APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-3196

WILLIAM T. SCHMITT; CHAD THOMPSON;
DEBBIE BLEWITT,

Plaintiffs-Appellees,

v.

FRANK LAROSE, Ohio Secretary of State,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus

No. 2:18-cv-00966—
Edmund A. Sargus, Jr., Chief District Judge.

Argued: June 26, 2019

Decided and Filed: August 7, 2019

Before: CLAY, WHITE, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant. Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, for Appellees. **ON**

BRIEF: Benjamin M. Flowers, Michael J. Hendershot, Stephen P. Carney, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellant. Mark R. Brown, CAPITAL UNIVERSITY LAW SCHOOL, Columbus, Ohio, Mark G. Kafantaris, Columbus, Ohio, for Appellees.

WHITE, J., delivered the opinion of the court in which CLAY, J., joined, and BUSH, J., joined in part. BUSH, J. (pp. 15–26), delivered a separate opinion concurring in part and in the judgment.

OPINION

HELENE N. WHITE, Circuit Judge. Plaintiffs William T. Schmitt and Chad Thompson submitted proposed ballot initiatives to the Portage County Board of Elections that would effectively decriminalize marijuana possession in the Ohio villages of Garrettsville and Windham. The Board declined to certify the proposed initiatives after concluding that the initiatives fell outside the scope of the municipalities' legislative authority. Plaintiffs then brought this action asserting that the statutes governing Ohio's municipal ballot-initiative process impose a prior restraint on their political speech, violating their rights under the First and Fourteenth Amendments. The district court issued a permanent injunction against the Portage County Board of Elections and Defendant Frank LaRose, in his official capacity as the Secretary of State of Ohio, prohibiting the enforcement of the statutes in any manner that failed to provide adequate judicial review. Defendant LaRose now appeals.

Because the Ohio statutes at issue do not violate Plaintiffs' First or Fourteenth Amendment rights, we **REVERSE** the district court's order and **VACATE** the permanent injunction.

I.

The Ohio Constitution reserves the power of legislation by initiative "to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action." Ohio Const. art. II, § 1f. "Because citizens of a municipality cannot exercise [initiative] powers greater than what the [Ohio] Constitution affords," an initiative may only propose "legislative action," as opposed to "administrative action." *State ex rel. Ebersole v. Del. Cty. Bd. of Elections*, 20 N.E.3d 678, 684 (Ohio 2014) (per curiam). "The test for determining whether an action is legislative or administrative is whether the action taken is one enacting a law, ordinance, or regulation, or executing a law, ordinance or regulation already in existence." *Id*. (citation and internal quotation marks omitted).

Under Ohio law, "[e]lection officials serve as gatekeepers, to ensure that only those measures that actually constitute initiatives or referenda are placed on the ballot." *State ex rel. Walker v. Husted*, 43 N.E.3d 419, 423 (Ohio 2015) (per curiam). Specifically, Ohio Revised Code (O.R.C.) § 3501.11(K) requires county boards of elections to "[r]eview, examine, and certify the sufficiency and validity of petitions," and to "[e]xamine each initiative petition . . . 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 as described [by Ohio law]." O.R.C. § 3501.38(M)(1) further provides that, "[u]pon receiving an initiative petition," the relevant board of elections "shall examine the petition to determine":

> Whether the petition falls within the scope of a municipal political subdivision's authority to enact

> via initiative, including, if applicable, the limitations placed by Sections 3 and 7 of Article XVIII of the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, 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[.]

Id. § 3501.38(M)(1)(a). If a petition "falls outside the scope of authority to enact via initiative or does not satisfy the statutory prerequisites to place the issue on the ballot," neither the board of elections nor the Ohio Secretary of State may accept the initiative. *Id*. § 3501.39(A)(3). The ballot-initiative statutes do not set forth the legislative-administrative distinction. However, the Ohio Supreme Court has explained that, "[b]ecause [an initiative] on an administrative matter is a legal nullity, boards of elections have not only the discretion but an affirmative duty to keep such items off the ballot." *Walker*, 43 N.E.3d at 423 (citation omitted). "It necessarily follows that the boards have discretion to determine which actions are administrative and which are legislative." *Id*.

When a board of elections declines to place an initiative on the ballot on the basis that it proposes an administrative action, the proponent has no statutory right to immediate judicial review. Instead, the proponent must seek a writ of mandamus in Ohio state court requiring the board of elections to put the initiative on the ballot. To show entitlement to mandamus relief, the petitioner must prove by clear and convincing evidence: "(1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the board members

to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Bolzenius v. Preisse*, 119 N.E.3d 358, 360 (Ohio 2018) (per curiam) (citation omitted). In reviewing a decision by a board of elections, an Ohio court may only issue the writ if the board members "engaged in fraud or corruption, abused their discretion, or acted in clear disregard of applicable legal provisions." *Id.* Typically, the "proximity of the [next] election" satisfies the requirement that there be no adequate remedy in the ordinary course of the law. *See, e.g.*, *State ex rel. Harris v. Rubino*, 119 N.E.3d 1238, 1246 (Ohio 2018); *Ebersole*, 20 N.E. at 491.

In early 2018, Plaintiffs William Schmitt and Chad Thompson submitted two proposed ballot initiatives to the Portage County Board of Elections (the Board). The initiatives eliminated criminal penalties associated with possession of marijuana in Garrettsville and Windham, two villages within Portage County, by abolishing criminal fines, court costs, and consequences related to driver's licenses. Although the proposed initiatives met Ohio's statutory prerequisites—each addressed only a single subject and contained the requisite number of signatures—the Board declined to certify the petitions. In an August 21, 2018 email to Plaintiffs, a representative of the Board explained that the initiatives were rejected because the Board deemed them administrative, rather than legislative:

> Reviewing the language in the proposals presented by the Village of Garrettsville and the Village of Windham, the $0 fine and no license consequences are administrative in nature. The $0 court costs is administrative in nature and is an impingement on the judicial function by a legislature. Accordingly, as the Garrettsville Vil-

> lage and Windham Village petitions deal with subject matter that is not subject to the initiative process, the Board of Elections, in its discretion, has chosen not to certify these issues to the ballot.

(R. 1-4, PID 35.)

Rather than petitioning for mandamus relief, Plaintiffs filed this action, bringing facial and as-applied challenges to the Ohio ballot-initiative statutes under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs allege that the statutes impose a prior restraint on their protected political speech, and that the ballot-initiative process must therefore comply with the procedural safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965). Because the process fails to provide de novo judicial review of a board's decision, Plaintiffs argued, it fails to satisfy the *Freedman* requirements. Plaintiffs sought a temporary restraining order and preliminary injunction against the Portage County Board of Elections members Craig Stephens, Patricia Nelson, Doria Daniels, and Elayne Cross, as well as then-Ohio Secretary of State Jon Husted.

After a hearing, the district court issued a temporary restraining order directing the Ohio Secretary of State and the Portage County Board of Elections to place both initiatives on the ballot for the November 2018 election. *Schmitt v. Husted*, 341 F. Supp. 3d 784 (S.D. Ohio 2018). Applying the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the district court determined that the Plaintiffs' right to ballot access was impermissibly burdened by the statutory framework:

> Recognizing [the state's interest in regulating elections], the Court finds no legitimate state interests in preventing an adequate legal remedy for petitioners denied ballot access by a board of elections. While the availability of mandamus relief is essentially a judicially imposed remedy when the law does not otherwise provide one, the high burden on petitioners to prove entitlement to an extraordinary remedy is no substitute for de novo review of the denial of a First Amendment right.[1]

Schmitt, 341 F. Supp. 3d at 791. The district court later converted the temporary restraining order to a preliminary injunction that would expire the day after the election. On election day, the two proposed ordinances met different fates; the Windham initiative passed by a vote of 237 to 206, but the Garrettsville initiative failed 471 to 515.

After the election, the district court ordered additional briefing on Plaintiffs' facial challenge.[2] Plaintiffs maintained that the ballot-initiative statutes constituted a prior restraint in violation of the First Amendment "because [they] vest[] discretion in local

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[1] The district court did not identify the source of the asserted right to de novo judicial review.

[2] We note that Plaintiffs' as-applied challenge is moot. Under Article III, we "may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citation omitted). The district court enjoined the Secretary of State to place the Plaintiffs' initiatives on the Portage County ballots, and the election was conducted in November 2018. The State made clear at oral argument that it does not seek to relitigate the district court's decision on the as-applied challenge. Accordingly, we will not consider it here, and review the district court's permanent injunction only as to the facial challenge.

election officials to select initiatives for ballots without providing timely and meaningful judicial review." (R. 32, PID 240.) Plaintiffs alternatively argued that the statutes authorized content-based review by local boards of elections and were therefore subject to strict scrutiny. Ohio, on the other hand, argued that the ballot-initiative statutes were not susceptible to a First Amendment challenge because they merely set forth the process by which legislation is made, and therefore did not implicate any expressive interests. Ohio also argued that even if the First Amendment is implicated, the state's interests in regulating elections, reducing voter confusion, and simplifying the ballot all justify the alleged infringement on Plaintiffs' constitutionally protected interests.

The district court found that Plaintiffs were entitled to de novo review of the denial of their ballot initiative, and issued a permanent injunction barring the Ohio Secretary of State "from enforcing the gatekeeper function in any manner that fails to provide a constitutionally sufficient review process to a party aggrieved by the rejection of an initiative petition." *Schmitt v. LaRose*, 2019 WL 1599040, at *2 (S.D. Ohio Apr. 15, 2019). Notably, the district court did not analyze Plaintiffs' claim under the First Amendment, but rather under procedural due process. This approach had no basis in the pleadings or arguments below; the complaint did not separately state a procedural due process claim, and the parties' supplemental briefing did not invoke due process. On appeal, neither party defends the district court's analysis in its order granting the permanent injunction. The State disputes the merits of the procedural due process claim, and Plaintiffs insist their claim is founded only on First Amendment law. Because Plaintiffs did not raise a procedural due process argument below, and did not address it in

their appellate briefing, we would ordinarily deem the issue waived. *See Watson v. Cartee*, 817 F.3d 299, 302 (6th Cir. 2016). However, we may affirm a district court's injunction order for any reason supported by the record. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018). Accordingly, we will evaluate Plaintiffs' claim under both the First Amendment and procedural due process.

II.

"[A] party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Am. Civil Liberties Union of Ky. v. McCreary County*, 607 F.3d 439, 445 (6th Cir. 2010) (quoting *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006)). When evaluating a district court's grant of a permanent injunction, we review factual findings for clear error, legal conclusions de novo, and the scope of injunctive relief for abuse of discretion. *Id*. The parties do not dispute the underlying facts; the only issue is whether Plaintiffs suffered a violation of their First Amendment rights.

III.

A.

