt*, 933 F.3d at 641. *Second*, ballot-access laws preserve confidence in the State's election process, which would wither if citizens were often asked to vote on initiatives that were "later held invalid on the ground that voters exceeded their authority" when they voted to enact them. *Schmitt*, 933 F.3d at 641 (quotations omitted). *Third*, and relatedly, the Initiative Authority Statutes prevent the confusion that would result from allowing voters to enact initiatives—binding laws—that are beyond the People's power to enact. The State has an obvious interest in doing what it can to prevent anyone from forming reliance interests on laws that are destined to be quickly struck down if enacted.

Because the Initiative Authority Statutes advance these important interests without meaningfully burdening First Amendment rights, they survive *Anderson-Burdick* scrutiny.

II. The Initiative Authority Statutes do not violate the Fourteenth Amendment. The Fourteenth Amendment prohibits States from depriving "any person of life, liberty, or property, without due process of law." U.S. Const., Am. 14. The Supreme Court has held that this includes protection "against government interference with certain fundamental rights and liberty interests." *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997). Fundamental rights, however, include only those rights that are, "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (quotations and citations omitted). There is no fundamental right to ballot access for initiatives. Nor is there a right to local self-government that includes a right to legislate by initiative. To the contrary, the Supreme Court has long held that, as far as federal law is concerned, local governments remain subject to the control of their creating States. *See, e.g.*, *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *Mt. Pleasant v. Beckwith*, 100 U.S. 514, 524 (1880).

III. For similar reasons, the plaintiffs fail to state any claim under the Ninth Amendment. The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., Am. 9. As its text reflects, the Ninth Amendment does not "confer substantive rights," but is instead a principle of construction; it forbids inferring from the express enumeration of some rights that Congress has authority to pass any laws not infringing those rights. *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991). Because the plaintiffs' claim rests on the Ninth Amendment as *the source* of a right to local self-government, their claim fails.

IV. Finally, the District Court correctly held that it lacked jurisdiction over the plaintiffs' claim invoking separation of powers under the Ohio Constitution. The plaintiffs bring this claim against the Secretary in his official capacity. Compl., R.1, PageID#8–9, 60–61. Sovereign immunity bars official-capacity claims against state officials under state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984); *accord Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520–21 (6th Cir. 2007).

STANDARD OF REVIEW

For the most part, this appeal addresses the District Court's dismissal of federal claims under Rule 12(b)(6). This Court reviews such dismissals *de novo*.

Boxill v. O'Grady, 935 F.3d 510, 517 (6th Cir. 2019). Claims survive a motion to dismiss under Rule 12(b)(6) "only if they 'contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

This Court also reviews *de novo* the District Court's dismissal of the plaintiffs' state-law claim under Rule 12(b)(1). *CIC Servs., LLC v. IRS*, 925 F.3d 247, 250 (6th Cir. 2019). When, as here, a defendant challenges jurisdiction on the face of the complaint, this Court "accept[s] all material allegations in the complaint as true and construe[s] the complaint in the light most favorable to the nonmoving party." *Id.*

ARGUMENT

"When a party comes" to the Sixth Circuit "with nine grounds for reversing the district court, that usually means there are none." *Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012). So it is here. The plaintiffs' brief presents nine questions relating to four different legal theories, all of which challenge the constitutionality of the Initiative Authority Statutes. The District Court correctly rejected the plaintiffs' arguments and this Court should affirm.

I. The Initiative Authority Statutes do not violate the First Amendment.

The plaintiffs argue that the Initiative Authority Statutes, by allowing the pre-screening of proposed county-charter and municipal initiatives, violate the First Amendment. That claim fails for two reasons, which this brief will explore in order.

First, the statutes do not implicate the First Amendment at all. While binding precedent subjects the Initiative Authority Statutes to First Amendment scrutiny under the *Anderson-Burdick* test, the *en banc* Court should overrule that precedent. In a concurrent filing, the Secretary seeks initial *en banc* review to enable the Court to address the issue immediately. This section begins by laying out the theory that the Secretary urges the *en banc* Court to adopt.

Second, even if this Court declines to revisit its precedent, the Initiative Authority Statutes survive *Anderson-Burdick* review. Indeed, this Court already rejected an *Anderson-Burdick* challenge to some of the same statutes in *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019). There are no material differences between that case and this one.

A. If this Court grants initial *en banc* review, it should hold that laws regulating ballot access for state initiatives do not implicate the First Amendment.

1. The First Amendment's Free Speech Clause prohibits laws "abridging the freedom of speech." U.S. Const., Am. 1. But the First Amendment confers no positive "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). And the First Amendment makes no promise that States will even have an initiative process. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018). Rather, it is "up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring).

To be sure, States that adopt an initiative process must run it without violating rights the Constitution *does* guarantee. For instance, under the First Amendment's Free Speech Clause, States that choose to have an initiative process cannot abridge speech relating to the process. Applying that principle, the Supreme Court invalidated a Colorado law that criminalized the payment of petition circulators. *Meyer v. Grant*, 486 U.S. 414 (1988). A law like that, the Court held, regulated "interactive communication" between petition circulators and potential signatories—

it regulated *who* could communicate about an initiative. *Id.* at 421–22. That holding makes sense because "freedom of speech," U.S. Const., Am. 1, "undoubtedly" includes the freedom to engage in political speech in the initiative context, "just as it" includes the freedom to engage in "speech intended to influence other political decisions," *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (*en banc*). It follows that laws "restrict[ing] the communicative conduct of persons advocating a position" on an initiative—for example, laws regulating *who* may advocate for an initiative's passage—implicate the Free Speech Clause. *Id.* at 1100; *see, e.g.*, *Meyer*, 486 U.S. at 415–16; *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 187 (1999).

