No. 24-3354

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTHIA BROWN, ET AL.,	:	
	:	On Appeal from the
Plaintiffs-Appellants,	:	United States District Court
	:	for the Southern District of Ohio
v.	:	
	:	District Court Case No.
DAVID YOST, Ohio Attorney General, in his official capacity,	:	2:24-cv-01401
	:	
	:	
Defendant-Appellee.	:	
	:	

APPELLEE'S SUPPLEMENTAL EN BANC BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

The Ohio Constitution reserves to the People the right to initiate constitutional amendments. Those initiating amendments must draft summaries of their proposed amendments. The summaries eventually become a part of official petitions, which voters read when they decide whether to support proposals. Given the role that summaries play in Ohio's initiative process, the Attorney General reviews each summary to ensure that it fairly represents the corresponding proposal. Ohio Rev. Code §3519.01(A). The plaintiffs request a preliminary injunction to block this review process. But their request suffers from at least two fatal problems.

First, the plaintiffs ask for relief that a federal court cannot grant. Specifically, sovereign immunity bars retroactive relief. And here, the plaintiffs seek to undo a decision the Attorney General has already made, about a summary the plaintiffs submitted months ago. *Second*, Ohio's review process does not offend the First Amendment. That is because 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). Even assuming the First Amendment requires some review, the States retain considerable leeway to decide "whether and how to permit legislation by popular action." *Doe v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). Ohio's commonsense review process falls well within that leeway.

STATEMENT

I. Ohio reserves a portion of its legislative power to citizens via the ballot initiative, by which citizens may directly propose statutes or constitutional amendments to voters. The power to legislate via initiative was *not* among this nation's founding promises: "Direct lawmaking by the people was virtually unknown when the Constitution of 1787 was drafted." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 793 (2015) (quotations omitted). There were surely "precursors and analogues" to direct lawmaking. *Id.* Colonial Americans held town halls in the 1600s. *See* 1 Proceedings and Debates of the Constitutional Convention of the State of Ohio, 675, 798 (1912) ("*Convention Debates*"). And some States submitted constitutions to their citizens for ratification. *See id.* at 675. Even so, direct lawmaking did not gain traction in the country's early years. *Ariz. State Legis.*, 576 U.S. at 794.

Begin at the federal level. The Founders believed in representative government, not direct democracy, promoting "the total exclusion of the people, in their collective capacity," from government processes. The Federalist No. 63 (James Madison). The Constitution thus vested "All" of the federal government's "legislative Powers" in Congress, subject to the President's review. U.S. Const. art. I, §§1, 7. And early Congresses rejected proposals that would have allowed constituents to "instruct" their representatives on how to vote. Cass R. Sunstein, *Beyond the*

Republican Revival, 97 Yale L.J. 1539, 1559 & n.113 (1988) (citing 1 Annals of Cong. 733–45 (J. Gales ed. 1789)).

The Constitution, of course, left the States free to structure their own governments. *Ariz. State Legis.*, 576 U.S. at 816–17. But for much of the country's history, no State chose to embrace an initiative process as part of its legislative authority. *Id.* at 794. That remained so into the late 1800s, decades after the Civil War Amendments to the federal Constitution. *Id.*

Things changed with the Progressive movement. In 1898, South Dakota became the first State to adopt an initiative process. *Id.* at 794. Four years later, Oregon became the first State to allow for constitutional amendments via initiative. *Id.* Other States soon followed suit. *Id.* at 795. But even today, direct lawmaking remains the minority approach: only 24 States enable their citizens to propose state law through an initiative process. *Initiative & Referendum Processes*, Nat'l Conf. of State Legis. (Jan. 4, 2022), https://perma.cc/27PU-VSZ5.

