UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CYNTHIA BROWN, CARLOS BUFORD, and JENNY SUE ROWE,

Plaintiffs,

v. **CASE NO. 24-cv-01401-JLG-EPD**

DAVID YOST,
in his Official Capacity as **Ohio Attorney General**,

Defendant.

EMERGENCY ELECTION LITIGATION

PRELIMINARY INJUNCTION REQUESTED

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO SECOND MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Cynthia Brown, Carlos Buford and Jenny Sue Rowe respectfully submit this Reply to Defendant's Response to Plaintiffs' Second Motion for Preliminary Injunction filed by Defendant Dave Yost on February 21, 2025 (Doc. No. 59) ("Opposition" or "Opp.").

Introduction

Each of the arguments that Defendant raises in his Opposition was squarely rejected by the Sixth Circuit panel that heard Plaintiffs' prior appeal in this case. Although the panel's opinion was vacated when the Sixth Circuit granted rehearing en banc and the appeal was subsequently dismissed as moot, the panel's reasoning is sound and its opinion persuasive authority. *See*, *e.g*., *Barrett v. Harrington*, 130 F.3d 246, 258 n. 18 (6th Cir.1997). Yet Defendant makes no attempt to address the panel's reasoning or revise his position accordingly, but simply rehashes the same arguments the panel previously rejected. For the reasons set forth below, this Court should reject them, too. It is now plain that Plaintiffs are entitled to the preliminary relief necessary to ensure their access to Ohio's November 2025 general election ballot. As the Sixth Circuit sitting en banc stated, "there is ample time to ensure that [Plaintiffs'] First Amendment rights are aired in time for the November 2025 election, and we stand ready to ensure that happens." *Brown v. Yost*, 122 F.4th 597, 603 (6th Cir. 2024). Plaintiffs' Motion for Preliminary Injunction should be granted.

<u>Facts</u>

Defendant has now admitted several critical facts alleged in Plaintiffs' Amended Complaint. In particular, Defendant admits that O.R.C. § 3519.01(A) "mandates" Defendant's "fair and truthful" review of petitions' summaries and titles, *see* Am. Comp., Doc. No. 47, at PageID #489, ¶ 1; Answer, Doc. No. 58, PageID #596, ¶ 1, that Plaintiffs duly submitted their March 4, 2024 petition, "Protecting Ohioans' Constitutional Rights," to Defendant for review under this mandate, *see* Am. Comp., Doc. No. 47, at PageID #490, ¶ 3; Answer, Doc. No. 58,

PageID #596, ¶ 3, that Plaintiffs' Exhibits attached to their Complaint are accurate,[1] that when summaries are rejected by Defendant under O.R.C. § 3519.01(A) the petitioners must begin all over again collecting another 1000 signatures and resubmitting to Defendant a new petition with corrected summary and title, *see* Am. Comp., Doc. No. 47, at PageID #492, ¶ 13; Answer, Doc. No. 58, PageID #597, ¶ 13, that petitioners cannot begin collecting the hundreds of thousands of signatures required to access ballots following Defendant's rejection of their summaries and titles under O.R.C. § 3519.01(A), *see* Am. Comp., Doc. No. 47, at PageID #493, ¶ 14; Answer, Doc. No. 58, PageID #598, ¶ 11, and that Plaintiffs' Exhibit 7 is their proposed "Ohio Wrongful Conviction and Justice Reform Amendment." *See* Am. Comp., Doc. No. 47, at PageID #503, ¶ 34; Answer, Doc. No. 58, PageID #601, ¶ 26.

As explained in greater detail below, these admissions -- coupled with undisputed deposition testimonies and verified allegations -- make plain that Plaintiffs are likely to prevail on the merits of their challenge to Defendant's use of O.R.C. § 3519.01(A)'s fair and truthful requirement to block their March 4, 2024 petition and their newly proposed constitutional amendment.

To access Ohio's November 2025 general election ballot Plaintiffs must first seek and receive the Defendant's "fair and truthful" approval for both petitions under O.R.C. § 3519.01(A). Plaintiffs have already submitted versions of the rejected March 4, 2024 petition, entitled

[1] Defendant rather than admitting or denying allegations frequently states that they "speak for themselves." This is improper under Federal Rule of Civil Procedure 8 and constitutes an admission. *See New Hampshire Ins. Co. v. Marinemax of Ohio*, 408 F. Supp. 2d 526, 530 (N.D. Ohio 2006) (ruling that "speaks for itself" constitutes an admission); *Nazarovech v. American Elite Recovery*, 2021 WL 313 1534, *3 (W.D. N.Y. 2021) (holding that equivocal responses that do not formally admit, deny or express lack of knowledge in compliance with Rule 8 are admitted); *U.S. v. Vehicle 2007 Mack 600 Dump Truck*, 680 F. Supp. 2d 816, 828 (E.D. Mich. 2010) (same). Plaintiffs here construe Defendant's use of "speaks for itself" as an admission.