Although the "freedom of speech" includes the right to communicate during an initiative campaign or circulation drive, it does not include the freedom to ignore rules governing the mechanics of the initiative process. This flows from the fact that the initiative power is a legislative power; the "'power of direct legislation by the electorate.'" *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) (quoting *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections*, 441 A.2d 889, 897 (D.C. 1981) (*en banc*)). The nature of the power means that the People act as legislators when they make law by initiative. The First Amendment does not confer on legislators (or anyone else) a "right to use

governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127; *see also Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283–84 (1984).

Putting all this together, courts must distinguish between laws "that regulate or restrict the communicative conduct of persons advocating a position in a referendum," which implicate the First Amendment, and laws "that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1100. Laws within the latter category limit legislative power, not expression, and therefore do not implicate the First Amendment. Thus, while the First Amendment applies to state laws restricting what initiative proponents may say, it does not apply to laws that govern the process by which initiatives gain ballot access and become law.

2. Decisions from several circuits support this distinction. The D.C. Circuit's decision in *Marijuana Policy Project* and the *en banc* Tenth Circuit's decision in *Walker* are particularly illustrative.

In *Marijuana Policy Project*, the D.C. Circuit held that "the First Amendment imposes no restriction on the withdrawal of subject matters from the initiative process." 304 F.3d at 86. The case involved a federal law prohibiting the District of Columbia from passing any law, by initiative or otherwise, that reduced penalties for drug-related crimes. *Id.* at 83. In upholding the prohibition, the D.C. Circuit

stressed the difference between ballot access and speech surrounding a ballot issue. The court noted that the initiative process is "'a power of direct legislation by the electorate.'" *Id.* at 85 (quoting *Convention Ctr. Referendum Comm.*, 441 A.2d at 897). While "the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.* Because the challenged law "silence[d] no one," but instead just stopped them from legislating, it had no impact on the plaintiffs' First Amendment rights. *Id.* at 86.

The *en banc* Tenth Circuit drew the same line in *Walker*. That case involved a First Amendment challenge to a provision in Utah's constitution that required a supermajority for all initiatives involving wildlife-management issues. 450 F.3d at 1086, 1099. The Tenth Circuit held that the supermajority requirement did not implicate the First Amendment at all because it did not "regulate or restrict the communicative conduct of persons advocating a position" on issues being put to a vote; it merely set forth "the process by which legislation is enacted." *Id.* at 1099–1100.

Decisions from other courts are in accord. *See, e.g.*, *Miller v. Thurston*, 967 F.3d 727, 737–38 (8th Cir. 2020); *Morgan v. White*, 964 F.3d 649, 652 (7th Cir. 2020) (*per curiam*); *Jones*, 892 F.3d at 937–38; *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d. Cir. 2009); *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997); *Pony*

Lake Sch. Dist. 30 v. State Comm. for the Reorganization of Sch. Dists., 271 Neb. 173, 191 (Neb. 2006); *Port of Tacoma v. Save Tacoma Water*, 422 P.3d 917, 924–25 (Wash. Ct. App. 2018). Consider especially the Second Circuit's decision in *Molinari*. That case addressed whether New York City's City Council could repeal a local law passed by popular referendum. *Molinari,* 564 F.3d at 595. The Second Circuit held that the legality of such repeals did not implicate the First Amendment. *Id.* at 596. Relying on *Walker*, it explained that "First Amendment rights are not implicated by referendum schemes *per se* … but by the regulation of advocacy within the referenda process." *Id.* at 602. New York City's ability to repeal laws passed by initiative did not restrict referenda proponents "from engaging in First Amendment activity," so the proponent's First Amendment challenge failed. *Id.* at 599.

3. True enough, not all courts have recognized the distinction between laws regulating communicative conduct about initiatives and laws that simply regulate the initiative process. *See, e.g.*, *Comm. to Impose Term Limits on the Ohio Sup. Ct. v. Ohio Ballot Bd.*, 885 F.3d 443, 448 (6th Cir. 2018); *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2011)*; Wirzburger v. Galvin*, 412 F.3d 271, 278 (1st Cir. 2005). But the weakness of their arguments *for* applying the Free Speech Clause to laws

governing the mechanics of the initiative process bolsters the argument *against* the Clause's application.

The first sign of weakness is that most of the courts that analyze these laws under the Free Speech Clause simply assume the Clause applies or provide only cursory reasoning. *See, e.g.*, *Wirzburger*, 412 F.3d at 275, 279; *Schmitt*, 933 F.3d at 639. When courts do attempt to justify the First Amendment's application, the results are unsatisfying. Courts that apply the First Amendment in this context absolutely must have an answer to the following question: When a State regulates the process by which voter initiatives become law, how is it "abridging the freedom of speech"? Most courts do not even try to answer this question. The only one that has—the Ninth Circuit—offered a very-unsatisfying explanation. In *Angle*, the court suggested that ballot-access laws, in their application to initiatives, "indirectly impact core political speech" because they decrease the odds that the law in question will become "the focus of statewide discussion." 673 F.3d at 1133 (quotations omitted). That, however, proves too much. *All* limits on the legislative power, including Article I's limits on congressional power, "indirectly impact core political speech" by making it less likely that issues beyond the legislative power become "the focus of [widespread] discussion." *Id.* Thus, accepting this logic "would call into question all subject matter restrictions on what Congress or state

legislatures may legislate about." *Schmitt*, 933 F.3d at 649 n.3 (Bush, J., concurring in part and in the judgment) (quotations omitted).