II. In 1912, participants in Ohio's constitutional convention debated whether the State should adopt an initiative process. Many worried that voters would not understand the initiatives they were voting on. *Convention Debates* at 721, 751, 786, 796, 804, 815, 817. Others worried that those proposing initiatives would manipulate voters. *E.g.*, *id.* at 683, 687, 690, 740, 752, 822, 824–25. As one person put it, Ohio

risked trading "rascals in the legislature" for "rascals outside of the legislature." *Id.* at 740. A consensus emerged that, if Ohio were to have an initiative process, the process would need "proper safeguards." *Id.* at 696; *see also id.* at 711, 750, 753, 758, 816, 822, 833, 863, 909. For example, one speaker stressed that any proposal should leave the legislature with power "to govern the method of signing petitions and to prevent corrupt practices." *Id.* at 753; *see also id.* at 701, 760, 774, 859, 908–09, 946.

Ultimately, Ohioans added initiative powers to the Ohio Constitution. Ohio Const. art. II, §§1a–g. They included an important caveat: that "[l]aws may be passed to facilitate the[] operation" of petition circulation. Ohio Const. art. II, §1g. That language, Ohio's High Court has explained, enables the General Assembly to enact statutes that "ensure the integrity of and confidence in" the initiative process. *State ex rel. Ethics First-You Decide Ohio PAC v. DeWine*, 147 Ohio St. 3d 373, 377 (2016) (*per curiam*) (quotations omitted).

III. Before an initiative makes it on Ohio's ballot, initiative proponents must satisfy multiple steps. Proponents must first collect the signatures of 1,000 voters. Ohio Rev. Code §3519.01(A). Next, proponents must submit their proposal, along with a summary, to the Ohio Attorney General. *Id.* The "summary" within these submissions must be "a short, concise, summing up," which advises potential signers of a proposal's content. *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 27 (1931).

Within ten days, the Attorney General must review the summary. Ohio Rev. Code §3519.01(A). This review does not consider whether the proposal is wise policy, *State ex rel. Schwartz v. Brown*, 32 Ohio St. 2d 4, 9–11 (1972), but only whether the summary fairly represents the proposal, *State ex rel. Barren v. Brown*, 51 Ohio St. 2d 169, 170 (1977). This process dates back to the 1920s. *Schaller v. Rogers*, 2008-Ohio-4464, ¶¶13–15 (10th Dist.) (discussing statutory history).

Initiative proponents also have judicial recourse. If the Attorney General determines that an initiative summary is unfair—and thus refuses to certify it—the proponent may file an original action in the Supreme Court of Ohio. Ohio Rev. Code §3519.01(C). The Supreme Court of Ohio has discretion to expedite cases as it sees fit. *See State ex rel. Shemo v. City of Mayfield Heights*, 93 Ohio St. 3d 1, 3–4 (1998).

After the Attorney General certifies a summary, he sends the proponent's initiative materials to the Ohio Ballot Board. The Ballot Board then reviews whether the initiative contains only one proposed amendment. Ohio Rev. Code §3505.062(A). If it does, the Ballot Board sends the matter back to the Attorney General. *Id.* But at that point, the Attorney General's role is mechanical: he passes the submissions along to the Secretary of State. *See* Ohio Rev. Code §3519.01(A).

After clearing the above steps, proponents must circulate petitions. To gain ballot access for a constitutional amendment, proponents must gather signatures

equaling at least 10 percent of the vote cast for governor at the last gubernatorial election. Ohio Const. art. II, §1a. Proponents must gather these signatures by 125 days before Election Day, *id.*—or July 3, for this year's election.

Two final details about petition circulation. First, the petitions that proponents circulate to voters contain the certified summary. Ohio Rev. Code §3519.05(A). Second, a certified summary has no expiration date. If proponents fail to meet the signature requirements for a given election, they may try again the next election cycle without repeating the initial steps of Ohio's process. *See* Ohio Const. art. II, §1a.

IV. The plaintiffs are individuals who wish to amend Ohio's Constitution to subject government actors to greater liability in state court. Between February 2023 and the start of this litigation in March 2024, the plaintiffs submitted their proposed amendment and summary (in varying forms) seven times for the Attorney General's review. Each time, the Attorney General was unable to certify the plaintiffs' summary. One submission did not include enough signatures. The other submissions, the Attorney General concluded, did not fairly represent the plaintiffs' proposal. *E.g.*, Compl. Ex. 4, R.1, PageID#38–40.