"Protecting Ohioans' Constitutional Rights," a half-dozen and more times without success. They presently seek to have O.R.C. § 3519.01(A)'s fair and truthful application immediately and preliminarily enjoined so they can meet Ohio's July 2, 2025 deadline and have that March 4, 2024 petition placed on Ohio's November 2025 general election ballot. *See* Brown Dep., Doc. No. 59-2, at PageID #789, 833. Plaintiffs have engaged consultants to assist with the signature collection, have a written and formal plan, and are "ready and able" to proceed. *Id.* at PageID #833-34. As the en banc Sixth Circuit observed in explaining that Plaintiffs' case remains alive and can succeed with the expedited dispatch that Defendant continues to resist: "Brown's First Amendment challenges in the underlying lawsuit are on track to receive [federal court review] before the next general election: November 2025." *Brown v. Yost*, 122 F.4th 597, 603 (6th Cir. 2024) (en banc).

Plaintiffs also intend to place their new proposed amendment, "Ohio Wrongful Conviction and Justice Reform Amendment," on Ohio's November 2025 ballot. *See* Am. Comp., Doc. No. 47, at PageID #504, ¶ 39. *See also* Brown Dep., Doc. No. 59-2, at PageID #804. They are presently collecting the 1000 needed signatures to support their intended submission to Defendant and intend to have enough signatures by February 27, 2025. *Id.* at PageID #884. Without a fair and truthful certification from Defendant following their intended submission, Plaintiffs cannot proceed to the signature-collection stage, which must be completed by July 2, 2025. Defendant's insistence in his Opposition that Plaintiffs' summary for that proposed amendment contains "material misrepresentations," *see* Opp., Doc. No. 59, at PageID # 699, makes plain that Plaintiffs cannot and will not win Defendant's certification under O.R.C. § 3519.01(A). If there were ever any doubt, Plaintiffs' pre-enforcement challenge is therefore now plainly ripe and ready for resolution.

The constitutional question in this case squarely raises is whether Defendant's "fair and truthful" enforcement under O.R.C. § 3519.01(A) violates the First Amendment. As explained

below, it does. Further, Plaintiffs are suffering irreparable injury. Contrary to Defendant's argument and accompanying dilatory tactics, Plaintiffs are entitled to immediate emergency relief.

ARGUMENT

I. Plaintiffs Possess Article III Standing to Pursue Both Their March 4, 2024 Petition and their New Petition.

Though he concedes that Plaintiffs possess Article III standing in his Opposition to Plaintiffs' motion for emergency preliminary relief by not addressing the issue, Defendant continues to insist in his Answer that they cannot satisfy Article III. *See* Answer, Doc. No. 58, at PageID #602. Plaintiffs accordingly briefly address Article III standing here.

In addition to their "Protecting Ohioans' Constitutional Rights" initiative, Plaintiffs' new proposed constitutional amendment entitled "Ohio Wrongful Conviction and Justice Reform Amendment" by itself proves Plaintiffs' Article III standing to enjoin application of O.R.C. § 3519.01(A). Plaintiffs intend to place this amendment on the November 2025 general election ballot and are ready and able to do so. *See supra*. The needed 1000 signatures are being collected and will by the end of the week be sufficient to satisfy O.R.C. § 3519.01(A). *See supra*. Defendant, meanwhile, expressly states in his Opposition that Plaintiffs' summary for that proposed amendment includes "material misrepresentations" that will prevent him from certifying it. *See supra*. Just as with denials of equal protection, it is the threatened "imposition of the barrier, not the ultimate inability to obtain the benefit," *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993), that supplies the requisite injury. Plaintiffs are being subjected that kind of barrier here.

This principle is aptly illustrated by the Supreme Court's ruling in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). There, the Supreme Court made clear that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a

'substantial risk' that the harm will occur." This disjunctive standard is met when threatened harm is "sufficiently imminent," *id*. at 152, or presents "a credible threat." *Id*. at. 159. The Court in *Driehaus* noted, moreover, that although past injury by itself is not sufficient to support claims to prospective relief, "past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'" *Id*. at 164. *See also City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987) (noting that past arrests for violating an ordinance supported his Article III standing).