Plaintiffs urge us to view the ballot-initiative statutes as imposing a prior restraint on political speech. "A prior restraint is any law 'forbidding certain communications when issued in advance of the time that such communications are to occur.'" *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)). "Prior restraints are presumptively invalid because of the risk of censorship associated with the vesting of unbri-

dled discretion in government officials and the risk of indefinitely suppressing permissible speech when a licensing law fails to provide for the prompt issuance of a license." *Bronco's Entm't, Ltd. v. Charter Twp. of Van Buren*, 421 F.3d 440, 444 (6th Cir. 2005) (citation and internal quotation marks omitted). In *Freedman v. Maryland*, the Supreme Court articulated three procedural safeguards necessary for a system of prior restraint to survive constitutional challenge. 380 U.S. at 57–59.

> First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. Second, the licensing scheme must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor.

Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville, 274 F.3d 377, 400 (6th Cir. 2001) (discussing *Freedman*, 380 U.S. at 57–59) (internal citations and quotation marks omitted). Plaintiffs assert that because the ballot-initiative statutes delegate authority to boards of elections to review proposed initiatives prior to the election, the statutes amount to a prior restraint, and, consistent with *Freedman*, Ohio must provide de novo judicial review of a board's decisions.

We conclude, however, that the ballot-initiative process here is not a prior restraint. The fundamental objection to systems of prior restraint is that they create a risk of government censorship of expressive activity. *See, e.g.*, *City of Lakewood v. Plain Dealer*

Publ'g Co., 486 U.S. 750, 757 (1988) ("At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.") Accordingly, prior-restraint challenges typically emerge from licensing schemes that directly target core expressive conduct and "authorize a licensor to pass judgment on the content of speech." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002). *See City of Lakewood*, 486 U.S. at 750 (permit required for placement of newspaper racks on public property); *McGlone*, 681 F.3d at 718 (advance-notice requirement for obtaining permission to speak on campus); *Deja Vu*, 274 F.3d at 377 (licensing scheme for nude dance clubs); *Freedman*, 380 U.S. at 61 (censorship of obscene films). Ohio's ballot-initiative laws, in contrast, do not directly restrict core expressive conduct; rather, the laws regulate the process by which initiative legislation is put before the electorate, which has, at most, a second-order effect on protected speech. In other words, the statutes enable boards of election to make "structural decisions" that "inevitably affect[]—at least to some degree—the individual's right to speak about political issues and to associate with others for political ends." *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) (quoting *Anderson*, 460 U.S. at 788) (internal quotation marks omitted). 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*. at 212–13 (citation omitted).

Moreover, although the Supreme Court has acknowledged that a person or party may express beliefs or ideas through a ballot, it has also stated that "[b]allots

serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (citing *Burdick*, 504 U.S. at 438). As a result, the heightened procedural requirements imposed on systems of prior restraint under *Freedman* are inappropriate in the context of ballot-initiative preclearance regulations. *See also Aey v. Mahoning Cty. Bd. of Elections*, 2008 WL 554700, at *6 (N.D. Ohio Feb. 26, 2008) ("Plaintiff fails to cite any authority in support of the proposition that prior restraint licensing analysis should be applied to a ballot access statute."); *Comm. to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members & Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd.*, 275 F. Supp. 3d 849, 861 (S.D. Ohio 2017) (holding that another aspect of Ohio's ballot initiative process, the "single subject rule," is not a prior restraint).

B.

Instead, we generally evaluate First Amendment challenges to state election regulations under the three-step *Anderson-Burdick* framework, in which we "weigh the character and magnitude of the burden the State's rule imposes on [Plaintiffs' First Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358 (citations and internal quotation marks omitted). The first, most critical step is to consider the severity of the restriction. Laws imposing "severe burdens on plaintiffs' rights" are subject to strict scrutiny, but "lesser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id*. (citations and

internal quotation marks omitted). Regulations 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." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) (citation and internal quotation marks omitted). At the second step, we identify and evaluate the state's interests in and justifications for the regulation. *Id*. The third step requires that we "assess the legitimacy and strength of those interests" and determine whether the restrictions are constitutional. *Id*.

We first examine whether the burden imposed by the Ohio ballot-initiative statutes is "severe." *Timmons*, 520 U.S. at 358. "The hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Grimes*, 835 F.3d at 574. Plaintiffs claim an injury from the lack of de novo review of the decisions of boards of elections; by requiring aggrieved petitioners to seek a writ of mandamus, argue Plaintiffs, the Ohio ballot-initiative process unduly hampers their right to political expression. We disagree.

We begin by making clear that Plaintiffs have never challenged the legitimacy of the legislative-administrative distinction or the state's right to vest in county boards of elections the authority to apply that distinction. Instead, Plaintiffs assert, and the district court found, a right to de novo review of a board's decision. However, outside the context of *Freedman*'s requirements for a prior restraint, Plaintiffs have not identified the source of such a right.

But even accepting Plaintiffs' argument that the First Amendment requires de novo review of a board's decision, the Ohio case law suggests that petitioners receive essentially that. The Ohio Supreme Court's evaluation of the decisions of boards of elections shows

no particular deference to the boards' decisions. And, although the standard for showing entitlement to mandamus is recited as "fraud or corruption, abuse of discretion, or clear disregard of the law," Plaintiffs have identified no case in which the Ohio Supreme Court questioned the legal determination of a board of elections but nevertheless deferred to its discretion. Rather, the cases show that notwithstanding the stated standard of review, the court considers the proposed initiative and makes an independent reasoned determination whether it is within the Ohio Constitution's grant of legislative authority. *See State ex rel. Langhenry v. Britt*, 87 N.E.3d 1216 (Ohio 2017) (proposed referendum financing bonds for refurbishment of arena is legislative because it "represents the adoption of a new policy and a new undertaking"); *State ex rel. Sensible Norwood v. Hamilton Cty. Bd. of Elections*, 69 N.E.3d 696, 179–80 (Ohio 2016) (initiative making marijuana possession a fifth-degree felony is not within legislative authority); *Ebersole*, 20 N.E.3d at 684 (initiative approving land development is administrative because it "complied with the preexisting requirements for the Downtown Business District . . . and did not require any zoning changes").

Indeed, at least one justice of the Ohio Supreme Court has questioned whether the standard of review for ballot-initiative challenges is actually closer to de novo. *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 109 N.E.3d 1184, 1192 (Ohio 2018) (Fisher, J., concurring in judgment) (explaining that although the court purports to follow an abuse-of-discretion standard, "we have also stated that we need accord no deference to a board of elections' interpretation of state election law" (quotation omitted)). If there is any actual distance between the de novo standard of review Plaintiffs demand and the mandamus review

provided by the Ohio Supreme Court, it is hardly significant enough to result in "virtual exclusion" from the ballot. We also note that because Ohio Supreme Court rules provide for expedited briefing and decision in election cases, aggrieved citizens who challenge an adverse decision are able to seek timely redress. The ballot-initiative statutes are thus not subject to strict scrutiny based on a severe burden.[3] *Timmons*, 520 U.S. at 358.

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[3] Plaintiffs also attempt to invoke strict scrutiny on the ground that the ballot-initiative statutes are content-based restrictions. But Plaintiffs have made clear in the district court and on appeal that they "do not challenge Ohio's ability to limit the subject matter of its initiatives." (R. 19, PID 136.) Instead, the focus of Plaintiffs' challenge is the asserted inadequacy of the review afforded to the boards' discretionary judgments. This aspect of the ballot-initiative statutes is plainly content-neutral. Moreover, the mere fact that the legislative-administrative distinction is directed to the content of an initiative does not necessarily make it content based such that it triggers strict scrutiny. *Cf. Committee to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members & Emps. of the Ohio Gen. Assembly v. Ohio Ballot Bd.*, 885 F.3d 443, 447 (6th Cir. 2018). The rule applies without regard to the subject matter or viewpoint of the initiative.

Further, the main case Plaintiffs rely upon in discussing whether the ballot-initiative statutes are content-based is largely inapposite. Plaintiffs rely primarily on the Supreme Court's recent decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). In that case, the Court held that Minnesota's ban on wearing political apparel at polling places on election day violated the First Amendment. *Id.* at 1892. However, the Court was not concerned with whether the ban was content-based. Rather, the Court was concerned with "[t]he discretion election judges exercise[d] in enforcing the ban" given the lack of "objective workable standards" for what constituted political apparel. *Id.* at 1891. *Mansky* thus does not explain whether Plaintiffs' challenge targets a content-based restriction. And in any event, *Mansky* involved a restriction on core political speech, in which "the whole

Having determined that the restriction imposed by the ballot-initiative process is not severe and does not trigger strict scrutiny, we also conclude that the burden is not so minimal as to warrant rational-basis review. A burden is minimal when it "in no way" limits access to the ballot. *Grimes*, 835 F.3d at 577. Here, however, boards of elections wield the discretionary authority to decline to certify initiatives, and the burden thus falls on the aggrieved proponent to obtain mandamus relief in order to vindicate his or her interest. It is reasonable to conclude that the cost of obtaining legal counsel and seeking a writ of mandamus disincentivizes some ballot proponents from seeking to overturn the board's decision, thereby limiting ballot access. As a result, the burden imposed by the Ohio ballot-initiative process is somewhere between minimal and severe, and we engage in a flexible analysis in which we weigh the "burden of the restriction" against the "state's interests and chosen means of pursuing them." *Id*. at 574 (citations omitted).

At the second step of *Anderson-Burdick* we consider the State's justifications for the restrictions. *Id*. The Supreme Court has explained that, in structuring elections, "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons*, 520 U.S. at 358; *see also John Doe No. 1*, 561 U.S. at 186 ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Buckley v. Am. Constitutional Law*

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point of the exercise [was] to prohibit the expression of political views." *Id*. at 1891. As noted earlier, this case does not involve core expressive conduct; "the whole point of the exercise" is preventing the overcrowding of ballots. *Id*. *Mansky*'s salience is questionable in this context.

Found., 525 U.S. 182, 191 (1999) ("States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process.") We have previously stated that states have a strong interest in "ensuring that its elections are run fairly and honestly," as well as in "maintaining the integrity of its initiative process." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). Further, a state may legitimately "avoid[] overcrowded ballots" and "protect the integrity of its political processes from frivolous or fraudulent candidacies." *Jolivette v. Husted*, 694 F.3d 760, 769 (6th Cir. 2012) (quoting *Bullock v. Carter*, 405 U.S. 135, 145 (1972)). Here, Ohio's interest is in "ensur[ing] that only ballot-eligible initiatives go to the voters" because "[k]eeping unauthorized issues off the ballot reduces the odds that an initiative is later held invalid on the ground that the voters exceeded their authority to enact it." (Appellant Br. at 49.) Ohio also contends it has an interest in maintaining voter confidence in the electoral process. Plaintiffs do not dispute these interests, and we find that they are legitimate and substantial.

At the third step of *Anderson-Burdick* we assess whether the State's restrictions are constitutionally valid given the strength of its proffered interests. Again, Plaintiffs do not contest that Ohio's interests in avoiding ballot overcrowding and safeguarding the integrity of the initiative process justify the administrative-legislative distinction and do not argue that the board-of-elections certification process is otherwise unconstitutional. Rather, they challenge the adequacy of the judicial review of such decisions. As explained above, however, because the Ohio Supreme Court recognizes a proponent's right to seek mandamus review of a board of elections' decision not to place an initiative on the ballot and the court performs what

is essentially a de novo review of the legal issue whether an initiative is within the municipality's initiative power, the absence of a statutory de novo appeal of right does not impose a significant or unjustified burden on initiative proponents' First Amendment rights. Although the State's chosen method for screening ballot initiatives may not be the least restrictive means available, it is not unreasonable given the significance of the interests it has in regulating elections.