In addition to their inability to explain *why* the First Amendment applies in this context, courts have yet to identify any good test for analyzing alleged violations. For example, this Court and the Ninth Circuit have applied the *Anderson-Burdick* test. But the *Anderson-Burdick* test is a poor fit in the initiative context, for both conceptual and practical reasons.

Start with the conceptual problems. The Supreme Court developed the *Anderson-Burdick* test to address a tension that does not arise in the initiative context. The tension is this: On the one hand, the States have an obligation "to regulate their own 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.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). On the other hand, the right to vote is fundamental, and *every* election law "will invariably impose some burden upon individual voters." *Id.* After all, every "provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others

for political ends.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). To resolve this inherent tension between state authority over election procedure and the fundamental right to vote, the Supreme Court adopted the "flexible" *Anderson-Burdick* test. *Id.* at 433–34. This flexible test ensures that States have latitude to structure elections while simultaneously ensuring judicial oversight to guard against the unjustified diminution of voting and associational rights. *Id.*; *accord Ohio Democratic Party v. Husted*, 834 F.3d 620, 626–27 (6th Cir. 2016).

The need for so "flexible" a test collapses in cases, like this one, where there is no constitutional tension to resolve. Again, this Court and others agree that individuals have no constitutional right to legislate through direct democracy. *Taxpayers United*, 994 F.2d at 295; *Jones*, 892 F.3d at 937. Thus, state laws that limit the initiative power are not in tension with the fundamental right to vote, and there is no need for a "flexible" balancing test that empowers federal courts to oversee the exercise of state authority.

Now consider the practical problems. The *Anderson-Burdick* test requires courts to "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which

those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The immediate problem with applying this test in the initiative context stems from the already-discussed fact that no one can explain how laws regulating the mechanics of the initiative process "injur[e] … the rights protected by the First … Amendment[]." *Burdick*, 504 U.S. at 434. Without a definable injury, the test makes no sense: asking whether an impossible-to-identify injury outweighs government interests is rather like asking "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

There is also an additional, more serious problem. *Anderson-Burdick* "is a dangerous tool." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment). It is a "quintessential balancing test," and one that "does little to define the key concepts a court must balance." *Id.* (quotations omitted). Thus, "*Anderson-Burdick* leaves much to a judge's subjective determination." *Id.* As the Seventh Circuit recently noted, lower courts too often apply *Anderson-Burdick* as though it empowers "the judiciary to decide whether any given election law is necessary." *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). That approach "allows a political question—whether a rule is beneficial, on

balance—to be treated as a constitutional question and resolved by the courts rather than by legislators." *Id.* *Anderson-Burdick* has had just such an effect in this Circuit, as the many decisions reversing or staying *Anderson-Burdick*-inspired rulings suggest. *See, e.g.*, *Mays v. LaRose*, 951 F.3d 775, 791 (6th Cir. 2020) (reversing district court); *Ohio Democratic Party*, 834 F.3d at 634 (same); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625 (6th Cir. 2016) (same); *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988, 989 (2014) (stay pending certiorari); *SEIU Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (stay pending appeal).

The type of discretion that *Anderson-Burdick* affords may be necessary, and thus acceptable, when used to maintain an appropriate balance between state authority over voting laws and the fundamental right to vote. But it is unnecessary, and thus unacceptable, when used to decide what the initiative process within a given State should look like. Courts "are ill-suited to determine whether or not a state advances an important governmental interest" in the structuring of the State's legislative power. *Schmitt*, 933 F.3d at 648–49 (Bush, J., concurring in part and in the judgment). Indeed, courts should be especially deferential with respect to the questions of whether and how the People may wield the legislative power directly. Few issues more clearly bear on state sovereignty than the States' processes for making law.

Combing the circuits, one other potential test exists, though that test is just as bad as *Anderson-Burdick*. In *Wirzburger*, 412 F.3d 271, the First Circuit, with minimal explanation, applied the intermediate-scrutiny test from *United States v. O'Brien*, 391 U.S. 367 (1968). Like *Anderson-Burdick*, the *O'Brien* test makes little sense in its application to the initiative context. The *O'Brien* test is designed to protect expressive conduct. It permits the States to regulate "conduct combining 'speech' and 'non-speech' elements" only if "four requirements are met: (1) the regulation 'is within the constitutional power of the Government;' (2) 'it furthers an important or substantial government interest;' (3) 'the governmental interest is unrelated to the suppression of free expression;' and (4) 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Wirzburger*, 412 F.3d at 279 (quoting *O'Brien*, 391 U.S. at 377). The test does not apply to the initiative context because the question of whether an initiative qualifies for ballot access does not involve "conduct combining 'speech' and 'non-speech' elements." *Id.* Indeed, ballot-access regulations do not regulate conduct or speech at all; they regulate the State's lawmaking apparatus, and they leave initiative proponents free to do or say whatever they want.

In sum, no one has identified a test that can be coherently applied to adjudicate the question whether a state law regulating ballot access in the initiative context violates the First Amendment.