In *Driehaus* the Supreme Court also observed that not only was there a credible threat of future enforcement, the activists there plainly alleged their "intention to engage," *id*. at 666, in the same conduct in the future. *See also Carney v. Adams*, 592 U.S. 53 (2020). This increased the likelihood of the threat to their First Amendment rights. Plaintiffs here make that same verified allegation. Am. Com., Doc. No. 47, at PageID #504. Further, Plaintiffs allege that they are "able and ready," *id*., to timely satisfy O.R.C. § 3519.01(A)'s constitutional components.[2]

These same principles, as the initial interlocutory panel ruled, support Plaintiffs' continuing standing to pursue their March 4, 2024 petition here. The panel observed that "[i]t is undisputed that Plaintiffs suffer an "injury in fact." *Brown v. Yost*, 103 F.3d at 430 (citations omitted). "Plaintiffs are prohibited from advocating for their proposed amendment in the way they wish, thus undermining their freedom of 'expression of a desire for political change and' their ability to discuss 'the merits of the proposed change.'" *Id*. (quoting *Meyer v. Grant*, 486 U.S. 414, 421

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[2] For all of these reasons, Defendant's concession before the en banc Sixth Circuit in this case that "[a]s 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" is certainly correct. Appellee's [Yost's] Supplemental En Banc Brief, *Brown v. Yost*, No. 24-3354, Doc. No. 54, at Page 19 (6th Cir., Aug. 15, 2024) (citing *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046–50 (6th Cir. 2015)). "Such a pre-enforcement challenge would have fallen within the confines of *Ex parte Young*." Appellee's Supplemental En Banc Brief, supra, at 19.

(1988)). "[A] decision enjoining Yost's authority to decide whether or not to certify Plaintiffs' summary would lift the burden on Plaintiffs' speech." *Id*. Plaintiffs, the Sixth Circuit panel correctly ruled, thus possess Article III standing.

II. The Requested Injunction Would Not Implicate Sovereign Immunity.

Defendant continues to insist that injunctive relief in this case would somehow violate the Eleventh Amendment. Opp., Doc. No. 59, at PageID #702. As the Sixth Circuit panel made plain, he is wrong. All parties agree that this Court can award Plaintiffs prospective relief for an ongoing violation of federal law under *Ex parte Young*, 209 U.S. 123 (1908). Plaintiffs are experiencing just that sort of ongoing violation—they continue to be barred from circulating and advocating for their March 4, 2024 ballot initiative, with their chosen title and summary, in the manner they choose, and that injury is attributable to Yost's refusal to submit their proposed amendment, summary and title to the Ohio Ballot Board with the required certification of their validly collected 1000 signatures. An injunction requiring Yost to forward Plaintiffs' proposed summary to the next phase of the review process is forward-looking relief addressing Plaintiffs' ongoing injury.

The only basis Yost identifies for characterizing the relief sought as retrospective is that he decided not to submit Plaintiffs' filing in the past. But this confuses Plaintiffs' *claim* with their *injury*. It is true that—as in almost every case—Plaintiffs' First Amendment claim accrued because of Yost's past actions. But the harm caused by his enforcement of the unconstitutional statutory scheme remains constant and ongoing. *See In re Flint Water Cases*, 960 F.3d 303, 334 (6th Cir. 2020) (rejecting sovereign immunity argument because the allegation was not that plaintiff's rights would be violated "again in the future," but that the past violation "has continuing effects"). Plaintiffs do not seek to alter Yost's past certification decision; rather, they seek to prevent him

from continuing to restrict their speech and advocacy through enforcement of the unconstitutional "fair and truthful" provision in O.R.C. § 3519.01(A) moving forward.

Instead of demonstrating that an injunction would be retrospective, Yost has repeatedly presented to this Court and the Sixth Circuit a mishmash of arguments that are both wrong and unrelated to sovereign immunity. These arguments fail at the outset because they ignore the Court's obligation to "accept as valid the merits of" Plaintiffs' claim. *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022). Plaintiffs argue that Yost's enforcement of his gatekeeping authority burdens their right to political expression in violation of the First Amendment because it allows Yost to unilaterally block them from advocating for their proposed amendment as they wish with the summary they prepare and title they select, without any mechanism for timely and meaningful judicial review. Plaintiffs have therefore alleged an injury-in-fact traceable to Yost's refusal to submit the necessary filings to the Ballot Board and redressable by an injunction requiring Yost to make the submission immediately.

Although Defendant would have this Court believe that Plaintiffs' claims about the inadequacy of § 3519.01(C)'s judicial review mechanism mean that the Ohio Supreme Court is the proper defendant, the unavailability of meaningful judicial review goes to the *merits* of Plaintiffs' claim that Yost's gatekeeping authority violates the First Amendment, not their ability to challenge that authority. Yost is the executive official responsible for enforcing § 3519.01(A), and therefore the proper defendant for this suit. *See Whole Woman's Heath v. Jackson*, 595 U.S. 30, 45-46 (2021). The burden on Plaintiffs' First Amendment rights—their inability to advocate for their amendment as they wish and to circulate their petition—is directly caused by his enforcement of § 3519.01(A), not by the Ohio Supreme Court's rules or management of its docket. And the fact that Plaintiffs dismissed their mandamus action does nothing to solve this ongoing

injury or moot their claims—they still lack the certification necessary to allow them to proceed with their ballot initiative, a continuing infringement on their First Amendment rights. Injunctive relief is necessary and appropriate to redress that harm.