Plaintiffs' First Amendment challenge thus fails.

IV.

We next evaluate whether the ballot-initiative statutes violate procedural due process. The Fourteenth Amendment provides, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. To establish a claim of procedural due process, a plaintiff must show that (1) he or she had a life, liberty, or property interest protected by the Due Process Clause; (2) he or she was deprived of this protected interest; and (3) the state did not afford adequate procedural rights. *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (6th Cir. 2014) (citation omitted).

As noted, Plaintiffs did not raise a procedural due process claim below. Nevertheless, the district court concluded that Plaintiffs had a protected "right to participate in Ohio's initiative process with . . . adequate review in the courts of Ohio." (R. 37, PID 291.) According to the district court, this liberty interest derives from state law; the district court reasoned that because Ohio established a ballot-initiative process, it is constitutionally bound not to "restrict the process in any manner" that would violate due process.

(*Id*. at PID 290 (citing *Taxpayers United*, 994 F.2d at 295).)

We need not decide whether Ohio has created a constitutionally protected liberty interest, however, because it is clear that the State affords aggrieved ballot-initiative proponents adequate procedural rights through the availability of mandamus relief in the state courts. This court has previously found that state mandamus is a satisfactory post-deprivation remedy for the purposes of procedural due process. *See Kahles v. City of Cincinnati*, 704 F. App'x 501, 507 (6th Cir. 2017) ("[P]laintiffs were able to seek a writ of mandamus in the state-court system to challenge any alleged abuse of discretion on the part of the City's medical director. . . . The plaintiffs thus received the process to which they were due."); *Martinez v. City of Cleveland*, 700 F. App'x 521, 522–23 (6th Cir. 2017) ("Because Martinez had [state mandamus relief] available to him, no due-process violation occurred."). And although the district court held that only de novo review will suffice, due process does not mandate any particular standard of review. *See Miller v. Francis*, 269 F.3d 609, 621 (6th Cir. 2001) ("Miller does not cite, nor are we aware of, any Supreme Court precedent vesting him with a procedural due process right to a particular standard of appellate review in the state courts.").

Plaintiffs therefore cannot state a procedural due process claim, and the district court erred in concluding otherwise.

V.

For the reasons stated above, we **REVERSE** the district court's order and **VACATE** the permanent injunction.

CONCURRING IN PART AND IN THE JUDGMENT

JOHN K. BUSH, Circuit Judge, concurring in part and concurring in the judgment. I agree with the Majority that the Ohio legislative authority statutes[1] do not violate either the First Amendment as incorporated by the Fourteenth Amendment or the Due Process Clause of the Fourteenth Amendment. I join Parts I, II, and IV of the majority opinion, but, as explained below, my reasoning differs from the remainder of the Majority's analysis. It is arguable that Ohio's legislative authority statutes do not regulate "speech" within the meaning of the First Amendment at all because they concern only election mechanics. But even assuming that state-referendum laws regulate First Amendment speech, regulations of the nature at issue here do not warrant heightened scrutiny under that constitutional provision. States are free to fashion rules of election mechanics that are content-neutral and do not discriminate against any particular point of view, including rules that affect the types of matters that may be subject to popular initiatives, without running afoul of the First Amendment.

A.

To understand why the First Amendment either is not implicated at all or, if it is, imposes no heightened scrutiny here, we should bear in mind what the Ohio legislative authority statutes do and *do not* regulate.

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[1] I refer to the Ohio statutes at issue, O.R.C. §§ 3501.11(K)(1)–(2), 3501.38(M)(1)(a), 3501.39(A), by using the Ohio Secretary of State's nomenclature: "Ohio's legislative authority statutes." Also, given the function these statutes serve to ensure that a proposed initiative "falls within the scope of authority to enact via initiative," Ohio Revised Code § 3501.11(K)(2), I sometimes refer to these statutes as the "gatekeeper" provisions.

Cf. John Doe No. 1 v. Reed, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring) ("In assessing the countervailing interests at stake in this case, we must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action."). First, these statutes do not regulate a citizen's ability to advocate for a proposed initiative or regulate any speech surrounding the issue on the ballot. Second, these statutes only address proposed initiatives. They do not regulate an individual's ability to appear on the ballot as a candidate for any position (as would a ballot-access provision).

As such, I would characterize these gatekeeper provisions as laws regulating election mechanics. That is, these statutes ensure that certain eligibility requirements are met before an initiative is formally certified for the ballot and voted on by the people. The eligibility regulation at issue in this case is a requirement that an initiative pertain to only "legislative action," not "administrative action." *State ex rel. Ebersole v. Del. Cty. Bd. of Elections*, 20 N.E.3d 678, 684 (Ohio 2014) (per curiam). This requirement, in turn, implements separation-of-powers principles under Ohio state constitutional law by ensuring that laws passed through popular initiatives are only legislative, as opposed to administrative, in nature. *See* Ohio Const. art. II, § 1f ("The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . . ."); *State ex rel. Walker v. Husted*, 43 N.E.3d 419, 423 (Ohio 2015) (per curiam) ("Election officials serve as gatekeepers, to ensure that only those

measures that actually constitute initiatives or referenda are placed on the ballot. For example, the right of referendum does not exist with respect to a measure approved by a city counsel acting in an administrative, rather than legislative, capacity." (citation omitted)).

B.

The Supreme Court has not addressed the precise scope of the First Amendment interests, if any, that are implicated by laws that regulate only the mechanics of the initiative process. The closest Supreme Court precedent is *Meyer v. Grant*, 486 U.S. 414 (1988), which found a First Amendment violation when a Colorado statute criminalized the compensation of petition circulators for gathering citizens' signatures for ballot initiatives. *Id.* at 415–16. The Colorado law limited "the number of voices who will convey" the message and also the initiative supporters' "ability to make the matter the focus of statewide discussion." *Id.* at 422–23. But *Meyer* is not completely on all fours with the facts in our case. The Colorado statute in *Meyer* targeted Coloradans' ability to advocate for initiative petitions, which amounted to regulation of political speech. The Ohio legislative authority statutes affect no such regulation.

Furthermore, the Court's precedents in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), though concerning election regulation, similarly do not address the key question raised in this case: is the First Amendment impinged upon by statutes regulating the election mechanics concerning initiative petitions? In those cases, the Court reviewed challenges to State laws that sought to limit a candidate's ability to appear on the ballot or otherwise limited a voter's ability to "write-in" candidates. *See Anderson*, 460 U.S. at 793–95, 805–06 (holding that

Ohio statute requiring independent candidates to file statements of candidacy by March to appear on November ballot was unconstitutional); *Burdick*, 504 U.S. at 441–42 (holding that Hawaii's prohibition on write-in voting did not violate the challengers' freedoms of expression and association). Indeed, this circuit has generally limited the application of *Anderson* and *Burdick* to freedom-of-association challenges to ballot access laws—i.e., laws that burden candidates from appearing on the ballot. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) ("The first step under the *Anderson*/*Burdick* framework is to determine whether this burden on the associational rights of political parties is 'severe.'" (footnote omitted)); *see also Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 572–73, 574 (6th Cir. 2016); *Green Party of Tenn. v. Hargetti*, 767 F.3d 533, 545 (6th Cir. 2014); *cf. Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 334 (6th Cir. 2016).

Here, by contrast, Appellees are not asserting that the Ohio legislative authority statutes violate their freedom-of-association rights or their right to vote. The Ohio laws at issue concern the regulation of the initiative petition—i.e., the process through which the people act in their sovereign capacity to legislate directly. Thus, we should look to authorities that address the State's ability to regulate its initiative process and ensure that all requirements are met before an initiative is certified for the ballot. This brings us to the most relevant case from our circuit, *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993).

In *Taxpayers United*, this court reviewed a Michigan statute requiring that each initiative petition have a certain number of valid signatures from registered

voters before the initiative could appear on the ballot. 994 F.2d at 293. The challengers of that statute argued that "they had been denied their right to vote and their rights to assemble and to engage in political speech," after the Michigan Board reviewed the challengers' initiative petition and concluded that the challengers failed to obtain the requisite number of signatures. *Id.* at 294. This court held that the challengers' First Amendment free speech rights and political association rights were not "impinged" by the statute. *Id.* at 297. The *Taxpayers United* court reasoned that "[b]ecause the right to initiate legislation is a wholly state-created right, we believe that the state may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiff's ability to initiate legislation." *Id.* at 297.

Our court noted that, "although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." *Id.* at 295; *see also Meyer*, 486 U.S. at 424. But, because Michigan's regulation did not regulate the challengers' speech on the basis of content, we determined that "it is constitutionally permissible for Michigan to condition the use of its initiative procedure on compliance with content-neutral, nondiscriminatory regulations that are . . . reasonably related to the purpose of administering an honest and fair initiative procedure." *Taxpayers United*, 994 F.2d at 297. In short, the Michigan statute did not trigger heightened scrutiny under the First Amendment and survived rational-basis review. *See id.*

In reaching this conclusion, the *Taxpayers United* court made a critical observation about the Michigan statute—that it did "not restrict the means that the

plaintiffs can use to advocate their proposal." *Id.* Had Michigan's statute been directed toward the challengers' ability to advocate for their initiative, the statute would have failed strict-scrutiny review under the Supreme Court's precedent in *Meyer*. *See Taxpayers United*, 994 F.2d at 295. As this court explained, "the principle stated in *Meyer* is that a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Id.* But because the Michigan statute at issue in *Taxpayers United* dealt "with methods used to validate and invalidate signatures of voters to an initiative petition," that law was not like the statute in *Meyer*, which "dealt with a limitation on communication with voters." *Taxpayers United*, 994 F.2d at 295. For its reasoning, this court did not address whether the Michigan statute regulated First Amendment speech. *See id.* at 293–94, 296–97. Instead, the court assumed that it did but nonetheless upheld the law under rational-basis review. *See id.* at 296–97. Thus, under *Taxpayers United*, statutes that, in a content-neutral and non-discriminatory fashion, implement and ensure compliance with the eligibility requirements for citizen initiative petitions are subject, at most, to only rational-basis review under the First Amendment. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) (citing *Taxpayers United* favorably for its holding).