The plaintiffs did not seek judicial review as to their first six submissions. But, after their seventh failed attempt this past March, the plaintiffs filed an action in the Supreme Court of Ohio. *State ex rel. Brown v. Yost*, No. 2024-0409 (Ohio). They

moved to expedite that action; the Attorney General opposed; and the Supreme Court of Ohio denied the request. The plaintiffs soon abandoned their state-court action. Voluntary Dismissal, No. 2024-0409 (May 20, 2024).

V. The plaintiffs filed their federal lawsuit in late March, shortly before they dismissed their just-discussed action in the Supreme Court of Ohio. They claimed that Ohio Revised Code §3519.01(A) violates the First Amendment, facially and as applied. They stressed that the law does not require the Supreme Court of Ohio to conduct immediate, de novo review. Compl., R.1, PageID#6, 10–12. They moved for preliminary relief, requesting an injunction to force the Attorney General to "immediately certify" their March summary. P.I. Mot., R.2, PageID#41. The District Court denied that relief, holding that the plaintiffs were both unlikely to prove jurisdiction and unlikely to succeed on the merits. Op., R.21, PageID#209–12, 214–21.

VI. On appeal, a divided panel of this Court reversed. It ordered the Attorney General "to send" the plaintiffs' proposed amendment and "most recent summary" to the Ohio Ballot Board for the next phase of Ohio's process. Panel Op.30. The full Court, however, granted the Attorney General's petition for *en banc* review.

After this Court granted *en banc* review, the plaintiffs submitted an eighth initiative summary to the Attorney General. The Attorney General was unable to certify that summary because it lacked a title. July 15, 2024 Ltr. from Ohio Att'y Gen.

to M. Brown, https://perma.cc/3QM8-W4LX. A few weeks ago, the plaintiffs filed an original action in the Supreme Court of Ohio challenging that decision. *State ex rel. Brown v. Yost*, No. 2024-1047 (Ohio). The matter remains pending.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). The plaintiffs fail to make those showings. Sovereign immunity bars the relief that the plaintiffs requested. They are also unlikely to succeed on their First Amendment claims.

I. Sovereign immunity bars the retroactive relief that the plaintiffs sought.

The plaintiffs have "struggled to articulate their theory of the case." Op., R.21, PageID#209. Because the theory is hard to pin down, so is federal jurisdiction. One can piece together a claim that the plaintiffs could have brought, and relief that they could have requested, that would pose no jurisdictional concern. *See below* 10, 12. But sovereign immunity bars the relief that the plaintiffs actually requested.

A. Begin with a few quick words about standing. That doctrine derives from the fact that federal courts are limited to resolving "Cases" or "Controversies." U.S. Const. art. III, §2. Article III thus requires that plaintiffs identify an injury in fact

that is traceable to the challenged conduct and redressable by a favorable decision. *Dep't of Educ. v. Brown*, 600 U.S. 551, 561 (2023).

With standing in mind, turn to sovereign immunity. The States entered the Union "with their sovereignty intact." *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (quotations omitted). Immunity from lawsuits is key to sovereign dignity; so sovereign immunity generally prevents private parties from suing non-consenting States in federal court. *Id.* at 283–84. The Supreme Court has carved out an exception to this immunity, which allows parties to sue state officials to enjoin future or ongoing violations of federal law. *Ex parte Young*, 209 U.S. 123, 155–56 (1908). But the "exception is narrow." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). "It applies only to prospective relief," and it "does not permit judgments against state officers declaring that they violated federal law in the past." *Id.* In sum, sovereign immunity bars "*all* retroactive relief." *S&M Brands, Inc. v. Cooper*, 527 F.3d 500, 509 (6th Cir. 2008); *accord Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

When drawing the line between sovereign immunity and *Ex parte Young*, courts must "conduct a straightforward inquiry" into whether a plaintiff "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 645 (2002) (quotations omitted). "Retroactive relief for past unlawful conduct will not do." *T.M. v. DeWine*, 49 F.4th 1082,

1088 (6th Cir. 2022). Sovereign immunity thus applies when the "alleged constitutional deficiency" is a "past event" and the requested relief is the correction of a "prior determination." *Cooper*, 527 F.3d at 510. Litigants, therefore, cannot ask a federal court to effectively reverse a state official's completed decision. *See id.*

B. The jurisdictional flaws in this case arise from the combination of (1) the plaintiffs' constitutional theory, (2) the defendant the plaintiffs chose to sue, and (3) the requested relief. The plaintiffs' principal theory is that Ohio's review process is constitutionally defective because it does not guarantee "timely de novo judicial review" before the Supreme Court of Ohio. *See* Compl., R.1, PageID#6. But the plaintiffs sued a defendant (the Attorney General) who does not manage the Supreme Court of Ohio's docket. That makes it hard to see how any injury is traceable to the Attorney General's conduct and redressable through relief against him.