For these reasons, the initial Sixth Circuit panel that heard Plaintiffs' prior interlocutory appeal correctly ruled that neither the Eleventh Amendment nor sovereign immunity defeated Plaintiffs' case. "Plaintiffs," it ruled, "repeatedly affirm that they 'do not seek to reverse Yost's decision.'" *Brown v. Yost*, 103 F.4th at 434. "Plaintiffs instead allege that Yost's ongoing enforcement of § 3519.01 against them—his ongoing exercise of authority to decline to certify their summary—continuously violates their First Amendment rights. Plaintiffs accordingly seek a prospective injunction prohibiting Yost from enforcing § 3519.01 against them—enjoining his authority to make a certification decision without timely judicial review—moving forward." *Id*. (citations omitted).

The panel relied on two prior Sixth Circuit cases. "In *League of Women Voters of Ohio v. Brunner*, plaintiffs alleged that 'Ohio's election machinery unconstitutionally denies or burdens Ohioans' right to vote based on where they live in violation of the Equal Protection Clause. 548 F.3d 463, 475 (6th Cir. 2008)." *Brown v. Yost*, 103 F.4th at 434. In response to Ohio's claim of sovereign immunity, the Court "explained that, though the initial allegedly harmful actions may have already occurred, plausible allegations that the 'problems [were] chronic and [would] continue absent injunctive relief,' demonstrated ongoing constitutional harm." *Id*. (citations omitted).

In *Boler v. Early*, 865 F.3d 391 (6th Cir. 2017), meanwhile, a group of plaintiffs sought an injunction directing a state official to provide services to the plaintiffs affected by a water crisis. The Sixth Circuit there ruled that the defendant's claim of retrospective relief "takes too narrow a

view of the ongoing constitutional violations that the Plaintiffs allege." *Id.* at 413. The panel here explained that "[t]hough the initial violation—bad water pipes—had already taken place, the constitutional harm—violations to their bodily integrity—was ongoing." *Brown v. Yost*, 103 F.4th at 435 (citations omitted).

Consequently, the interlocutory panel in this case found that "Plaintiffs alleged constitutional injury, like the injuries in *League of Women Voters* and *Boler*, [that is] is ongoing." *Brown v. Yost*, 103 F.4th at 435. "Plaintiffs plausibly allege that their inability to speak and advocate for their proposed constitutional amendment in the way they wish is a continuing harm." *Id*. (citation omitted). "That this alleged constitutional injury began with past action—here, Yost's multiple previous failures to certify the summaries to their proposed constitutional amendment—does not undermine the continuing constitutional violation and harmful effects." *Id*.

Further, as found by the interlocutory panel here, "Plaintiffs not only allege an ongoing violation of federal law; they also seek 'relief properly characterized as prospective.'" *Id*. (citations omitted). "Plaintiffs seek injunctive relief preventing Yost from enforcing § 3519.01 against them." *Id*. (citation omitted). "That relief is properly characterized as prospective." *Id*. (citation omitted). "Enjoining the enforcement of this statute as applied to Plaintiffs is prospective relief; Plaintiffs have thus shown that they are likely to succeed in demonstrating that their claims are not barred by sovereign immunity." *Id*. This Court and the Supreme Court, after all, have squarely rejected Yost's argument that an injunction reversing a past decision necessarily constitutes retrospective relief. Injunctions seeking "reversal of a completed state decision," this Court explained in *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002), are "prospective in nature and [an] appropriate subject[] for *Ex parte Young* actions." Indeed, as the Supreme Court made plain in *Reed v. Goertz*, 598 U.S. 230, 234 (2023), that is the point of an *Ex parte Young* injunction: to

require a state official to do something he has already determined he will not do.

III. Defendant's Enforcement of Ohio's Fair and Truthful Requirement Violates the First Amendment.

Defendant claims that Plaintiffs have "alter[ed] their theory of relief" with their amended complaint. Opp., Doc. No. 59 at PageID # 681. This is not true. Plaintiffs' theory of relief has always been that Defendant, both facially and as-applied, has violated the First Amendment. Nothing has changed in this regard with the amended complaint. That is why the initial Sixth Circuit panel's decision is so persuasive. Its rationale applies equally today as it did on May 29, 2024, when the Sixth Circuit panel ordered Yost to certify Plaintiffs' March 4, 2024 petition.