Consistent with *Taxpayers United*, this court in *Committee to Impose Term Limits on the Ohio Supreme Court & to Preclude Special Legal Status for Members & Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F.3d 443 (6th Cir. 2018) (hereinafter *Ohio Ballot Board*) upheld the constitutionality of Ohio's single-subject rule. *Ohio Ballot Board*, 885 F.3d

at 446. Under that rule, an initiative petition may only contain "one proposed law or constitutional amendment." *Id.* at 445. The challengers asserted that the provision violated the First Amendment because it was a content-based speech restriction. *Id*. at 446–47. Relying on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the *Ohio Ballot Board* court concluded that "Ohio's single-subject rule is not content based," because it "applies to all initiative petitions, no matter the topic discussed or idea or message expressed." *Ohio Ballot Board*, 885 F.3d at 447. Once again, just as in Taxpayers United, this court did not address whether an election-mechanics law regulated First Amendment speech. *See Ohio Ballot Board*, 885 F.3d at 445–46. Instead, the court assumed the First Amendment was implicated and upheld the single-subject requirement applying rational-basis review.

C.

Taxpayers United and *Ohio Ballot Board* align with decisions of the majority of other circuits that have addressed statutes relating to the regulation of election mechanics. These circuits have similarly concluded that non-discriminatory referendum regulations are, at most, subject to rational-basis review. *See Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009) (holding referendum statutes are only subject to rational-basis review); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc) (same); *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) (same); *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997) (same). *But see Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012) (holding referendum regulations imposing subject-matter restrictions are subject to heightened scrutiny); *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (same).

In *Walker*, the Tenth Circuit, sitting en banc, addressed a fundamental question that *Taxpayers United* and *Ohio Ballot Board* did not answer: whether election-mechanics laws ever regulate "speech" under the First Amendment. The Tenth Circuit indicated that the First Amendment may not be triggered by citizen-initiative regulations and, if it is, such regulations are subject to only lower scrutiny. In *Walker*, the election-mechanics law at issue was a Utah constitutional provision that imposed a requirement that any "legislation initiated to allow, limit, or prohibit the taking of wildlife . . . shall be adopted upon approval of two-thirds of those voting." 450 F.3d at 1086 (quoting Utah Const. art. VI, § 1(2)(a)(ii)). The Tenth Circuit held that the constitutional provision did not infringe upon the challengers' First Amendment rights because they were not implicated by laws of this nature. *Id.* at 1085. In reviewing whether the Utah provision was subject to heightened scrutiny, the *Walker* court defined a key distinction (just as this court did in *Taxpayers United*) between the types of election laws that were constitutionally permissible and those that were not: "The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1099–1100.

The *Walker* court reasoned that the First Amendment is not a vehicle for challenging regulations of the process that must be followed for legislation or popular initiatives to be enacted or adopted into law:

> Under the Plaintiffs' theory, every structural feature of government that makes some political outcomes less likely than others—and thereby dis-

courages some speakers from engaging in protected speech—violates the First Amendment. Constitutions and rules of procedure routinely make legislation, and thus advocacy, on certain subjects more difficult by requiring a supermajority vote to enact bills on certain subjects. Those who propose, for example, to impeach an official, override a veto, expel a member of the legislature, or ratify a treaty might have to convince two-thirds of the members of one or both houses to vote accordingly. State constitutions attach supermajority requirements to a bewildering array of specific categories of legislation, [collecting specific examples]. These provisions presumably have the "inevitable effect" of reducing the total "quantum of speech" by discouraging advocates of nuclear power plants, general banking laws, or unauthorized state flags from bothering to seek legislation or initiatives embodying their views. Yet if it violates the First Amendment to remove certain issues from the vicissitudes of ordinary democratic politics, constitutions themselves are unconstitutional. Indeed, the Plaintiffs' theory would have the ironic effect of rendering the relief they seek in this litigation unconstitutional under the First Amendment: if it is unconstitutional to amend the Utah constitution to require a supermajority to approve a wildlife initiative, those who favor such an amendment would be less likely to engage in advocacy in its favor.

No doubt the Plaintiffs are sincere in their many sworn statements that they find the heightened threshold for wildlife initiatives dispiriting, and feel "marginalized" or "silenced" in the wake of Proposition 5. Their constitutional claim begins, however, from a basic misunderstanding. The

> First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail.

450 F.3d at 1100–01. Based on this reasoning, the Tenth Circuit upheld the election-mechanics provision at issue even though, on its face, the law concerned subject-matter limitations relating to the referendum process. *See id.* at 1103. The Tenth Circuit indicated that the election-mechanics provision did not fall within the purview of the First Amendment because it did not regulate speech within the meaning of that constitutional guarantee. *See id.* at 1101, 1103; *see also Molinari*, 564 F.3d at 600–01 ("[P]laintiffs here claim that their First Amendment rights are chilled because New York State law puts referenda and City Council legislation on equal footing, permitting the latter to supersede the former (and *vice versa*). As such, like in [*Walker*,] there is no restriction on plaintiffs' speech."). The Tenth Circuit held that rational-basis review was the highest level of constitutional scrutiny that was warranted and upheld the Utah constitutional provision on this basis. *See Walker*, 450 F.3d at 1104–05.

D.

In reaching its holding, the Tenth Circuit rejected the reasoning of the First Circuit in *Wirzburger*, which recognized that an individual's First Amendment rights could be impermissibly burdened by a statute placing subject-matter limitations on popular initiatives. *See* 412 F.3d at 278–79. In *Wirzburger*, the First Circuit reviewed a challenge to provisions of the Massachusetts constitution that prohibited initiatives on two subjects: those calling for "public financial support for private primary or secondary schools," and those "relate[d] to religion, religious practices or reli-

gious institutions." *Id.* at 274–75 (quoting Mass. Const. art. 18; *id.* art. 48, pt. 2, § 2). The *Wirzburger* court declined to apply strict scrutiny because the constitutional provision governing the initiative process was not "a direct restriction on the communicative aspect of the political process." *Id.* at 277. The First Circuit observed that even though the subject-matter exclusions "aim at preventing the *act* of generating laws and constitutional amendments about certain subjects by initiative," the speech restriction caused by the state constitution "is no more than an unintended side-effect." *Id.* The *Wirzburger* court, however, declined to apply the lowest level of scrutiny, instead applying intermediate scrutiny pursuant to *United States v. O'Brien*, 391 U.S. 367 (1968), because the regulation bore on the initiative process, which "manifest[ed] elements of protected expression." *See Wirzburger*, 412 F.3d at 278.

Applying the *O'Brien* test,[2] the First Circuit concluded that Massachusetts had "a substantial interest in maintaining the proper balance between promoting free exercise and preventing state establishment of religion" and "in restricting the means by which these fundamental rights can be changed." *Id.* at 279. The First Circuit concluded that because "the exclusions aim at preventing certain uses of the initiative process, not at stemming expression," the law did not

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[2] Under *O'Brien*, a regulation must satisfy the following four elements to be constitutional: (1) the regulation "is within the constitutional power of Government;" (2) "it furthers an important or governmental 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." 391 U.S. at 377.

concern the suppression of expression or speech. *Id.* Because the court could "see no other way in which Massachusetts could achieve its interest in safeguarding these fundamental freedoms in its Constitution from popular initiative," it found that the "restriction on speech is no more than is essential" and thus did not violate the First Amendment. *Id.*

In *Walker*, however, the Tenth Circuit took issue with the First Circuit's application of heightened scrutiny in *Wirzburger*. First, the Tenth Circuit suggested that the First Amendment was not even implicated by referendum regulations of the type at issue. *See Walker*, 450 F.3d at 1104. Additionally, the *Walker* court noted that it would be wholly inappropriate to strike down an election-mechanics law under intermediate or strict scrutiny because it "would be an especially egregious interference with the authority of 'We the People' to adopt constitutional provisions governing the legislative or initiative process." *See id.* at 1103. As the Tenth Circuit reasoned, heightened scrutiny would be problematic, as it could imagine few tasks "less appropriate for federal courts than deciding which state constitutional limitations serve 'important governmental interests' and which do not. . . . Under our form of government, the people and their representatives, and not judges, assume the task of determining which subjects should be insulated from democratic change." *Id.*

E.

I find the *Walker* court's reasoning to be persuasive and another way to explain this court's holdings in *Taxpayers United* and *Ohio Ballot Board*. To be sure, our prior precedent did not involve an election-mechanics regulation that concerned subject-matter limitations for popular initiatives as in *Walker*. But, as

Walker indicates, the First Amendment simply is not implicated by structural requirements for the adoption of such laws, and this conclusion aligns with our circuit's prior holdings.

I share the Tenth Circuit's concern that we, as judges, are ill-suited to determine whether or not a state advances an important governmental interest by limiting the subject-matter of its initiative petitions. Here, the people of Ohio and their elected representatives, through their state constitution and statutes, have determined that only "legislative actions" are within the municipal power and thus, that the subject of any initiative must be a legislative, rather than an administrative, matter. We are in no position to second-guess this rule. Just as the Tenth Circuit feared to tread into whether Utah's subject-matter limitations relating to the wildlife initiatives served an important governmental interest, so too are we ill-suited to address the importance of the state separation-of-powers principles implemented by Ohio through its legislative authority requirement for popular referenda.

Furthermore, this case is similar to *Walker*, *Taxpayers United*, and *Ohio Ballot Board* in that there is no contention here that the election-mechanics regulation at issue discriminates against any particular point of view. In *Walker*, the law imposed a two-thirds approval of voters as to *any* law that pertained to the taking of wildlife, regardless of whether it was for or against such practice. *See* 450 F.3d at 1087. Similarly, in *Taxpayers United*, there was no discrimination against any viewpoint by the requirement of a requisite number of registered voter signatures for an initiative to be placed on the ballot. *See* 994 F.2d at 297. And in *Ohio Ballot Board*, the single-subject rule applied to all initiatives, regardless of their subject

matter. 885 F.3d at 447–48. Likewise, here, the legislative authority statutes apply equally to all referenda, without regard to their subject matter.[3]

Thus, based on the logic of *Walker*, I question whether that the election-mechanics statutes at issue are even within the purview of the First Amendment. However, even assuming that they are, these statutes are constitutional under the rational-basis review applied in *Taxpayers United* and *Ohio Ballot Board*. Accordingly, there is no merit to Appellees' assertion that the legislative authority statutes are an unconstitutional prior restraint, given that Ohio either is not restraining any constitutionally protected speech or that, if it is, the restraint is nonetheless valid under

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[3] In *Angle*, the Ninth Circuit also applied heightened scrutiny to a Nevada election-mechanics law, but one that, unlike the Utah statute in *Walker*, did not pertain to a subject-matter restriction. *See Angle*, 673 F.3d at 1126–27, 1133–34. The Ninth Circuit reviewed whether Nevada's constitutional requirement that initiative proponents "must obtain signatures from a number of registered votes equal to 10 percent of the votes cast in the previous general election" in each congressional district to have the initiative placed on the ballot violated the First Amendment. 673 F.3d at 1126. The Ninth Circuit rejected the plaintiffs' assertion that the rule imposed a "severe burden on communication between circulators and voters," *id.* at 1133, but nonetheless applied intermediate scrutiny to the Nevada law because it had the potential, though minimal, to "reduc[e] the total quantum of speech on a public issue," *id.* (alteration in original) (quoting *Meyer*, 486 U.S. at 423). The Ninth Circuit's application of heightened scrutiny to election-mechanics laws is inconsistent with the Sixth Circuit precedent discussed above. The Ninth Circuit's logic also is troubling because, as the Ohio Secretary of State notes, it would call into question "all subject matter restrictions on what Congress or state legislatures may legislate about" because "such restrictions make it harder for those subjects to become 'the focus of' national or 'statewide discussion.'" Appellant Br. at 38–39 (quoting *Angle*, 673 F.3d at 1126).

rational-basis scrutiny. As I explain below, these provisions survive rational-basis review because they are content-neutral and non-discriminatory.