4. At bottom, the Tenth and D.C. Circuits get the better of the debate. There is no First Amendment right to an initiative process. *Jones*, 892 F.3d at 937 (compiling authority). The right to free speech does not include the "right to use governmental mechanics," such as state initiative processes, "to convey a message." *Carrigan*, 564 U.S. at 127. That leads to a distinction between laws "that regulate or restrict the communicative conduct of persons advocating a position," to which the First Amendment applies, and laws "that determine the process by which legislation is enacted," to which it does not apply. *Walker*, 450 F.3d at 1099–1100.

Accepting that distinction, the Initiative Authority Statutes are immune from First Amendment scrutiny. These laws do not stop the plaintiffs, or any other initiative proponent, from communicating their positions. They simply govern the process by which legislative proposals, via initiative, gain ballot access. As a result, they do not trigger scrutiny under the First Amendment.

B. The Initiative Authority Statutes are constitutional under *Anderson-Burdick*, as this Court held in *Schmitt*.

If this Court continues to apply *Anderson-Burdick* to laws regulating the mechanics of state initiative processes, the Initiative Authority Statutes satisfy that test. This Court already explained why in *Schmitt*. 933 F.3d at 639–42.

1. Again, the *Anderson-Burdick* test is a "flexible standard." *Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 789. As mentioned above, the test requires courts to balance voting burdens against state interests. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). It operates on a sliding scale. Laws that impose "severe" burdens receive strict scrutiny. *Id.* On the other extreme, minimally burdensome laws receive "a less-searching examination closer to rational basis." *Ohio Council 8 Am. Fed'n of State, Cnty. & Mun. Emps. v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016). Finally, "[r]egulations that fall in the middle warrant a flexible analysis that weighs the state's interests and chosen means of pursuing them against the burden of the restriction." *Schmitt*, 933 F.3d at 639 (quotations omitted).

For purposes of this case, it is important to keep in mind two important points about the *Anderson-Burdick* test. First, a law does not impose a "severe" burden unless it makes the exercise of a protected First or Fourteenth Amendment right actually or practically impossible. In this Court's words: "'The hallmark of a

severe burden is *exclusion or virtual exclusion* from'" the exercise of a protected right. *Schmitt*, 933 F.3d at 639 (emphasis added) (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)); *accord Thompson v. Dewine*, — F.3d —, 2020 U.S. App. LEXIS 30651, at *8 (6th Cir. Sept. 16, 2020). The second important point to keep in mind is that *all* less-than-severely-burdensome laws receive considerable deference. For such laws, the *Anderson-Burdick* test presumes that the State's important interests in regulating elections will "usually be enough to justify reasonable, nondiscriminatory restrictions." *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005) (quotations omitted); *accord Thompson*, — F.3d —, 2020 U.S. App. LEXIS 30651, at *11–13; *Kishore v. Whitmer*, 972 F.3d 745, 750 (6th Cir. 2020); *Hawkins v. DeWine*, 968 F.3d 603, 607 (6th Cir. 2020); *Mays*, 951 F.3d at 784–90. This should be especially so in the initiative context, where "States enjoy 'considerable leeway' to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access." *Doe*, 561 U.S. at 212 (Sotomayor, J., concurring) (quoting *Buckley*, 525 U.S. at 191).

2. Applying these principles here, the Initiative Authority Statutes pass constitutional muster.

Burden. The statutes impose at-most-moderate burdens on First Amendment rights. *Schmitt*, 933 F.3d at 639–41.

To start, it is worth repeating that there is no First Amendment right to an initiative process. *Taxpayers United for Assessment Cuts*, 994 F.2d at 295. Thus, the question in any *Anderson-Burdick* case challenging ballot-access laws as they pertain to initiatives is not whether they will keep *some* initiatives from gaining ballot access—by definition, all ballot-access laws do that. Instead, the relevant question is whether the challenged law will exclude or virtually exclude from the ballot those initiatives that are within the initiative power conferred by state law. Here, that means asking whether the Initiative Authority Statutes will make it actually or practically impossible to qualify county-charter or municipal initiatives for the ballot. They will not. The Initiative Authority Statutes permit county boards to exclude only *ineligible* initiatives, and their determinations are subject to judicial review in the Supreme Court of Ohio, where the standard of review is essentially *de novo*. *Schmitt*, 933 F.3d at 639–40. Thus, the odds that an eligible initiative will be excluded from the ballot are slim to none.

The fact that Ohio excludes *ineligible* initiatives from the ballot does not transform the Initiative Authority Statutes into a severe burden on First Amendment rights. Again, citizens have no First Amendment right to legislate by initiative. *Taxpayers United for Assessment Cuts*, 994 F.2d at 295. And so, as this Court recognized in *Schmitt*, ballot-access rules governing "the process by which initia-

tive legislation is put before the electorate" result in, "at most, a second-order effect on protected speech." *Schmitt*, 933 F.3d at 638. Instead of *directly* regulating First Amendment conduct, rules limiting what issues may go on the ballot have at most an indirect effect on speech, as they decrease the odds that initiatives denied ballot access will become "the focus of statewide discussion." *Angle*, 673 F.3d at 1133 (quotations omitted). But these indirect effects do not constitute a "severe" burden, because the ballot-access laws here do not actually or practically exclude anyone from exercising the First Amendment right to speak about anything. While it might be unproductive to speak about initiatives that fail to qualify for ballot access, it would not be impossible or even difficult. And again, Ohio allows judicial review of ballot-access determinations, all but eliminating the risk that an issue will be *wrongfully* kept off the ballot and thus all but eliminating the risk that any indirect effects on speech will wrongfully occur.