To overcome those problems, one must view the plaintiffs' claims as encompassing the Attorney General's role in the process. *See* Panel Op.9. But that tees up a sovereign-immunity problem. Recall that the plaintiffs sought preliminary relief specifically targeted at their March summary. P.I. Mot., R.2, PageID#41. By the time of the plaintiffs' federal lawsuit, the Attorney General had already discharged his administrative duties as to the plaintiffs' March summary. Thus, any relief directing the Attorney General to "immediately certify" the March summary, *id.*, is

retrospective in nature. Ohio's sovereign immunity blocks this attempt to reverse a state official's, prior, completed decision. *See Cooper*, 527 F.3d at 510. Indeed, the Attorney General is *not* Ohio's chief elections officer. *See* Ohio Rev. Code §3501.04. He does not exercise any continual oversight as to which initiatives make it onto the ballot. Rather, the Attorney General's role is discrete: he must review each initiative summary within ten days and determine its accuracy. Ohio Rev. Code §3519.01(A). If the Attorney General refuses to certify a summary, his role in the process ends.

C. The plaintiffs' contrary arguments are unpersuasive. The plaintiffs argue, for example, that the Court must accept their characterizations of the violation they allege. *See* Brown Supp. Br.7. That is wrong. To determine if sovereign immunity applies, this Court must inquire into whether the alleged violation is ongoing. *Verizon Md. Inc.*, 535 U.S. at 645. The Court cannot take the plaintiffs' word for it.

The plaintiffs' reliance on *In re Flint Water Cases*, 960 F.3d 303 (6th Cir. 2020) is also misplaced. There, the Governor of Michigan argued for sovereign immunity as to claims arising from the water crisis in Flint. The Court held that its earlier decision in *Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017) precluded the Governor's argument. *In re Flint Water Cases*, 960 F.3d at 333–34. *Boler*, in turn, held that *Ex parte Young* applied because a group of plaintiffs had alleged an ongoing constitutional violation concerning ineffective relief efforts. 865 F.3d at 413. The panel in

Flint Water went on to suggest—if not hold—that private litigants may pursue federal relief against state officials for past violations, if the violations have some continuing effect. 960 F.3d at 334. That aspect of *Flint Water*'s analysis contradicts binding precedent. Under the Supreme Court's controlling test, this Court must consider whether the alleged "violation" itself is "ongoing" to decide whether *Ex parte Young* applies. *Verizon Md. Inc.*, 535 U.S. at 645. A contrary approach would result in the "exception swallowing the rule," *see T.M.*, 49 F.4th at 1093 (Readler, J., concurring), as litigants could almost always allege some lingering effect of past action.

One further point. While the plaintiffs chose to seek retroactive relief here, they easily could have sought prospective relief. *Cf. Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005) (*en banc*). As repeat players in Ohio's initiative process, the plaintiffs could have sought to enjoin the Attorney General's enforcement of Ohio law as to some future summary they intended to submit. Such a pre-enforcement challenge would have fallen within the confines of *Ex parte Young*. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046–50 (6th Cir. 2015). But the plaintiffs chose to make these proceedings about their past March summary. P.I. Mot., R.2, PageID#41. So, they have themselves to blame for the sovereign-immunity barrier.