F.

Consistent with this court's holding in *Taxpayers United*, the Ohio statutes satisfy rational-basis review because they are "nondiscriminatory, content-neutral limitations on the [Appellees'] ability to initiate legislation." 994 F.2d at 297. Indeed, consonant with Supreme Court precedent, the Ohio statutes at issue can be justified without reference to the content of the regulation. In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), the Court explained that "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." "Statutes that are not content based on their face may still be considered content based if they 'cannot be justified without reference to the content of the regulated speech' or 'were adopted by the government because of disagreement with the message the speech conveys.'" *Ohio Ballot Board*, 885 F.3d at 447 (quoting *Reed*, 135 S. Ct. at 2227).

The Ohio legislative authority statutes easily clear this threshold because, by their very terms, they apply to each petition submitted for review. *See, e.g.*, O.R.C. § 3501.38(M)(1)(a) ("Upon receiving an initiative petition . . . concerning a ballot issue that is to be submitted to the electors of a county or municipal political subdivision, the board of elections shall examine the petition to determine: Whether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative . . . ."). Moreover, the laws can be justified without reference to the content of the initiative petition, because, as explained

by the Secretary, "[t]he challenged portion of the [laws] channel ballot-access decisions to county boards and then mandamus proceedings that ensure that the State can quickly and efficiently promote its legitimate interests in screening out ineligible administrative actions and simplifying the ballot." Reply Br. at 24.

It is true that the contents of the proposed initiative dictate its fate in one limited sense. *See* O.R.C. §§ 3501.38(M)(1)(a), 3501.39. Under the statutes, if the reviewer, either the Board of Elections or the Ohio Secretary of State, finds that the proposed initiative is outside the municipal power or is an administrative matter, then the proposed initiative will not be certified. By contrast, proposed initiatives that are within the municipal power and are legislative, assuming all other conditions are met, are certified to appear on the ballot. But despite the different treatment that proposed initiatives receive depending upon their legislative or administrative nature, Ohio's legislative authority statutes are nonetheless content-neutral for purposes of the First Amendment because (1) their application does not depend on "the topic discussed or the idea or message expressed," (2) they can "be justified without reference to the content of the regulated speech," and (3) they were not "adopted . . . because of disagreement with the message . . . convey[ed]." *Reed*, 135 S. Ct. at 2227; *Ohio Ballot Board*, 885 F.3d at 447. To put the point more concretely, based on the initiative that gave rise to this case, the Ohio legislative authority statutes do not regulate on the topic of marijuana possession in particular or operate to restrict any viewpoint, idea, or message on that topic. Rather, they simply regulate the manner in which *any* topic concerning *any* viewpoint, idea, or message may be presented to the voters for approval via the initiative

process. Such regulation, though it involves analysis of the text of the initiative, is nonetheless content-neutral under the First Amendment. *See Taxpayers United*, 994 F.2d at 295 (holding Michigan Board's review of the contents of the petition signatures to determine whether they were valid and from registered voters was content-neutral and did not violate the First Amendment).

In light of this conclusion, whether the Ohio legislative authority statutes survive review turns on the neutral application of the statutes by the Board and the Secretary—that is, are they applied in a discriminatory or non-discriminatory manner? Had Appellees presented evidence that the Board of Elections treated their initiatives differently because of their position regarding marijuana advocacy, then their claims might have had some merit. But, in the absence of evidence that the legislative authority statutes were applied in a discriminatory manner, it follows that the Board applied the gatekeeper provisions in a content-neutral and non-discriminatory way and therefore in compliance with the First Amendment. Although the Board may make mistakes in reviewing petitions and determine that otherwise certifiable initiatives are administrative (as the Secretary acknowledged happened here, Oral Arg. at 38:02–07), that does not mean that Ohio's legislative statutes are discriminatory as to any point of view. Instead, it is a steadfast reminder that humans make errors and likely is the reason why Ohio provides petitioners the right to seek a writ of mandamus in the Ohio Supreme Court. And thus, Ohio's legislative authority statutes are nondiscriminatory.

Because "it is constitutionally permissible for [Ohio] to condition the use of its initiative procedure on

compliance with content-neutral, nondiscriminatory regulations that are, as here, reasonably related to the purpose of administering an honest and fair procedure," the Appellees' "First Amendment claim is without merit." *Taxpayers United*, 994 F.2d at 297. For these reasons, therefore, I concur in the judgment of the Majority that the Ohio legislative authority statutes do not violate the First Amendment.

APPENDIX B

363 F.Supp.3d 842

UNITED STATES DISTRICT COURT,
S.D. OHIO, EASTERN DIVISION

Case No. 2:18-cv-966

WILLIAM T. SCHMITT, *et al.*,

Plaintiffs,

v.

OHIO SECRETARY OF STATE JON HUSTED, *et al.*,

Defendants.

Signed 02/11/2019

Attorneys and Law Firms

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OPINION AND ORDER

EDMUND A. SARGUS, JR., CHIEF UNITED STATES DISTRICT JUDGE

This matter is before the Court for consideration of Plaintiffs William T. Schmitt and Chad Thompson's

("Plaintiffs") *Motion for Temporary Restraining Order and/or Injunctive Relief* (ECF No. 3), which the Court previously granted (ECF No. 22), extended (ECF No. 26), and converted into a preliminary injunction, which expired on November 7, 2018 (ECF No. 28). By order of the Court (ECF No. 28), Defendants Ohio Secretary of State John Husted and the Portage County Board of Elections (the "Board")—individually, Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross—("Defendants") briefed the issue of constitutionality of the relevant Ohio statutes. *(See* ECF Nos. 30, 32, 34, and 35). On December 19, 2018, the Court held oral argument to discuss reinstating the preliminary injunctive relief granted to Plaintiffs. Based on the parties' briefs and their positions at oral argument, the Court orders permanent injunctive relief. Thus, the Court **REINSTATES** as a permanent injunction the preliminary injunctive relief granted in its Opinion and Order issued on September 19, 2018. (ECF No. 22).

I. BACKGROUND

A. Ohio's Ballot Initiative Scheme

The Ohio Constitution creates an initiative process for Ohio citizens. Ohio Const. Art. II, Sec. 1. Ohio law requires petitioners of a municipality's ordinances to submit ballot initiatives to a county's board of elections. O.R.C. § 3501.11(K)(1). The boards of elections "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." O.R.C. § 3501.11(K)(2). This process is known as the "gatekeeper mechanism." *State ex rel. Walker v. Husted*, 144 Ohio St. 3d 361, 43 N.E.3d 419, 423 (2015).

The Supreme Court of Ohio has held that boards of elections have discretion when determining "which actions are administrative, and which are legal." *Id.* "The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance, or regulation, or executing or administering a law, ordinance or regulation already in existence." *State ex rel. N. Main St. Coalition v. Webb*, 2005-Ohio-5009, 106 Ohio St.3d 437, 835 N.E.2d 1222 (quoting *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 O.O.2d 1, 233 N.E.2d 500, paragraph two of the syllabus). Legislative actions are appropriate for the initiative process; administrative actions are not. *See* O.R.C. §§ 3501.38(M)(1) and 3501.39(A)(3).[1]

When a board of elections approves an initiative petition, citizens opposing the petition's validity (and therefore, the board of elections' decision) have an original cause of action for review in the Supreme Court of Ohio. Ohio Const. Art. II, Sec. 1g. In contrast, when a board of elections or the Ohio Secretary of State rejects a petitioner's ballot initiative for a substantive reason, *e.g.*, whether the proposed legislation is administrative versus legislative, neither the Ohio Constitution nor state laws provide a remedy.[2]

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[1] The Court does not address whether Plaintiffs' ballot initiatives implicated administrative or legal actions.

[2] *See State ex rel. Jones v. Husted*, 149 Ohio St.3d 110, 73 N.E.3d 463 (2016) ¶ 24 ("By its plain language, Section 1g creates a cause of action to challenge, that is, to *oppose* signatures and part-petitions. It does not create a broader cause of action only to challenge decisions by the secretary or the county boards to reject petitions. *That* cause of action still falls under this court's original mandamus jurisdiction.") Here, Plaintiffs' fall under the latter scenario. That is, the Portage County Board rejected Plaintiffs'

Thus, a party aggrieved by a rejected initiative petition has no right, by statute or otherwise, to a review of the executive board's legal conclusion. An aggrieved petitioner may seek a writ of mandamus, which is wholly separate from an appeal of right, since a writ is an extraordinary remedy that is discretionary and "will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction." *State ex rel. Sparto v. Juvenile Court of Darke County* (1950), 153 Ohio St. 64, 65, 90 N.E.2d 598.

Under Ohio law, to be entitled to a writ of mandamus, a petitioner must prove, by clear and convincing evidence: (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the board of electors to provide the requested relief, and (3) the lack of an adequate remedy at law. *State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 153 Ohio St.3d 581, 2018-Ohio-1602, 109 N.E.3d 1184 (citing *State ex rel. Waters v. Spaeth*, 2012-Ohio-69, 131 Ohio St. 3d 55, 960 N.E.2d 452, ¶ 6, 13). Only the Ohio Supreme Court of Ohio or the courts of appeals have original jurisdiction in mandamus. Ohio Const. Art. IV, §§ 2(B)(1)(b), 3(B)(1)(b); *see State ex rel. Jones v. Husted*, 2016-Ohio-5752, 149 Ohio St.3d 110, 73 N.E.3d 463. When the Supreme Court of Ohio or a court of appeals reviews a decision by a county board of elections, the court may only issue the writ if the board "engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions." *Jones*, 149 Ohio St.3d at ¶ 4 (citing *State ex rel. Jacquemin v.*

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decision. Therefore, Plaintiffs' only state-court remedy exists in mandamus before either the Supreme Court of Ohio or the courts of appeals.

Union Cty. Bd. of Elections, 147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759, ¶ 9).