Defendant also claims that O.R.C. § 3519.01(A) survives First Amendment scrutiny under both the *Anderson-Burdick* analysis and *Meyer v. Grant*, 486 U.S. 414 (1988); his judging petitioners' summaries and titles for truthfulness and accuracy, he claims, is merely procedural and constitutes government speech. *See* Opp., Doc. No. 59, at PageID # 682-96. Again he is wrong. Defendant's unconstitutional authority to review, censor and reject Plaintiffs' summary and title, just as he did with their prior attempts, changes and chills how and what form Plaintiffs can submit both their March 4, 2024 petition and their new initiative, entitled "Ohio Wrongful Conviction and Justice Reform Amendment," to Ohio's voters. Their speech in the form of the amendment's title and summary – not the government's speech – is changed and corrupted. Content-based restrictions like this plainly violate the First Amendment, both facially and as-applied.

A. The summary/title provision restricts "core political speech" and fails strict scrutiny.

1. By preventing Plaintiffs from circulating their petition with their chosen summary, Yost has restricted their political speech. The First Amendment's protections are at their "zenith" when applied to "core political speech." *Buckley v. Am. Constitutional L. Found.* ("*ACLF*"), 525 U.S.

182, 186-87 (1999); *accord Grant*, 486 U.S at 425. "Core political speech" involves "both the expression of a desire for political change and a discussion of the merits of the proposed change." *Grant*, 486 U.S. at 421. It "need not center on a candidate for office"; discussion surrounding "issue-based elections ... is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

As the Supreme Court and other circuits have long recognized, speech associated with the circulation of ballot-initiative petitions is core political expression. Ballot initiative proponents "seek by petition to achieve political change," and "their right freely to engage in discussion concerning the need for that change is guarded by the First Amendment." *Grant*, 486 U.S. at 421. Petition circulators must "persuade [potential signatories] that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate," which will typically require "an explanation of the nature of the proposal and why its advocates support it." *Id.* at 421. Petition circulation "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 422; *see also ACLF*, 525 U.S. at 211 (Thomas, J., concurring) ("The aim of a petition is to secure political change, and the First Amendment, by way of the Fourteenth Amendment, guards against the State's efforts to restrict free discussions about matters of public concern."); *Lerman v. Bd. of Elections in City of N.Y.*, 232 F.3d 135, 146 (2d Cir. 2000) (holding that petition circulation activity "clearly constituted core political speech"). Plaintiffs' proposed speech pertaining to their ballot initiative on a "matter[] of public concern" is thus core political speech "at the heart of the First Amendment's protection." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

Yost's enforcement of the challenged summary provision restrains that speech in several ways, especially given the lack of timely judicial review. First, in giving the Attorney General

unilateral authority and unfettered discretion to review and reject Plaintiffs' proposed summary of their ballot initiative, the provision offers the government editorial control over how Plaintiffs communicate with voters about their proposal. Unlike language that appears on the ballot or in the text of the proposed legislation, which might properly be considered government speech, the summary at issue here is used only during circulation of the petition. Written by Plaintiffs, the summary is their political speech advocating for their proposed change, and government review of that speech necessarily implicates the First Amendment. Second, Yost's denials—combined with the lack of timely judicial review by the Ohio Supreme Court—have categorically barred Plaintiffs from communicating their message, through both the summary and one-on-one conversations, to the Ohio electorate in the context of petition circulation. As *Grant* and its progeny recognize, that is an essential avenue for political speech. Third, by blocking circulation, the Attorney General makes it impossible for plaintiffs to "garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion" and "reducing the total quantum of speech on a public issue." *Grant*, 486 U.S. at 423. This is a quintessential government restriction on political expression.

The Supreme Court's seminal case on this issue is instructive. In *Grant*, the Court reviewed a Colorado law that made it a felony to pay petition circulators. It concluded that the case "involve[d] a limitation on political expression subject to exacting scrutiny." *Grant*, 486 U.S. at 420. Because "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change," the Court explained, the "interactive communication concerning political change" associated with collecting signatures on a proposed ballot initiative fell within "core political speech." *Id.* at 421. It found that the ban on paid petition circulators restricted political expression by "limit[ing] the number of

voices who will convey" the proponents' message and therefore "the size of the audience they can reach." *Id.* at 422-23. The restriction in this case is, if anything, more severe. No one can circulate Plaintiffs' petition, regardless of whether the circulators are paid or unpaid, until Yost approves the speech that Plaintiffs will use in the circulation process (or until the Ohio Supreme Court orders him to do so), by which time the deadline for getting on the ballot may pass again.