II. The plaintiffs are unlikely to succeed on the merits.

On the merits, the plaintiffs' First Amendment claims will fail. To assess those

claims, the Court must first decide what, if any, First Amendment standard applies. That question is the subject of a circuit split. *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616–17 (2020) (Roberts, C.J., concurring in the grant of a stay). This Court has applied *Anderson-Burdick* review to initiative laws. *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992). But the full Court should now join other circuits in holding that laws that regulate the initiative process itself—as opposed to laws that regulate speech about initiatives—do not implicate the First Amendment. *E.g.*, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (*en banc*); *Marijuana Pol'y Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002). If the Court does so, then the plaintiffs' claims necessarily fail. But even if this Court sticks with *Anderson-Burdick* review, the challenged law—Ohio Rev. Code §3519.01(A)—survives.

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

1. The First Amendment prohibits laws "abridging the freedom of speech." U.S. Const. amend. I. When considering this protection, the Court should consult history. *Vidal v. Elster*, 602 U.S. 286, 301 (2024). In this case, history tells a powerful story. The federal government has never had an initiative process. And, at the time of the founding and the Civil War Amendments, no State had yet adopted an initiative process. *Above* 3. "Nothing in the Constitution," it follows, requires States to

provide an initiative process. *Reclaim Idaho*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of a stay); *accord Reed*, 561 U.S. at 212 (Sotomayor, J., concurring); *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018).

Significantly, when a citizen uses an initiative process, the citizen acts "as a legislator." *Reed*, 561 U.S. at 221 (Scalia, J., concurring in the judgment); *accord Ariz. State Legis.*, 576 U.S. at 814. That matters here because the First Amendment does not confer on legislators (or anyone else) a positive "right to use governmental mechanics to convey a message." *Carrigan*, 564 U.S. at 127. In a similar vein, government speech does not normally trigger First Amendment protection. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015) ("*SCV*"). That remains so even when the government accepts public suggestions. *Id.* at 204–05.

To be sure, States that adopt an initiative process must run it without violating rights the Constitution *does* guarantee. Under the First Amendment's Free Speech Clause, States that choose to have an initiative process cannot abridge private speech during the process. Thus, laws that "regulate or restrict the communicative conduct of persons advocating a position" on an initiative—such as laws regulating *who* may advocate for an initiative's passage or *how* advocates must go about speaking when circulating petitions—implicate the First Amendment. *Walker*, 450 F.3d at 1099–1100; *see also Meyer v. Grant*, 486 U.S. 414, 415–16 (1988); *Buckley v. Am. Const. L.*

Found., 525 U.S. 182, 197–204 (1999). And, while there is no right to an initiative, the act of signing a petition "remains expressive"—so laws compelling signers to disclose information trigger some First Amendment review. *Reed*, 561 U.S. at 195–96.

Putting this together, the following distinction emerges. Courts must distinguish between laws "that regulate or restrict the communicative conduct of persons advocating" for or signing onto an initiative, which implicate the First Amendment, and laws "that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1100. Laws within the latter category limit legislative power, not expression, which means such laws do not implicate the First Amendment. Said another way, while the "freedom of speech" includes the right to communicate during an initiative campaign or circulation drive, it does not include the freedom to ignore rules governing the mechanics of the initiative process. Nor does it include the freedom to embed one's own private message into official government materials. Just as the First Amendment has no bearing on rules dictating the processes for enacting laws in state legislatures, the First Amendment has no bearing on rules governing the processes for enacting laws by direct democracy.

2. The challenged law falls on the legislative-process side of this divide. Again, Ohio law requires that the Attorney General review initiative summaries, before they are extensively circulated to voters, to ensure that the summaries are a fair

representation of the proposal. Ohio Rev. Code §3519.01(A). But the law does nothing to regulate who may speak on behalf of an initiative. Nor does it restrict what supporters of an initiative may say to voters when they circulate petitions. Nor does it require that initiative circulators or signers disclose private information.

The challenged law instead regulates Ohio's legislative process *itself*. Once an initiative proponent submits a summary to the Attorney General, the summary is no longer private speech. At that point, the summary becomes a part of official petitions by which voters decide whether to support a proposed initiative. Ohio Rev. Code §3519.05(A). Indeed, the summary immediately "follow[s] the certification of the attorney general," *id.*, making clear to voters that the summary has the State's blessing. Think of it this way. After lawmakers submit a bill to the legislature, they have no First Amendment right to control what happens to the bill in committee. And when the clerk reads a bill's title aloud in the General Assembly, it is not the lawmaker's private speech. *See* Ohio G.A. House R. 76; Ohio G.A. Senate R. 47. The same conclusions follow here: initiative proponents have no First Amendment right to convey their own message via the content of Ohio's official, certified petitions.