B. Relevant Facts

In 2018, Plaintiffs circulated ballot initiatives in two Ohio villages: Garrettsville and Windham. Both ballot initiatives proposed identical ordinances, which essentially decriminalized marijuana possession by reducing criminal fines to $0, removing all consequences related to drivers' licenses, and reducing court costs to $0. Plaintiffs acquired the necessary number of signatures and submitted the ballot initiatives to the Board. The Board's minutes state:

> Staff presented a list of ballot issues for the November 6, 2018 ballot. Denise Smith, Chief Assistant Prosecutor addressed questions about two initiative petitions regarding marijuana penalties filed for Garrettsville Village and Windham Village. Staff reported that both initiative petitions had a sufficient number of valid elector signatures. Both initiative petitions have identical language and seek to decriminalize marijuana by proving for no monetary fines, no license suspension and no court costs for misdemeanor marijuana offenses. Denise indicated that the Prosecutor's Office will not sign off on the ballot language and does not believe the initiative petitions are appropriate for the ballot because the initiatives are administrative in nature, rather than legislative. Administrative actions are not appropriate for initiative petitions.
>
> Denise indicated that the decision is ultimately up to the Board. Ms. Daniels moved that the initiative petitions regarding marijuana penalties for Garrettsville Village and Windham Village not

> be certified to the November 6, 2018 General Election ballot. Second by Ms. Cross.
>
> **ROLL CALL:**
>
> Ms. Nelson — Yes
>
> Ms. Daniels — Yes
>
> Ms. Cross — Yes

Pl.'s Compl., Ex. 3 (ECF No. 1). Therefore, the Board rejected Plaintiffs' proposed initiatives. The Board then advised Plaintiffs that their initiatives had been rejected, stating:

> In *State ex rel. Sensible Norwood v. Hamilton County Board of Elections* [148 Ohio St.3d 176], 2016-Ohio-5919 [69 N.E.3d 696], the Ohio Supreme Court said administrative actions are not subject to initiative. Reviewing the language in the proposals presented by the Village of Garrettsville and the Village of Windham, the $0 and no license consequences are administrative in nature. The $0 court costs is administrative in nature and is an impingement on the judicial function by a legislature. Accordingly, as the Garrettsville Village and Windham Village petitions deal with subject matter that is not subject to the initiative process, the Board of Elections, in its discretion, has chosen not to certify these issues to the ballot.

Pl.'s Compl., Ex. 4 (ECF No. 1).

C. Procedural History

On August 28, 2018, Plaintiffs filed their *Complaint* (ECF No. 1) and *Motion for Temporary Restraining Order and/ or Preliminary Injunction* (ECF No. 3). On September 19, 2018, the Court granted Plaintiffs a temporary restraining order (ECF No. 22), which

directed Defendants to place both initiative petitions on the November 6, 2018 ballot. The Court then held a telephone status conference during which the parties consented to converting the temporary restraining order to a preliminary injunction, which would expire on November 7, 2018—the day after the election. (ECF No. 28). Subsequently, the parties briefed the constitutionality of the Ohio laws at issue, and the Court held oral argument on December 19, 2018. (ECF Nos. 30, 32, 33, 34, 35). At the December 19, 2018 hearing, the parties stipulated that Plaintiffs' motion for injunctive relief is ripe for review because Plaintiffs intend to submit identical initiative petitions in upcoming voting cycles.

II.

Federal Rule 65 of Civil Procedure allows a party to seek injunctive relief if the party believes that it will suffer irreparable harm or injury. Fed. R. Civ. P. 65. To determine whether injunctive relief should be issued, the Court considers these four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether granting the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *McPherson v. Michigan High School Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc).

These factors are not prerequisites; each must be weighed against the others. *Id.* at 459. "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000). A district court is required to make specific findings concerning each of the factors unless fewer are diapositive of the issue. *Performance Unlim-*

ited v. Questar Publishers, Inc., 52 F.3d 1373, 1381 (6th Cir. 1995).

"The standard for a preliminary injunction is essentially the same as for a permanent injunction except that the plaintiff must show actual success on the merits rather than a likelihood of success." *Gas Natural Inc. v. Osborne*, 624 Fed. Appx. 944, 948 (6th Cir. 2015) (citing *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 607 F.3d 439, 445 (6th Cir. 2010)). When a plaintiff seeks a permanent injunction, "[a]n evidentiary hearing is typically required before an injunction may be granted, but a hearing is not necessary where no triable issues of fact are involved." *United States v. Miami University*, 294 F.3d 797, 815 (6th Cir. 2002) (citing *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983)).

III.

Plaintiffs argue that Ohio's ballot initiative process violates their procedural due process rights guaranteed by the United States Constitution. To establish a procedural due process claim, a plaintiff must show that "(1) it had a life, liberty, or property interest protected by the Due Process Clause; (2) it was deprived of this protected interest; and (3) the state did not afford it adequate procedural rights." *Daily Services, LLC v. Valentino*, 756 F.3d 893, 904 (6th Cir. 2014).

1. Liberty Interest Protected by the Due Process Clause

The right to initiate legislation through the initiative process is not derived from the United States Constitution. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). Once a state creates an initiative process, however, the state may not restrict the process in any manner that violates

the Constitution. *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *Austin*, 994 F.2d at 295 ("although the Constitution does not require a state to create an initiative petition procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution"). Ohio's has created a ballot initiative process for its citizens. *See* O.R.C. § 3501.11(K)(1). Therefore, Ohio cannot restrict that process in any manner that violates the Constitution.

Defendants argue Plaintiffs have no right for placement of the proposed legislation on the ballot and therefore Plaintiffs lack any threatened liberty interest. This argument is not well taken. Plaintiffs do not claim they have a substantive right to appear on the ballot. Plaintiffs contend that Ohio's ballot initiative framework fails to provide procedural due process.

2. Deprivation of the Liberty Interest Without Adequate Procedural Rights

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). When a liberty interest is at stake, "procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before the deprivation occurs." *Center for Powell Crossing, LLC v. City of Powell, Ohio*, 173 F.Supp.3d 639, 657 (S.D. Ohio 2016) (citing *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005)).

Plaintiffs argue they were deprived of their right to participate in Ohio's initiative process without the right to adequate review in the courts of Ohio. In contrast, Defendants contend that mandamus is a constitutionally sufficient remedy for review of an allegedly unconstitutional deprivation of ballot access. The Court disagrees.

In procedural due process cases, the Sixth Circuit directs courts to determine whether the deprivation of a liberty interest is a result of "an established procedure" or is "pursuant to a random and unauthorized act" of a state employee. *Daily Services, LLC v. Valentino*, 756 F.3d 893, 907 (6th Cir. 2014); *Wedgewood Ltd. Partnership v. Township of Liberty, Ohio*, 610 F.3d 340, 349–50 (6th Cir. 2010). "If the former, then it is both practicable and feasible for the state to provide pre-deprivation process, and the state must do so regardless of the adequacy of any post-deprivation remedy . . . ." *Walsh v. Cuyahoga County*, 424 F.3d 510, 513 (6th Cir. 2005) (internal quotations and citations omitted).

The gatekeeping function is based on Ohio's constitution and statutory framework, rendering it "an established procedure." Accordingly, it is both practicable and feasible for Ohio to provide a meaningful right to review of the decision rendered by the Board of Elections. Indeed, Ohio already applies *a de novo* standard when reviewing executive agencies' legal determinations in other contexts. *See Akron City School Dist. Bd. of Education v. Summit Cty. Bd. of Revision*, 2014-Ohio-1588, 139 Ohio St.3d 92, 9 N.E.3d 1004, ¶¶ 10–11; *see also Gahanna-Jefferson Local School Dist. v. Zaino*, 93 Ohio St.3d 231, 232, 754 N.E.2d 789 (2001). In the ballot initiative process, however, the State of Ohio has not provided Plaintiffs an adequate

review process. Instead, the gatekeeping function enables a board of elections—an executive body—to make legal determinations without providing denied petitioners a right to review. The only possibility of review requires an aggrieved petitioner to convince a court of appeals or the Supreme Court of Ohio to exercise its discretion under heightened standards.[3] Plaintiffs contend that the refusal of the Board to certify a vote on the legislation without a right to review by a judicial body violates Plaintiffs' constitutionally protected liberty interest.

No doubt, Ohio has strong interests in ensuring its elections are run fairly and efficiently. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 191, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). Ohio also has a strong interest in placing on the ballot only such proposed legislation as would be lawful as municipal legislation under Ohio Const. Art. XVIII, Sec. 3. Allowing votes on matters unlawful or unenforceable on their face could erode public confidence in Ohio's entire initiative process.

Recognizing those interests, the Court finds no legitimate state interests in withholding an adequate

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[3] In *State ex rel. Maxey v. Saferin*, three dissenting Ohio Supreme Court Justices highlighted "the uncertainty regarding the constitutionality of the amendments to R.C. 3501.11 made by H.B. 463." — Ohio St. 3d —, 2018-Ohio-4035, — N. E. 3d —, at ¶ 52. In *Maxcy*, the Supreme Court of Ohio found that county boards of elections lack authority to review the substance of a proposed municipal charter amendment. In so holding, the majority observed that Article XVII, Sections 8 and 9 of the Ohio Constitution apply to municipal charter amendments rather than Article II, Section 1f, which applies to citizen-initiated legislation, *i.e.*, referendum and initiative petitions. For that reason, the majority declined to address the constitutionality of R.C. 3501.11(K). *Id.* at ¶ 13.

legal remedy for petitioners denied ballot access by a board of elections. "Although a state has a wide scope in regulating the franchise, it is not permitted to adopt any standard it desires, but it is limited by the strictures of the federal and state constitutions . . . ." 25 Am. Jur. 2d Elections § 98. Given the availability of mandamus relief is extraordinary and only exercised when the law does not otherwise provide an adequate remedy, the high burden on petitioners to prove entitlement to an extraordinary remedy is no substitute for *de novo* review of the denial of a constitutionally protected liberty interest. Therefore, the Court finds Plaintiffs prevail on their constitutional challenge to Ohio's ballot initiative process.[4]

IV.

In conclusion, the Court **REINSTATES** and **CONVERTS** to permanent injunction the preliminary injunctive relief granted in its Opinion and Order issued on September 19, 2018. (ECF No. 22). The Court **DIRECTS** the Clerk to enter judgment accordingly.

IT IS SO ORDERED.

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[4] As the Court mentioned during oral argument, the Boards of Elections in Ohio make many decisions that permit or deny ballot access to candidates and petitioners. The issues in this case do not involve whether the Boards of Elections may exercise such powers. The Court assumes that the Boards of Elections may exercise such powers as given by the Ohio General Assembly. The sole issue in this case is whether a constitutionally adequate review is available to a party deprived of ballot access by a Board of Elections.

APPENDIX C

341 F.Supp.3d 784

UNITED STATES DISTRICT COURT,
S.D. OHIO, EASTERN DIVISION

Case No. 2:18-cv-966

WILLIAM SCHMITT, JR., *et al.*,

Plaintiffs,

v.

OHIO SECRETARY OF STATE JON HUSTED, *et al.*,

Defendants.

Signed 09/19/2018

Attorneys and Law Firms

Mark George Kafantaris, Kafantaris Law Offices, Mark R. Brown, Columbus, OH, for Plaintiffs.

Sarah Elaine Pierce, Renata Y. Staff, Ohio Attorney General's Office Constitutional Offices Section, Columbus, OH, Christopher J. Meduri, Portage County Prosecutor's Office, Ravenna, OH, for Defendants.

OPINION & ORDER

EDMUND A. SARGUS, JR., CHIEF UNITED STATES DISTRICT JUDGE

This matter is presently before the Court for consideration of Plaintiffs Application for a Temporary Restraining Order. (ECF No. 3.) For the reasons set forth herein, the motion is GRANTED.