As in *Grant*, this restriction on speech is not permissible just because "other avenues of expression remain open" to the initiative's proponents. *Id.* at 424. The Supreme Court has explained that a provision that "restrict[s] access to the most effective, fundamental, and perhaps economical avenue of political discourse" and prevents the proponents from "select[ing] what they believe to be the most effective means for" advocating for their cause violates the First Amendment. *Id.* at 424; *see also SD Voice v. Noem*, 60 F.4th 1071, 1079 (8th Cir. 2023) (rejecting an initiative filing deadline one year before the next general election as a restriction on core political speech because it limited the circulation and discussion of initiative petitions, even though other avenues of communication remained open). That is equally true here.

Grant and its progeny illustrate that core political speech restrictions are distinguishable from other types of generic ballot access regulations. Many ballot access regulations aim only to "control the mechanics of the electoral process" and thus do not directly implicate core political speech. *McIntyre*, 514 U.S. at 345-46; *see also Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996) (distinguishing between regulations that affect the circulation of initiative petitions and the discussion about the political change at issue, which burden "core political speech," and general initiative regulations, which do not). These might be considered "typical" and "neutral regulations on ballot access." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring); *see also Grant*, 486 U.S. at 420. In contrast, where, as here, a regulation "restrict[s] political

discussion or petition circulation, it is not a "neutral, procedural regulation." *Id.*; *see also Mazo c. N.J. Sec. of State*, 54 F.4th 124, 142-43 (3d Cir. 2022) (explaining that laws burdening speech that is separate from the ballot or polling place and has "the potential to spark direct interaction and conversation" regulate core political speech, not the mechanics of the electoral process).

In addition to restricting core political speech, the summary provision is content based, something Defendant concedes. *See* Opp., Doc. No. 59, at PageID #687.[3] A provision is a "direct regulation of the content of speech" if "the category of covered [speech] is defined by [its] content" or if the provision requires the speech to contain certain information. *McIntyre*, 514 U.S. at 345-46. The summary provision is content-based because the Attorney General decides whether to approve the summary based on its content. And, in practice, the Attorney General *has* prevented Plaintiffs from using their chosen summary based on content: For instance, he objected to the title of plaintiffs' proposed amendment—"Protecting Ohioans' Constitutional Rights"—because he characterized that title as stating a "subjective hypothesis," when instead it contained an objective statement of the initiative proponents' purpose in proposing the amendment and their chosen formulation for the message they wanted to present to voters. When Plaintiffs deleted that title, Yost rejected them again for not including one acceptable to him (notwithstanding his lack of statutory authority at that time to review titles). "Consequently, we are not faced with an ordinary election restriction; this case 'involves a limitation on political expression ….'" *McIntyre*, 514 U.S. at 346.

[3] Because Yost admits that O.R.C. § 3519.01(A) is based on subject matter and does not argue it is content-neutral, Plaintiffs do not discuss that latter possibility here. Suffice it to say that even if it were, the lack of timely judicial review itself would violate *Anderson-Burdick*. *See Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019). Plaintiffs have raised this argument and reserve it should Yost at a later stage attempt to assert that O.R.C. § 3519.01(A)'s "fair and truthful" requirement is content-neutral.

2. As a restriction on core political speech—especially a content-based restriction on that speech—the summary provision is subject to strict scrutiny. The First Amendment's broad protections "reflect[] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *FEC v. Cruz*, 596 U.S. 289, 302 (2022) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Governmental restrictions on "the discussion of political policy generally or advocacy of the passage or defeat of legislation" are "wholly at odds with the guarantees of the First Amendment." *Grant*, 486 U.S. at 427. Accordingly, restrictions that burden this First Amendment right are "always subject to exacting judicial review." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981); *accord Grant*, 486 U.S. at 420; *ACLF*, 525 U.S. at 204. The content-based nature of the restriction independently triggers strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *see also McIntyre*, 514 U.S. at 346; *ACLF*, 525 U.S. at 209 (Thomas, J., concurring) ("Content-based regulation of speech typically must be narrowly tailored to a compelling state interest.").

Under strict scrutiny, "'the State may prevail only upon showing a subordinating interest which is compelling,' 'and the burden is on the Government to show the existence of such an interest.'" *Bellotti*, 435 U.S. at 786 (citations omitted); *see also ACLF*, 525 U.S. at 206 (Thomas, J., concurring) (laws that "directly regulate[] core political speech" have always been subject to "strict scrutiny" and must be "narrowly tailored to serve a compelling government interest"). A law restricting speech that "does not "avoid unnecessary abridgment" of the First Amendment "cannot survive 'rigorous' review.'" *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (quoting *Buckley*, 424 U.S. at 25).