At bottom, whether one views the petition summary process as the "governmental mechanics" of Ohio's initiative process, *see Carrigan*, 564 U.S. at 127, or as Ohio's own speech, *see SCV*, 576 U.S. at 207–08, the challenged law should receive

no First Amendment scrutiny. If the Court agrees, it necessarily follows that the plaintiffs are unlikely to succeed on their claims.

3. To solidify the above analysis, it helps to consider the most plausible alternative. This Court and the Ninth Circuit have applied the *Anderson-Burdick* balancing test to laws governing the initiative process. *Schmitt*, 933 F.3d at 639; *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012). But when applied to the initiative context, the test suffers from both conceptual and practical problems.

The conceptual problem stems from the "why" behind *Anderson-Burdick*. The Supreme Court developed that test to address the tension between (1) the need for election regulations and (2) the right to vote for and associate with candidates and parties on the ballot. *See Burdick*, 504 U.S. at 433. Given that tension, *Anderson-Burdick* review employs a "flexible standard" to ensure that States may regulate elections without unduly burdening voting or associational rights. *Id.* at 433–34. The need for so "flexible" a test collapses with initiatives: with no right to legislate through direct democracy, *Jones*, 892 F.3d at 937, there is no tension to resolve.

As a result, the *Anderson-Burdick* test is poorly suited to the initiative context. The test requires courts to "weigh 'the character and magnitude of the asserted injury to'" First Amendment rights against the state interests that a challenged law advances. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780,

789 (1983)). But if there is no right to legislate by initiative, how do laws regulating the mechanics of the initiative process injure First Amendment rights? No one seems to know. And, because no one can pin down the exact injury to First Amendment rights, asking whether an impossible-to-identify injury outweighs the government's interests is about as sensible as 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).

A final problem is the most serious. *Anderson-Burdick* review "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" that "does little to define the key concepts a court must balance." *Id.* (quotations omitted). Consequently, 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." *Id.* This Circuit's experiences confirm the danger of such review: the Court has often needed to step in and reverse *Anderson-Burdick*-inspired rulings. *See, e.g., Mays v. LaRose*, 951 F.3d 775, 791 (6th Cir. 2020); *Thompson v. DeWine*, 976 F.3d 610, 614 (6th Cir. 2020) (*per curiam*); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 634 (6th Cir. 2016).

All told, while *Anderson-Burdick* may be a necessary tool in some election contexts, it is unnecessary here. When it comes to how States choose to structure their own legislative power, federal judges are "in no position to second-guess" the States' decisions. *Schmitt*, 933 F.3d at 648–49 (Bush, J., concurring in the judgment).

B. The challenged law satisfies the *Anderson-Burdick* test.

Even if the Court continues to apply *Anderson-Burdick* review to state initiative laws, the plaintiffs still have little chance of success. The challenged law readily survives a proper application of *Anderson-Burdick*.

Once again, *Anderson-Burdick* requires courts to weigh the burdens a challenged law places on First Amendment rights against the State's justification for the law. *Burdick*, 504 U.S. at 434. The test operates on a sliding scale. Laws that impose "severe" burdens receive strict scrutiny. *Id.* Laws that impose "lesser burdens" receive far more deference. *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005). For those less-than-severely-burdensome laws, the *Anderson-Burdick* test presumes that the State's important interests in regulating elections "will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 587 (quotations omitted).

Burden. The first step is to decide whether a challenged law imposes a severe burden or something less. A severe burden, in the ballot-access context, is one that excludes or virtually excludes a candidate from the ballot. *Schmitt*, 933 F.3d at 639.