I.

A. Undisputed Relevant Facts

The following facts are set forth for the limited purpose of addressing the immediate motion before the Court. Any findings of fact and conclusions of law made by a district court in addressing a request for injunctive relief, particularly in consideration of a temporary restraining order, are not binding at a trial on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

Plaintiffs William Schmitt and Chad Thompson drafted and circulated two ballot initiatives in two Ohio villages, Garretsville and Windham. (ECF No. 3.) Both initiatives proposed ordinances with identical language that essentially decriminalized marijuana possession. The initiative reduced criminal fines to $0, removed any consequences related to licenses, and reduced court costs to $0. (*Id.*) After acquiring the necessary signatures, Schmitt and Thompson submitted the proposed ordinances to the Portage County Board of Elections, one of the defendants in this case.

The Portage County Board of Elections rejected the proposed initiative for two reasons. First, the Board determined that "the $0 fine and no license consequences are administrative in nature." (*Id.*) Second, the Board found that "[t]he $0 court costs is administrative in nature and is an impingement on the judicial function by a legislature." (*Id.*) On August 21, 2018, the Portage County Board of Elections notified

Schmitt and Thompson that it would not certify the proposed initiatives for the ballot. (*Id.*)

On August 28, 2018, Plaintiffs filed their Complaint (ECF No. 1) and a Motion for Temporary Restraining Order and/or Preliminary Injunction. (ECF No. 3.) Defendants filed Responses in Opposition to Plaintiffs' Motion (ECF Nos. 17, 18) to which Plaintiffs answered with their Reply. (ECF No. 19.) On September 17, 2018, this Court held a hearing on Plaintiffs' requested injunctive relief.

B. Ohio's Ballot Initiative Scheme

Ohio has created an initiative process for its citizens. Ohio Const. Art. II, Sec. 1. Relevant to this case, Ohio law requires petitioners for the initiation of legislation in a municipality to submit an initiative petition to a board of elections. O.R.C. § 3501.11(K)(1). The board of elections then reviews, examines, and certifies the sufficiency and validity of the petition. *Id.* The boards of elections are also required 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." O.R.C. § 3501.11(K)(2). This is known as the "gatekeeper mechanism." *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015). The Supreme Court of Ohio has held that boards of elections have discretion when determining "which actions are administrative and which are legal." *Id.* Administrative actions are not appropriate for the initiative process; legislative actions are. *See* O.R.C. §§ 3501.38(M)(1) and 3501.39(A)(3). While recognizing that this Court is without jurisdiction to decide whether the initiative petition contains legislative or administrative action, the parties dispute this issue, which would otherwise

determine whether the matter should be placed on the ballot.

When a local elections board determines that an action is administrative (and therefore improper) or legislative (and therefore proper), Ohio law creates a fork in its procedural road. If the initiative petition is deemed valid, then citizens opposing the petition's validity—and in a practical sense, the board's decision—have an original cause of action for review of the board's decision in the Supreme Court of Ohio. Ohio Const. Art. II, Sec. 1g. On the other hand, if the board or secretary rejects a petitioner's submission for a substantive reason, as in the administrative versus legislative divide, *supra*,[1] neither the Ohio Constitution nor state laws provide a remedy. As a result, a party aggrieved by the rejection of an initiative petition has no right, by statute or otherwise, to review of an executive board's legal conclusion. An aggrieved petitioner may seek a writ of mandamus, which is wholly separate from an appeal of right.

Under Ohio law, to be entitled to a writ of mandamus, a petitioner must prove, by clear and convincing evidence: (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the board to provide

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[1] *See State ex rel. Jones v. Husted*, 149 Ohio St.3d 110, 73 N.E.3d 463 (2016) ¶ 24 ("By its plain language, Section 1g creates a cause of action to challenge, that is, to *oppose* signatures and part-petitions. It does not create a broader cause of action only to challenge decisions by the secretary or the county boards to reject petitions. *That* cause of action still falls under this court's original mandamus jurisdiction.") In the instant case, Plaintiffs' fall under the latter scenario. That is, the Portage County Board rejected Plaintiffs' decision. Therefore, Plaintiffs' only state-court remedy exists in mandamus issued by either the Supreme Court of Ohio or the courts of appeals.

it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Khumprakob v. Mahoning Cry. Bd. of Elections*, 2018-Ohio-1602, 109 N.E.3d 1184 (citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13). Only the Supreme Court of Ohio or the courts of appeals have original jurisdiction in mandamus. Ohio Const. Art. IV, Sec. 3; *State ex rel. Jones v. Husted* (Ohio, 2016) 149 Ohio St.3d 110, 73 N.E.3d 463, 2016-Ohio-5752. When the Ohio Supreme Court or courts of appeals reviews a decision by a county board of elections, such court may only issue the writ if the board "engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions." *Id.* ¶ 4 (citing *State ex rel. Jacquemin v. Union County Bd. of Elections*, 147 Ohio St.3d 467, 2016-Ohio-5880, 67 N.E.3d 759, ¶ 9).

Applied to these narrow facts, Ohio's initiative scheme denies a rejected petitioner "an adequate remedy . . . of law" for review of a local board of election's legal determination. Instead, the only recourse available is a petition for a writ of mandamus. A writ is an extraordinary remedy that is discretionary and "will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction." *State ex rel. Sparto v. Juvenile Court of Darke County* (1950), 153 Ohio St. 64, 65, 90 N.E.2d 598. In other words, rejected petitioners are stuck between a rock and a hard place. But is there any constitutional violation?

On that question, the parties disagree. Plaintiffs allege that by following Ohio law, Defendants violated their rights protected by the First and Fourteenth Amendments. Defendants argue that the gatekeeper

mechanism and the possibility of a writ of mandamus are constitutionally sound. To remedy their alleged violations, Plaintiffs move this Court to order injunctive relief, pursuant to Federal Rule 65 of Civil Procedure.

II.

Federal Rule 65 of Civil Procedure allows a party to seek injunctive relief if the party believes that it will suffer irreparable harm or injury. Fed. R. Civ. P. 65. To determine whether injunctive relief should be issued, the Court considers these four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether granting the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *McPherson v. Michigan High School Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc).

These factors are not prerequisites; each must be weighed against the others. *Id.* at 459. "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000). A district court is required to make specific findings concerning each of the factors unless fewer are diapositive of the issue. *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). The Court will now analyze each of the four factors below.

III.

A. Likelihood of Success

Plaintiffs argue that Ohio's ballot initiative procedure violates their rights guaranteed by the United States Constitution. In their Reply Brief (ECF No. 19),

Plaintiffs make clear that they "do not challenge Ohio's ability to limit the subject matter of its initiatives. What Plaintiffs challenge is how Ohio has chosen to implement this otherwise lawful task." (*Id.*) At oral argument, however, Plaintiffs argued that the Ohio procedure for proposing initiatives violates constitutional due process protections.

At the same oral argument, Defendants responded that the mandamus relief is constitutionally sufficient. Defendants conceded that mandamus relief is only appropriate when there is no adequate remedy at law, and that the Supreme Court or courts of appeals must review local board of election's decision by a "clear disregard of law" standard.

The right to initiate legislation through the initiative process is not a federal constitutional right. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). Concomitantly, once the initiative or, if its counterpart, the referendum process, is made a part of state law, the process becomes a "democratic tool" to be regulated in a manner consistent with the First and Fourteenth Amendments. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976).

In *Meyer v. Grant*, the United States Supreme Court held that once a right of initiative is created, that state may nor place restrictions on the exercise of the initiative that unduly burden First Amendment rights. *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *see Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use . . . .") In *Meyer*, the United States Supreme Court struck down

a Colorado provision criminalizing the payment of money to anyone circulating an initiation petition. *Id.* Since Ohio has created an initiative procedure, Ohio cannot restrict its use in violation of the federal Constitution.

The United States Supreme Court has articulated a standard for evaluating constitutional challenges to a state's election laws in *Anderson v. Celebrezze*, 460 U.S. 780, 788–89, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and in *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). The court must: (1) "consider the character and magnitude of the plaintiffs' alleged injuries, (2) "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," and (3) assess the "legitimacy and strength of each of those interests," as well as the "extent to which those interests make it necessary to burden the plaintiff[s'] rights." *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564. This is known as the *Anderson-Burdick* standard.

"States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 191, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). The Court addresses these factors below.

The touchstone of *Anderson-Burdick* is flexibility when weighing competing interests. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016). Opposite this flexibility, the "rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

Plaintiffs argue that without the right to review an executive board's legal decision, Ohio's initiative procedure deprives Plaintiffs of their First Amendment rights related to voting upon valid initiative-generated legislation. Voting is "of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979).

In addition to voting, Plaintiffs' allege that their rights to due process are violated. The Due Process Clause of the Fourteenth Amendment extends to First Amendment rights. *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) ("It is by now well established that the concept of 'liberty' protected against state impairment by the Due Process Clause of the Fourteenth Amendment includes the freedoms of speech and association and the right to petition for redress of grievances.")) These protected rights may take the form of "simple association for mutual political or social benefits, including support of independent candidates or specific policies." *Id.* (citing *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964)).

No doubt, Ohio has strong interests in ensuring its elections are run fairly and honestly. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993). Ohio also has an interest in placing on the ballot only such proposed legislation as would be lawful as municipal legislation under Ohio Const. Art. XVIII, Sec. 3. Repeated votes on matters unlawful or unenforceable on their face could erode public confidence in the entire initiative or referendum process.

Recognizing such interests, the Court finds no legitimate state interests in preventing an adequate

legal remedy for petitioners denied ballot access by a board of elections. While the availability of mandamus relief is essentially a judicially imposed remedy when the law does not otherwise provide one, the high burden on petitioners to prove entitlement to an extraordinary remedy is no substitute for *de novo* review of the denial of a First Amendment right. For those reasons, the Court finds that Plaintiffs' have a high likelihood of success on the merits.

B. Irreparable Harm

Plaintiffs argue that without a right of review of the board's legal decision, Ohio laws deprive Plaintiffs of their First Amendment rights. "Even a temporary deprivation of First Amendment rights constitutes irreparable harm in the context of a suit for an injunction." *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975) (citing *Schnell v. Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969)). Without a right to appeal or review, Plaintiffs will suffer irreversible injuries which could not be remedied by law, absent injunctive relief.

C. Substantial Harm to Others; Public Interest

As the Supreme Court noted in *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), election structures are critical "if some sort of order, rather than chaos, is to accompany the democratic processes." While election laws will "invariably impose some burden on individual voters," this Court must balance the equities to ensure the state's regulatory interests justify any harm to others. *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059. Given this is an election case, "harm to others" concerns only the public.

In the instant action, Plaintiffs argue Defendants will suffer no injury should this Court enjoin the

enforcement of O.R.C. § 3503.06(C)(1)(a). (ECF No. 3.) Defendants contend preliminary relief would harm Ohio by undermining its interest in regulating the ballot process. (ECF No. 17) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986)). Defendants cite *Jones v. Markiewicz-Qualkinbush*, in which the Seventh Circuit stated that "states have a strong interest in simplifying the ballot." 892 F.3d 935, 938 (7th Cir. 2018).