B. At a minimum, the summary provision is subject to—and cannot survive—the *Anderson-Burdick* balancing test.

Even if Ohio's summary provision were not subject to strict scrutiny as a content-based restriction on core political speech, it would still be subject to the *Anderson-Burdick* balancing test as content-based, subject-matter restrictions on the ballot-access process. Under the *Anderson-Burdick* framework, a court assessing the constitutionality of an election regulation must "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 v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The Supreme Court has held that "[w]hen a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest," whereas "lesser burdens trigger less exacting review." *ACLF*, 525 U.S. at 206-07. When an election regulation imposes neither a "severe" nor a "minimal" burden, it is subject to intermediate scrutiny. *Schmitt v. LaRose*, 933 F.3d 628, 641 (6th Cir. 2019).

Because Ohio's summary provision restricts both political speech and Plaintiffs' ability to circulate their petition, the circuit split over when *Anderson-Burdick* applies to neutral, procedural regulations of ballot-initiative processes is not relevant here—all circuits would agree that this provision implicates the First Amendment. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616-17 (2020) (Roberts, C.J., concurring in the grant of stay) (describing split). And in any event, the Sixth Circuit has correctly held that even neutral, procedural ballot-initiative regulations are subject to *some* degree of First Amendment scrutiny. Even if it disagrees that the provision is subject to strict scrutiny under *Grant* and its progeny, the Court should thus nevertheless enjoin the unconstitutional summary provision under the *Anderson-Burdick* framework.

1. As the panel majority correctly recognized, Ohio's summary provision restricts both political discussion and petition circulation by forcing Plaintiffs "to alter their proposed summary," "restrict[ing] one-on-one communication between Plaintiffs and potential voters," and impeding Plaintiffs' ability to "make the matter the focus of statewide discussion." *Brown v. Yost*, 103 F.3d at 439 (citing *Grant*, 486 U.S. at 423)). The summary provision directly impacts Plaintiffs' ability to engage with voters and discuss their proposal—indeed, Yost's unreviewable abuse of the review process has made it impossible for plaintiffs to circulate their proposal at all. No court has held that such a law is exempt from First Amendment scrutiny.

Yost's contention that the First Amendment is flatly inapplicable to ballot initiatives because they are government speech or procedural is mistaken. The act of signing a referendum petition, as with signing any other type of political petition, "expresses a view on a political matter." *Doe v. Reed*, 561 U.S. 186, 194-95 (2010). Even when signing a referendum petition may have a "legal effect" on the legislative process, that effect does not "deprive[] that activity of its expressive component" or "tak[e] it outside the scope of the First Amendment." *Id*. at 195. As the Supreme Court has made clear, "[p]etition signing remains expressive even when it has legal effect in the electoral process." *Id*.

Plaintiffs' advocacy in support of their ballot initiative is expressive in the same way as any other political speech, and it thus falls within the scope of the First Amendment. Indeed, the Supreme Court has held that petition circulation is even more expressive than distributing handbills opposing a proposed ballot measure, a form of expressive speech unquestionably afforded First Amendment protection. *See ACLF*, 525 U.S. at 199 (citing *McIntyre*, 514 U.S. at 345-47). As compared to handbill distribution, petition circulation "is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition." *Id.* And because an interaction

between a circulator and a voter "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change," their communications are undeniably expressive. *Id.* (citing *Grant*, 486 U.S. at 421). It is exactly this sort of ongoing political discussion and engagement with the community that Plaintiffs have been barred from as a result of Ohio's summary provision. Yost's repeated denials of Plaintiffs' summary have prevented them from communicating with voters about their initiative in the manner they would like and from circulating their petition at all. This is a severe restriction on Plaintiffs' ability to speak, and it imposes a significant burden on their First Amendment rights.

III. Plaintiffs Are Suffering Irreparable Harm and Equity Supports Emergency Relief.

Contrary to Defendant's claim, Opp., Doc. No. 59, at PageID #703, Plaintiffs continue to suffer irreparable harm. Although a variant of their "Protecting Ohioans' Constitutional Rights" petition was finally (and over his fervent continuing objection) certified by Defendant, that variant includes a summary that differs from the March 4, 2024 petition's summary and does not include a title. Plaintiff was forced to remove its preferred title, "Protecting Ohioans' Constitutional Rights," by Yost's insistence that it was misleading. For both these reasons, Plaintiffs seek to move forward with their March 4, 2024 petition and have it placed on the November 2025 general election ballot. It is not subject to subsequent challenges because it lacks a title,[4] and more importantly its summary better conveys Plaintiffs' message. Defendant's refusal to allow the March 4, 2024 to move forward necessarily causes Plaintiffs irreparable harm. *See Elrod v. Burns*,

[4] Defendant's prediction that any later attack based on the July 5, 2024's lack of a title "would fail" is meaningless, of course, since Defendant would not be the decision maker in such a subsequent protest proceeding. He could not know whether such an attack would fail and cannot provide that kind of binding assurance anyway. *See Hoffman v. Secretary of State*, 574 F. Supp.2d 179, 191 (D. Me. 2008) (observing that only when "state authorities affirmatively had misled the candidates or voters or petition signers" is there an argument that official advice can have legal effect).