Ohio's review process for initiative summaries imposes moderate burdens at most. Even setting aside the lack of any right to an initiative process, the challenged law does nothing to exclude or virtually exclude any proposed initiative from the ballot. As discussed above (at 15–16), the law does not restrict who may speak—or what may be said—in favor of an initiative. Petition circulators may say what they wish and offer any literature they like to prospective signers; petition sponsors may run ads that message however they like. And Ohio's review process is agnostic as to the subject of any given amendment. *See State ex rel. Schwartz*, 32 Ohio St. 2d at 9–11. It requires only that a summary be a fair representation of the proposed amendment. *State ex rel. Barren*, 51 Ohio St. 2d at 170. To the extent initiative proponents disagree with the Attorney General's determination, Ohio offers an independent check: they may challenge the determination in the Supreme Court of Ohio. Ohio Rev. Code §3519.01(C). It is true that Ohio law does not guarantee initiative proponents any particular schedule, but Ohio's High Court has discretion to expedite such cases.

Justifications. The next step of *Anderson-Burdick* is to consider the state justifications for a challenged law. And here, from the outset, Ohioans recognized that if Ohio adopted an initiative process, it would need proper safeguards. *Above* 4. Rightly so. States that choose to allow for an initiative process have strong interests in protecting "the integrity and reliability" of the process. *Buckley*, 525 U.S. at 191.

And States have strong interests in "avoiding voter confusion" and protecting the "fairness … of their ballots." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). States, moreover, have strong interests in "combating fraud" and "promoting transparency" in the initiative process. *Reed*, 561 U.S. at 197–98. Indeed, the panel opinion agreed that Ohio's interests are compelling. Panel Op.25.

Ohio's review process furthers these interests. Initiative summaries "advise those who are asked to" sign a petition about the content of a proposal "without the necessity of perusing [it] at length." *State ex rel. Hubbell*, 124 Ohio St. at 27–28. Armed with these summaries, voters can then make informed decisions. It thus makes perfect sense that Ohio screens these summaries to make sure that they are fair descriptions of what is being proposed. Consider things from the perspective of Ohio voters. Because initiative summaries appear as part of official petitions, *see* Ohio Rev. Code §3519.05(A), voters can reasonably infer that these summaries have the State's blessing. Voters would quickly grow distrustful of Ohio's process if misleading summaries, appearing within official initiative materials, tricked them into supporting proposed amendments. *See Reed*, 561 U.S. at 197.

Balancing. Ohio's interest in the integrity of its initiative process decidedly outweighs any burden the review process places on initiative proponents. That should come as no surprise. The challenged law sets a reasonable, generally

applicable requirement. That is just the type of requirement that "will usually" survive the *Anderson-Burdick* test. *Clingman*, 544 U.S. at 586–87 (quotations omitted).

C. The contrary arguments of the plaintiffs and their *amici* lack merit.

The plaintiffs' merits arguments miss the mark. The plaintiffs wrongly call for strict scrutiny. Their notion of "core political speech" conflates (1) conveying a message through personal advocacy with (2) conveying a message through a government process. The First Amendment confers no right as to the latter. *Carrigan*, 564 U.S. at 127. That makes *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)—a case about anonymous campaign literature—inapposite. *Contra* Brown Supp. Br.13. The lack of a First Amendment right also makes irrelevant whether Ohio's process is content based. *Contra* Brown Supp. Br.13–14. For example, in *Marijuana Policy Project*, the D.C. Circuit held that a content-based initiative scheme (banning one topic from the process) did not implicate the First Amendment. 304 F.3d at 83.

The plaintiffs also overread *Grant*, 486 U.S. 414. That case involved a Colorado law banning paid circulators. *Id.* at 415. Because that law restricted *who* could engage in communicative conduct, *Grant* fits neatly within the communicative-conduct/legislative-process distinction outlined above (at 15). *Grant* did not suggest that the initiative process's other safeguards—Colorado had several, *id.* at 416—also needed to survive strict scrutiny. Rather, the Court emphasized that the "[o]ther

provisions" within Colorado's process made the ban on paid circulators unneeded. *Id.* at 426–27. True, some lines from *Grant* can be plucked out of context. *Walker*, 450 F.3d at 1100. The plaintiffs here stress language about "limit[ing] the number of voices who will convey" and reducing the odds "of statewide discussion" about an initiative. Brown Supp. Br.11–12 (quoting *Grant*, 486 U.S. at 422–23). But, since *Grant*, the Supreme Court has repeatedly said that States have "considerable leeway" to structure their initiative processes. *Buckley*, 525 U.S. at 191; *Reed*, 561 U.S. at 197. If this leeway has any meaning, it cannot be that every law "that has the inevitable effect of reducing speech because it makes particular speech less likely to succeed" must satisfy strict scrutiny. *See Walker*, 450 F.3d at 1100 (quotations omitted).