Because the Initiative Authority Statutes do not make it impossible to qualify initiatives within the scope of Ohio's initiative power for ballot access, they impose an at-most-moderate burden on First Amendment rights.

State interests. That less-than-severe burden must be balanced against the State's justifications. And again, if those justifications are reasonable, they are presumably enough to carry the day under *Anderson-Burdick*. *See Clingman*, 544 U.S.

at 586–87. The Initiative Authority Statutes are more than reasonable; they advance important state interests.

"Ballots serve primarily to elect candidates" and pass initiatives, "not as fora for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Including legally invalid initiatives on the ballot—initiatives that would later be invalidated in court—would not serve that purpose. And it would critically undermine other important state interests. Consider first the State's "substantial" interest in "avoid[ing] overcrowded ballots." *Schmitt*, 933 F.3d at 641 (quotations omitted). This substantial interest arises not out of a concern with aesthetics, but rather out of a concern over voter confusion and fatigue. States have "a strong interest in simplifying the ballot"—in avoiding clutter—because simplicity encourages political participation. *Jones*, 892 F.3d at 938. "Limiting the number of" initiatives improves the likelihood that viable proposals "will receive enough attention, from enough voters, to promote a well-considered outcome." *Id.* Said differently, Ohio's interest in avoiding overcrowded ballots is strong to begin with. And it grows even stronger when a proposed initiative is invalid: including those initiatives on the ballot would impose the costs associated with clutter without the benefits associated with a potentially valid measure. *Schmitt*, 933 F.3d at 635.

The exclusion of ineligible initiatives also promotes the State's important interest in preserving "voter confidence in the electoral process." *Id.* at 641. Voters will not think much of a process that encourages them to vote on initiatives "later held invalid on the ground" that they exceeded the scope of the People's initiative power. *Id.* This dovetails with the State's related interest in avoiding confusion as to what the law is. "Perhaps the most basic of due process's customary protections is the demand of fair notice." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring). And basic fairness, along with any sound understanding of the rule of law, demands that States do all they can to ensure that laws are written and enacted in a manner that provides clear rules around which citizens may organize their conduct. The State promotes this rule-of-law interest by screening out initiatives that the People have no power to enact: doing so lessens the risk that citizens will organize their affairs around laws doomed to be overruled.

Balancing. These interests—avoiding ballot overcrowding, encouraging confidence in the election process, and avoiding confusion as to what the law is—are the product of common sense; they do not require States to make any "particularized showing" of proof before taking protective action. *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986). And they more than justify the minimal-to-moderate burden that Ohio's Initiative Authority Statutes impose on First

Amendment rights. Indeed, it is hard to see how the State could advance these critically important interests at all without some sort of pre-clearance mechanism for ballot access, and no one has suggested a way to run a pre-clearance process that would impose materially lesser burdens on First Amendment activity than the Initiative Authority Statutes do. Especially given the ease with which ballot-initiative proponents may seek speedy review of adverse decisions in Ohio's highest court, the odds that *any* ballot initiative will be wrongfully denied a place on the ballot are exceedingly low. Given the important state interests and the small risk of injury to First Amendment rights, the laws pass *Anderson-Burdick* scrutiny.

C. The plaintiffs' contrary arguments do not save their First Amendment claims.

The plaintiffs advance two First Amendment arguments: a prior-restraint argument and an *Anderson-Burdick* argument. *See* Beiersdorfer Br.14–32. Both fail. Before addressing why, it makes sense to initially address the relationship between this case and the Court's published decision last year in *Schmitt*. *See* 933 F.3d 628. At some points, the plaintiffs seem to recognize that *Schmitt* stands in their way. They say, for example, that *Schmitt* made a "controversial determination" as to the First Amendment's meaning that this Court should "reinterpret[]." Beiersdorfer Br.vii. At another point, however, they say that their constitutional challenges present "an issue of first impression in this Circuit," making no mention of *Schmitt*.

Id. at 11. That characterization understates the scope of *Schmitt*. The plaintiffs there brought "facial and as-applied [First Amendment] challenges to the Ohio ballot-initiative statute," including some of the Initiative Authority Statutes. 933 F.3d at 635–36; *see also id.* at 635 (discussing Ohio Rev. Code §§3501.11(K) and 3501.38(M)(1)). To resolve those challenges, the Court directly addressed and rejected the argument that Ohio's "ballot initiative statutes" impose "a prior restraint on political speech." *Id.* at 637. And the Court upheld Ohio's pre-screening process under *Anderson-Burdick* review. *Id.* at 641–42. Those holdings are binding here, *see* 6th Cir. R. 32.1(b), unless the full Court reviews this case. Regardless, the plaintiffs' arguments fail on their own terms.

Prior restraint. The plaintiffs are wrong to suggest that the Initiative Authority Statutes impose a prior restraint on speech. *See* Beiersdorfer Br.27–32. The "core abuse" that inspired the First Amendment's ratification were the licensing laws that arose in England during the 16th and 17th centuries—laws that required government pre-approval before the publishing of books or pamphlets. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002). The First Amendment forbids such "prior restraints" in nearly all circumstances. The government may require speakers to pre-clear their speech with the government *only if* the government provides adequate "procedural safeguards" that ensure speedy judicial review.