427 U.S. 347 (1976) (plurality).

Defendant's argument that Plaintiffs do not now have the needed time to meet the July 2, 2025 deadline, Opp., Doc. No. 59, at PageID #705, and do not have the time they need to raise the needed resources to make the November 2025 general ballot, *id*., is nothing but speculation with no basis in fact.[5] The one-year-old campaign finance report Plaintiffs filed with Ohio's Secretary of State is inadmissible here because it was not properly and timely disclosed under Federal Rule of Civil Procedure 26(a)(1), *see* Fed. R. Civ. P. 37(c)(1); *Eran Financial Services v. Eran Ind*., 2024 WL 4370994, *5 (S.D. Fla. 2024), but even if it were admissible it would prove nothing. Plaintiff-Brown and Kyle Pierce, the executive director of the Coalition to End Qualified Immunity, testified that they have a plan with a budget, *see* Brown Dep., Doc. No. 59-2, at PageID #833-34; Pierce Dep., Doc. No. 59-3, at PageID #1062, are collecting money, *id*. at PageID # 1064, have contacted needed resources including a consultant and paid circulators, Brown Dep., Doc. No. 59-2, at PageID #838; Pierce Dep., Doc. No. 59-3, at PageID #1071, and are "ready and able" to qualify their petitions by July 2, 2025. *See* Brown Dep., Doc. No. 59-2, at PageID #845. What their finances looked like last year is irrelevant.

Defendant, moreover, has littered the past several months with dilatory tactics designed to keep courts from reviewing his many "dubious" objections to Plaintiffs' proposed petitions,

[5] Defendant's proposed expert testimony about Plaintiffs' capacity to qualify their petitions for the November 2025 has no basis in fact, is improperly speculative, and is inadmissible. *See United States v. Maestras*, 554 F.2d 834, 837 n.2 (8th Cir. 1977) ("[E]vidence which is vague and speculative is not competent proof and should not be admitted into evidence."); MICHAEL H. GRAHAM, OPINIONS AND EXPERT TESTIMONY, 5 Handbook of Federal Evidence § 702:5 (9th ed. 2024) ("Expert testimony is also unreliable if it is … based upon subjective belief or unsupported speculation. Expert testimony lacking a proper foundation is incompetent, and its admission is an abuse of discretion."). Defendant has no idea what resources Plaintiffs presently possess nor what they may coordinate for their signature-collection campaign.

including their March 4, 2024 petition, their July 5, 2024 petition, and now their newly proposed constitutional amendment. He has already once run out the clock on Plaintiffs' efforts with his administrative "slow walks" and objections to expedited proceedings and now seeks to do so again. Having done so, he now asks this Court not only to count the quickly-ticking clock against Plaintiffs in this case, but to reward his dilatory tactics by ruling that Plaintiffs no longer have enough time to justify equitable relief. The Court should not do so; unclean hands should not be rewarded. *See Keystone Driller Co. v. General Excavator Co., et al.,* 290 U.S. 240, 245 (1933) (stating that one with "unclean hands" is not entitled to equity that is not consistent with "the advancement of right and justice).[6]

Defendant's argument, moreover, has already been rejected by the initial Sixth Circuit panel that granted emergency relief. It ordered Yost to certify Plaintiffs' March 4, 2024 petition to the ballot board on May 29, 2024, just over one month before the July 3, 2024 deadline for collecting signatures. *See Brown v. Yost*, 103 F.3d at 946. The argument carries no more weight now. Plaintiffs are suffering irreparable harm and are entitled to put their resources to the test. Whether Defendant or anyone else believes they can or cannot succeed is irrelevant.

CONCLUSION

Plaintiffs' motion for immediate emergency preliminary relief in this election case should be **GRANTED**.

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[6] Plaintiffs will not belabor Defendant's many needless and wasteful objections throughout these proceedings; suffice it to say that this Court's docket and that of the Ohio Supreme Court are full of them. Defendant even withheld his consent for a month in order to force Plaintiffs to file a motion for leave to file their amended complaint. His belated excuse that Plaintiffs did not show him the amended complaint is specious, of course, since all he had to do was ask. He never did.

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Respectfully submitted,

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