Tellingly, the plaintiffs offer no good limiting principle for their theory. Take, for example, their suggestion that a law restricting "subjects an initiative can address" has a less dramatic effect on "advocacy" than the law challenged here. *See* Brown Supp. Br.22 (emphasis omitted). That makes no sense. If a State bans a topic from its initiative process, that entirely blocks "advocating for proposed change" in "the context of petition circulation." *See* Brown Supp. Br.11. The more natural conclusion is that "every structural feature of government that makes some political outcomes less likely" will inevitably affect people's ability to advocate for change. *Walker*, 450 F.3d at 1100. The plaintiffs' theory thus proves too much.

Three further points regarding the plaintiffs' arguments. *First*, the plaintiffs misstate Ohio law when they say that the Attorney General has "unlimited discretion." Brown Supp. Br.17. Ohio law allows for judicial review, Ohio Rev. Code §3519.01(C); the plaintiffs have simply failed to let any state case run its course. *Second*, and contrary to the plaintiffs' repeated insinuations, the Attorney General reviews initiative summaries evenhandedly. Indeed, just last year, the Attorney General certified an initiative summary concerning an abortion amendment that he personally disagreed with. *See* Mar. 2, 2023 Ltr. from Att'y Gen. to D. McTigue, https://perma.cc/XPB4-SV73. *Third*, while the plaintiffs suggest that the challenged law fails a traditional application of *Anderson-Burdick* review, their hearts are clearly not in it. They submit only conclusions, no analysis. *See* Brown Supp. Br.25.

The arguments of the plaintiffs' amici fare no better. They claim that Ohio's approach is too harsh in comparison to other States. *See* DDS Br.8–10. But it is hard to imagine how any state-by-state comparison favors the plaintiffs, since 26 States do not even offer an initiative process. *See above* 3. In any event, many States require that their officials screen the submissions of initiative proponents. *See, e.g.*, Ark. Code Ann. §7-9-107(d)–(e); Md. Code Ann. Election Law §§6-201(c)(2), 6-208(a)(2); Me. Stat. tit. 21-A, §901 3-A; Mont. Code Ann. §§13-27-212, 13-27-226(3); N.M. Stat. Ann. §§1-17-8, 1-17-12; Utah Code Ann. §20A-7-202(5).

III. The remaining factors weigh against a preliminary injunction.

The remaining injunctive factors travel in lockstep with the merits. The challenged law does nothing to offend the First Amendment, so an injunction would harm Ohio and its citizens. *See Abbott v. Perez*, 585 U.S. 579, 602–03 (2018).

A few words about timing round out the discussion. The plaintiffs began Ohio's process in February 2023. But they did not bring this lawsuit until late March 2024. It is unsurprising, therefore, that the plaintiffs could not fully litigate this appeal before the July 3 signature-gathering deadline for the upcoming election. Any relief for the 2024 election is no longer feasible, as the plaintiffs seem to accept. Brown Supp Br.1–2, 6; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (counseling against late-breaking election injunctions). To be clear, the Attorney General agrees that the plaintiffs still have an interest in this appeal. If the Court were to order preliminary relief, the plaintiffs could get a head start on signature collection for the next election cycle. *See above* 6. But, because the plaintiffs have missed their window for the 2024 election, "the need for expediency has largely ceased." *Platt v. Bd. of Comm'rs on Grievs. & Discipline of the Ohio Sup. Ct.*, 769 F.3d 447, 455 (6th Cir. 2014) (quotations omitted). That weighs further against a preliminary injunction.

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, that this brief complies with the page limit for this supplemental brief. See *En Banc* Briefing Order, Doc.41 (June 21, 2024).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2024, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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