Freedman v. Maryland, 380 U.S. 51, 58–60 (1965). The State has somewhat more latitude for content-neutral licensing schemes than it does when it sets a "licensing standard which gives an official authority to censor the content of … speech." *Thomas,* 534 U.S. at 322–23 (internal quotation marks omitted).

The Initiative Authority Statutes are not prior restraints because they do not require pre-clearance of any speech at all. True, the Initiative Authority Statues require government approval for ballot access. But that is not a prior restraint on speech for the simple reason that initiatives are proposed laws, not protected "speech." Individuals of course engage in protected speech when they speak or write about proposed initiatives. But initiatives and candidate names placed on a ballot and put to a vote are not private speech, they are proposed public laws included on a government-issued ballot. The "ballot" is not "a public forum that must be opened to referenda"; it is a tool for electing candidates and passing initiatives. *Jones*, 892 F.3d at 937. Indeed, the Supreme Court has "rejected the notion that the First Amendment confers a right to use government mechanics to convey a message." *Carrigan*, 564 U.S. at 127 (citing *Timmons*, 520 U.S. at 362–63); *accord Ohio Council 8*, 814 F.3d at 336. Because the Initiative Authority Statues do not require citizens to obtain government approval before engaging in speech, they do not impose a prior restraint.

This Court's analysis in *Schmitt* drives home this conclusion. There, the Court rejected the argument that various Ohio ballot-access laws—including some of the Initiative Authority Statutes—constituted a prior restraint. 933 F.3d at 637–38. *Schmitt* reasoned that prior restraints are government actions, typically in the form of licensing laws, that require pre-clearance of "core expressive conduct." *Id.* at 638. But "Ohio's ballot-initiative laws … do not directly restrict core expressive conduct; rather, the laws regulate the process by which initiative legislation is put before the electorate." *Id.* "Regulations like these are 'a step removed from the communicative aspect' of core political speech, and therefore do not involve the same risk of censorship inherent in prior-restraint cases." *Id.* (quoting *Doe*, 561 U.S. at 212 (Sotomayor, J., concurring)).

The plaintiffs insist that the prior-restraint doctrine creates a "bright-line rule" against any pre-approval scheme for ballot initiatives. Beiersdorfer Br.30. They offer nothing, however, to justify this rule. They do not, for example, point to binding authority equating regulation of initiatives to a prior restraint. And while the plaintiffs highlight minor factual distinctions between this case and *Schmitt*, they never explain why those distinctions make a legal difference. What is more, they fail to grapple with the fact that their rule would require invalidating laws regulating the initiative processes in States across the Union. That the rule they

demand would so unsettle American election law is a good sign that their rule, not the law, is flawed. *See Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 539 (7th Cir. 2019).

Anderson-Burdick. The plaintiffs fare no better under the *Anderson-Burdick* framework. They insist that the Initiative Authority Statutes impose a severe burden and should therefore be strictly scrutinized. Beiersdorfer Br.14. In arguing for a severe burden, they seize on the rule that a "severe" burden, in the ballot-access context, is one that results in the "exclusion or virtual exclusion" from the ballot. *Grimes*, 835 F.3d at 574. The plaintiffs say that, since some initiatives have been screened out on eligibility grounds, some initiatives are excluded from the ballot and thus the burden here is severe. *See* Beiersdorf Br.14–15.

This argument fails for the reason explained above. The question is not whether the ballot-access laws will exclude *some* proposed initiatives—all ballot access rules exclude non-qualifying initiatives. The question, instead, is whether the Initiative Authority Statutes exclude or virtually exclude from the ballot initiatives that are within the scope of Ohio's initiative power. They do not. *See above* 38–39.

The plaintiffs also contend that the Initiative Authority Statutes fail intermediate scrutiny under *Anderson-Burdick*. Beiersdorfer Br.24–27. Their argument suffers from two major flaws. The first is that the plaintiffs misunderstand the *Anderson-Burdick* test. The test's flexible middle tier of scrutiny does not require that

a law be "narrowly tailored" to state interests. Beiersdorfer Br.25. Instead, even at its intermediate level, the *Anderson-Burdick* test presumes that reasonable regulations will survive because of the "important regulatory interests" the State has in conducting elections. *See Clingman*, 544 U.S. at 586–87 (quotations omitted). Thus, even more onerous regulations will survive intermediate scrutiny if they advance important government interests, as the laws here do. *See Mays*, 951 F.3d at 784–90. That raises the second problem. The plaintiffs offer no discussion of the State's well-established interests in avoiding overcrowded and overly complex ballots. *Compare above* 40–41; *with* Beiersdorfer Br.25. In other words, they attempt to show that the burden on First Amendment rights outweighs the State's interests by leaving the State's interests off the scale.

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Before concluding the First Amendment discussion, it is important to make three points clear.

First, the plaintiffs spend much time discussing their supposed right under Ohio law to be free from pre-election review of initiative proposals. *See* Beiersdorfer Br.16–19. The plaintiffs are getting Ohio law only partially correct. They are correct that boards of elections do not have a freewheeling ability to gauge the legality of proposed initiatives. *State ex rel. City of Youngstown v. Mahoning Cnty. Bd. of*

Elections, 144 Ohio St. 3d 239, 241 (2015). But the Ohio Supreme Court has approved of the boards' authority to perform a gatekeeping function under the Initiative Authority Statutes. *E.g.*, *State ex rel. Coover v. Husted*, 148 Ohio St. 3d 332, 334–36 (2016); *State ex rel. Ebersole v. Del. Cnty. Bd. of Elections*, 140 Ohio St. 3d 487, 491–94 (2014). And, thus far, the Ohio Supreme Court has not needed to address the question whether the 2017 amendments to the Initiative Authority Statutes violate the separation of powers under Ohio law. *See State ex rel. Bolzenius v. Preisse*, 155 Ohio St. 3d 45, 49 (2018). In any event, the plaintiffs fail to connect any purported right under Ohio law to their rights under the First Amendment. If boards of elections are violating Ohio law by reviewing initiative proposals, then the plaintiff can seek relief from the Ohio Supreme Court in *mandamus*. This Court need not be involved.

Second, a few times in passing, the plaintiffs note that they attempted a claim below arising under the First Amendment's Assembly Clause. *See* Beiersdorfer Br.3, 13. The plaintiffs do not develop any separate argument on that ground and have therefore forfeited any such claim. Regardless, the Supreme Court has held that "intertwined" First Amendment challenges that "arise in exactly the same context" trigger comparable review. *See Christian Legal Soc'y Chapter of the Univ.*

of Cal. v. Martinez, 561 U.S. 661, 680–81 (2010). Accordingly, any additional First Amendment claims fail for the reasons already outlined.

Finally, throughout this case, the plaintiffs have challenged the constitutionality of the pre-screening process required by the Initiative Authority Statues, *not* the substantive limits—such as the requirement that municipal initiatives take "legislative action"—that Ohio law imposes on the initiative process. To the extent the plaintiffs argue that these limitations are themselves content-based restrictions on speech, their argument fails. Again, because initiatives are not themselves speech, "States enjoy 'considerable leeway' to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access." *Doe*, 561 U.S. at 212 (Sotomayor, J., concurring) (quoting *Buckley*, 525 U.S. at 191). To hold otherwise would require subjecting to First Amendment scrutiny *all* limitations on the legislative process, including the Article I limits on Congress's power and limitations on legislative power imposed by state constitutions.

II. The Initiative Authority Statutes do not violate the Fourteenth Amendment.

The plaintiffs claim that the Initiative Authority Statutes violate their "fundamental right of local, community self-government," and thus run afoul of the

Fourteenth Amendment's Due Process Clause. Compl., R.1, PageID#56–58. The Court should reject this argument.

The Fourteenth Amendment prohibits States from depriving "any person of life, liberty, or property, without due process of law." U.S. Const., Am. 14. The Supreme Court has held that this right to process includes a substantive component that protects "against government interference with certain fundamental rights and liberty interests." *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997). Fundamental rights, though, are a limited category. The substantive-due-process doctrine protects only those rights that are "fundamental" in the sense of being "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (quotations and citations omitted). Such rights require "careful description," with "[o]ur Nation's history, legal traditions, and practices" serving as the "crucial guideposts for responsible decisionmaking." *Id.* at 721 (quotations omitted).

Carefully defined, the right at issue here is not the broad "right to local" and "community self-government." Compl. R.1, PageID#56–58. It is, instead, the right to make law by initiative free from state-law constraints. But however defined, the fundamental right the plaintiffs claim does not exist. The federal Consti-

tution leaves to the States all the power it does not take from them. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2334 (2020) (Thomas, J., concurring). And the federal Constitution, except perhaps in a few areas not relevant here, *see* U.S. Const., art. II, §1 (assigning state legislatures the power to determine the manner of selecting electors), leaves the States free to divide state authority as they see fit. In other words, there is "no inherent right of self government which is beyond the legislative control of the State." *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). Local government, for example, "remains the creature of the State exercising and holding powers and privileges subject to the sovereign will." *Id.*; *accord Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *Mt. Pleasant v. Beckwith*, 100 U.S. 514, 524 (1880); *see also S. Macomb Disposal Auth. v. Washington*, 790 F.2d 500, 505 (6th Cir. 1986). And, most relevant here, the States can decide for themselves whether to allow direct democracy at all. *Taxpayers United*, 994 F.2d at 295; *Jones*, 892 F.3d at 937. In sum, the plaintiffs have no right to exercise state authority, and so the Initiative Authority Statutes do not violate any such right by regulating the manner in which initiatives are placed on the ballot.

The plaintiffs' contrary analysis lacks merit. They cite a handful of cases discussing substantive due process, *see* Beiersdorfer Br.33–34, but none recognizes a fundamental right to pass initiatives or to exercise the power of self-government

free from state-law constraints. Take, for example, *League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir. 2008). That case involved a challenge to Ohio's general voting procedures, including allegations that certain polling locations did not have enough voting machines. The Court's substantive-due-process analysis discussed burdens on the "fundamental right to vote," not any right to local self-government. *See id.* at 478.

In the search for a fundamental right, the plaintiffs also put forth a *non sequitur* based on Ohio law. *See* Beiersdorfer Br. 34–36 (citing *Federal Gas & Fuel Co. v. Columbus*, 96 Ohio St. 530 (1917)). As the plaintiffs note, Ohioans have long reserved to themselves the power to make law by initiative. It does not follow, however, that individuals have a "deeply rooted" *federal* right to local self-government by which *federal* courts can order States to adopt some particular approach to direct democracy. To accept the plaintiffs' arguments would lead to the absurd conclusion that Ohioans, because they have long reserved to themselves the initiative power, are now prohibited from amending their Constitution to eliminate or limit the initiative power.

III. The Initiative Authority Statues do not offend the Ninth Amendment.

The plaintiffs argue that the Initiative Authority Statutes violate the Ninth Amendment. Compl., R.1, PageID#58–60. They are wrong.

The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., Am. 9. The Ninth Amendment thus sets forth a rule of construction. It forbids interpreting the express listing of certain rights to imply the non-existence of other rights. *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991). Critically, however, the Ninth Amendment does not "confer substantive rights in addition to those conferred by other portions of our governing law." *Id.*; *see also Butt ex rel. Q.T.R. v. Barr*, 954 F.3d 901, 908 (6th Cir. 2020); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 340–41 (2004). Thus, any claim relying on the Ninth Amendment as the standalone source of a right—including the plaintiffs' claim—automatically fails.

All this is consistent with the Amendment's original meaning. The Ninth Amendment has its "roots" in "the writings of the Antifederalists who raised concerns about federal courts engaging in 'latitudinarian interpretations' of federal power." Lash, *Original Meaning*, 83 Tex. L. Rv. at 336. The Constitution grants only limited powers to the federal government, reserving the rest to the States and the People. To remove any doubt on this score, the Framers proposed the Ninth and Tenth Amendments. The Tenth Amendment expressly states that all "powers not delegated to the United States by the Constitution, nor prohibited by

it to the States, are reserved to the States respectively, or to the people." U.S. Const., Am. 10. The Ninth Amendment's purpose is to prevent broad interpretations of federal power that would diminish the power reserved to the States under the Tenth Amendment. Lash, *Original Meaning*, 83 Tex. L. Rv. at 336 (quoting James Madison, *Speech in Congress Proposing Constitutional Amendments (June 8, 1789)*, in James Madison, Writings 489 (Jack N. Rakove ed., 1999)). The Ninth Amendment, as this Court's precedent recognizes, prohibits courts from endorsing the *exclusio unius* canon to conclude that Congress's may pass any law not violative of an enumerated right. *Gibson*, 926 F.2d at 537; Lash, *Original Meaning*, 83 Tex. L. Rv. at 394; 3 Joseph Story, *Commentaries on the Constitution* §1898, pp. 751–52 (1833).

The plaintiffs' argument ignores this Court's precedent and contradicts the Ninth Amendment's purpose. Their argument begins from a sound premise: the retained rights to which the Ninth Amendment refer include a "collective right of the people to local self government." Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 895, 932–33 (2008). But the plaintiffs err in thinking this retained right empowers them to pass initiatives without state oversight. Quite the contrary: the collective right to local self-government empowers the People to structure their state governments as they wish, and thus to grant or

withhold, or limit or expand, the initiative power as they wish. And the Ninth Amendment prohibits courts from inferring, based on the absence of any enumerated right to local self-government, that the federal government has authority to tell Ohioans how to govern themselves. The plaintiffs' argument is thus ironic: in pleading for federal interreference with Ohio's system of self-government, they invoke an amendment that *protects* the power of local self-government from federal interference.

IV. Sovereign immunity bars the plaintiffs' official-capacity, state-law claim.

Finally, the plaintiffs claim that the Initiative Authority Statutes violate the Ohio Constitution's separation-of-powers doctrine, and they seek to enjoin state officials from enforcing those statutes. The District Court correctly determined that it lacked jurisdiction to decide this state-law claim.

Sovereign immunity bars "a claim that state officials violated state law in carrying out their official responsibilities." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984); *accord Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520–21 (6th Cir. 2007). And the *Ex Parte Young* doctrine—which allows federal litigants to seek injunctive relief against state officials for violations of *federal* law—provides no exception to sovereign immunity "in a suit against state officials on the basis of state law." *Pennhurst*, 465 U.S. at 106. Here, the plain-

tiffs bring their separation-of-powers claim under Ohio law. Compl., R.1, PageID#60–61. And they bring this claim against the Secretary in his official capacity. *See id.*, PageID#8–9. Thus, sovereign immunity applies, as the District Court correctly held.

The plaintiffs do not argue against sovereign immunity. They instead argue that their separation-of-powers claim is "intertwined" with their federal claims, thus allowing the District Court to exercise supplemental jurisdiction under 28 U.S.C. §1367. Beiersdorfer Br.10. That argument wrongly assumes that supplemental jurisdiction, which derives from statute, overrides the State's sovereign immunity, which derives from the Constitution. It does not. *Edwards v. Ky. Revenue Cabinet*, 22 F. App'x 392, 393 (6th Cir. 2001) (citing *Pennhurst*, 465 U.S. at 100, 121).

CONCLUSION

The Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for a principal brief and contains 12,149 words. *See* Fed. R. App. P. 32(a)(7)(B)(i).

/s/ Benjamin M. Flowers
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

DESIGNATION OF DISTRICT COURT RECORD

Defendant-Appellee, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

***Susan Beiersdorfer, et al. v. Frank LaRose, et al.*, 4:19-cv-00260**

Date Filed	R. No.; PageID#	Document Description
2/1/2019	R.1; 1–62	Complaint
8/30/2019	R.69; 625–40	Memorandum of Opinion and Order Granting Motion to Dismiss
8/30/2019	R.70	Order of Dismissal
12/31/2019	R.77; 916–27	Order Granting Motion to Dismiss
4/30/2020	R.87; 1060–76	Memorandum of Opinion and Order Granting Motion to Dismiss
4/30/2020	R.88	Order Dismissing Complaint
5/28/2020	R.89; 1078–79	Notice of Appeal