Plaintiffs' argument is well taken. Ohio's regulatory scheme unreasonably infringes on Plaintiffs' First Amendment rights by allowing an executive board to determine disputed legal and even constitutional issues, thereby potentially blocking initiatives from the ballot, and then denying rejected petitioners a right to review. *Burdick*, 504 U.S. at 438, 112 S.Ct. 2059. No legitimate state interest is protected by a lack of appellate review. Similarly, Ohio voters are unlikely to suffer cognizable harm from Plaintiffs' access to the ballot.

Finally, in First Amendment cases, potential harm to others stemming from preliminary relief is "'dependent on a determination of the likelihood of success on the merits of the First Amendment challenge.'" *Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 218 F.Supp.3d 589, 596 (S.D. Ohio 2016) (quoting *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009)). For instance, if the "regulation in question is likely to be deemed constitutional, the public interest will not be harmed by its enforcement." *Id.* Here, Plaintiffs have a high likelihood of success on the merits. Accordingly, the public is unlikely to suffer significant harm from the injunctive relief that Plaintiffs seek.

IV.

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Application for a TRO (ECF No. 10.) Given the fact that there is no possibility of financial harm to Defendant, the Court dispenses with the requirement of a bond. The Court hereby **DIRECTS** the Ohio Secretary of State and the Portage County Board of Elections to place both initiative petitions which are the subject of this case on the upcoming ballot for the election to be held on November 6, 2018. This Order shall remain in effect for fourteen (14) days.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: Sep 04, 2019
DEBORAH S. HUNT, CLERK]

No. 19-3196

WILLIAM T. SCHMITT; CHAD THOMPSON;
DEBBIE BLEWITT,
Plaintiffs-Appellees,

v.

FRANK LAROSE, OHIO SECRETARY OF STATE,
Defendant-Appellant.

ORDER

BEFORE: CLAY, WHITE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[*] Judge Murphy recused himself from participation in this ruling.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: 08/13/2019]

No. 19-3196

WILLIAM T. SCHMITT, CHAD THOMPSON,
DEBBIE BLEWITT,

Plaintiffs-Appellees,

v.

FRANK LAROSE,
OHIO SECRETARY OF STATE,

Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of Ohio

APPELLEES' PETITION FOR REHEARING EN BANC

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RULE 35 STATEMENT

Appellees respectfully request Rehearing En Banc. The Panel's decision conflicts with decisions of the Supreme Court, including *Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999); *City of Lakewood v. Plain Dealer*, 486 U.S. 750 (1988); *Freedman v. Maryland*, 380 U.S. 51 (1965), and decisions of this Court, including *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993); *Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F.3d 443 (6th Cir. 2018); *Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372 (6th Cir. 2001). Consideration by the full Court is therefore necessary to secure and maintain uniformity of this Court's decisions. *See* F. R. App. P. 35(b)(1)(A).

Further, the case involves questions of exceptional importance, including whether and how the First Amendment's protections apply to popular democracy. As Judge Bush recognized, these questions have generated splits in Sister Circuits and States' high Courts. *See*, *e.g.*, *Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc); *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002); *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005); *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993). *See* F. R. App. P. 35(b)(1)(B).

STATEMENT OF THE CASE

Initiatives may be directly put to voters in Ohio. In order to gain ballot access, an initiative must first

meet several ministerial requirements, including being supported by a requisite number of voters' signatures. Assuming an initiative meets these content-neutral procedural requirements, Ohio law then mandates one last step: executive officials must be convinced that the initiative's content is acceptable.

This last step is codified as Ohio's "gatekeeper" law, O.R.C. § 3501.11(K). Local elections officials "serve as gatekeepers, to ensure that only those measures that actually constitute initiatives or referenda are placed on the ballot." *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 363, 43 N.E.3d 419, 423 (2015). Some proposed laws, those ostensibly addressing "administrative" as opposed to "legal" matters, may in the discretion of elections officials be deemed improper subjects for initiatives. *Id*. at 364, 43 N.E.3d at 423. Other pieces of "municipal legislation that would be beyond a municipality's legislative power," or not "fall[] within the scope of the constitutional power of referendum or initiative," may likewise be excluded. *State ex rel. Bolzenius v. Preisse*, 155 Ohio St. 3d 45, 47-48, 119 N.E.3d 358, 361-62 (2018). Applying these "puzzling" distinctions, *State ex rel. Khumprakob v. Mahoning Board of Elections*, 153 Ohio St.3d 581, 591-92, 109 N.E.3d 1184, 1192-93 (2018) (Fischer, J., concurring), local elections officials exercise discretion to pick and choose between proposed initiatives. *Walker*, 144 Ohio St.3d at 364, 43 N.E.3d at 423.

Because these content-based decisions are discretionary with elections officials, the Ohio Supreme Court has repeatedly emphasized that its review, exercised through mandamus, is limited to "determin[ing] whether the board members abused their discretion in determining that the proposed ordinance exceeds [local] legislative power." *Preisse*, 155 Ohio St. 3d at

48, 119 N.E.3d at 362. "As is well-established," the Ohio Supreme Court explained in *Walker*, 144 Ohio St.3d at 424, 43 N.E.3d at 365, "abuse of discretion means more than an error of law or of judgment." "In close cases" the Ohio Supreme Court has stated, it "might very well be compelled to find that [an election official] reasonably disqualified a ballot measure, in the exercise of his discretion, even if we, in the exercise of our constitutional duties, would deem the measure constitutional." *Id*.

The Ohio Supreme Court has confessed that it "is sometimes difficult to distinguish" appropriate subjects from improper content. *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 247, 95 N.E.3d 329, 332 (2016). Justice Fischer in *State ex rel. Khumprakob v. Mahoning Board of Elections*, 153 Ohio St.3d 581, 591-92, 109 N.E.3d 1184, 1192-93 (2018) (Fischer, J., concurring), was even more frank, complaining that Ohio's "puzzling" and "unworkable" gatekeeper law "does not lead to consistent results among various county boards of elections."

This proved true in the present case, where local elections boards in Ohio disagreed over the propriety of Appellees' identically-worded initiatives. Notwithstanding that several elections boards had already approved Appellees' initiative, the Portage County Board of Elections, expressing its discretion, would not: "the . . . petitions deal with subject matter that is not subject to the initiative process, [and] the Board of Elections, in its discretion, has chosen not to certify these issues to the ballot." Verified Complaint, Exhibit 4, R.1-4 (emphasis added).

Appellees challenged the Board's exercise of content-based discretion as an impermissible prior restraint. Under Supreme Court and Sixth Circuit precedent,

they claimed, executive officials cannot exercise content-based discretion when deciding whether to permit speech. Strict scrutiny is required, and Ohio's gatekeeper law cannot pass that test. Even if it did, Appellees argued, local officials must employ procedural safeguards to insure their decisions are correct. Here, not only was the Board wrong (as Appellant conceded at oral argument), Ohio's safeguards are grossly inadequate.

The District Court agreed. A Panel (Clay, White, and Bush, JJ.) of this Court, however, reversed. It concluded that while the First Amendment applies to initiatives, the First Amendment's most important and basic restriction – its prohibition on prior restraints – does not. "We conclude . . . that the ballot-initiative process here is not a prior restraint." Slip op., Doc. No. 40-2, at 7. "Ohio's ballot-initiative laws," it explained, "do not directly restrict core expressive conduct; rather, the laws regulate the process by which initiative legislation is put before the electorate, which has, at most, a second-order effect on protected speech." *Id*. at 8. Further, the Panel ruled that because mandamus review in Ohio – contrary to the Ohio Supreme Court's claim – is really de novo, and because that review mechanism is itself content-neutral, strict scrutiny does not apply. *Id*. at 10-11 & n.3.

Judge Bush, in his concurrence, went even further, concluding that "the First Amendment simply is not implicated by structural requirements for the adoption of [initiatives] . . . ." Slip op., Doc. No. 40-2, at Page 23.

For the reasons stated below, Appellees respectfully request rehearing en banc.

REASONS FOR REHEARING EN BANC

I. Concluding that Initiatives Are Not Subject to Full First Amendment Protection Contradicts This Court's and The Supreme Court's Precedents.

Prior restraints by definition are structural; they are designed to "regulate the process" by which information is presented to the public. Because a prior restraint placed on an initiative is no different in this regard, there is no principled reason for treating it differently under the First Amendment.

For example, discretionary restraints on the placements of news racks, *see City of Lakewood v. Plain Dealer*, 486 U.S. 750 (1988), and locations of adult businesses, *see Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372 (6th Cir. 2001), regulate how information reaches the marketplace. Neither prohibits that information from reaching its audience. Their restrictions are just as "structural" and "second order" as Ohio's restraint on initiatives. In the Panel's words, they "regulate the process by which [the information] is put before the [audience]." Yet both are clearly unconstitutional.

The lone authority cited by the Panel to support treating popular democracy differently is Justice Sotomayor's opinion in *John Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring), *see* Slip op., Doc. 40-2, at Page 8, a case that had nothing to do with executive discretion and prior restraints. The majority in *Reed*, 561 U.S. at 195, moreover, applied full First Amendment scrutiny to Washington's disclosure requirement: "The State, having "cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants

in that process the First Amendment rights that attach to their roles." (Emphasis added and citation omitted). It made no exception.

Contrary to the Panel's conclusion, the Supreme Court has never deviated from its holding that popular democracy involves "core political speech." It has never shied from affording initiatives the utmost First Amendment protection. In *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988), for example, the Court not only described popular democracy as involving "core political speech," it added that "the importance of First Amendment protections is 'at its zenith'" when citizens attempt to directly pass legislation. *Id*. at 424. The Court emphasized in *Meyer*, 486 U.S. at 424, that "[t]he First Amendment protects [the people's] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." That choice includes initiatives.

These sentiments were repeated in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186 (1999), where the Court stated that "[p]etition circulation . . . is 'core political speech.'" (Citation omitted). In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003), the Court stated that popular initiatives and referenda are "basic instrument[s] of democratic government." (Citation omitted). In sum, the Supreme Court has never treated popular democracy as "second-order" speech deserving less First Amendment protection.[1]

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[1] As explained by Judge Bush, Sister Circuits have disagreed over how much First Amendment protection is due initiatives. Slip op., Doc. No. 40-2, at Page 19 (Bush, J., concurring). This split of authority is now before the Supreme Court in *Port of Tacoma v. Save Tacoma Water*, 422 P.3d 917 (Wash. App. 2018), *review denied*, 192 Wash. 2d 1036 (Wash. 2019), *cert. pending*,

The Panel's conclusion not only strays from this controlling precedent, it contradicts rulings handed down by this Court. In *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296-97 (6th Cir. 1993), this Court cited *Meyer* in stating that although "the right to initiate legislation is a wholly state-created right," the First Amendment still demands that a State only place "nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation." (Emphasis added). The Court emphasized that "the principle stated in *Meyer* is that a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Id*. at 295. The Court created no "initiative exception" to the First Amendment's ordinary rules.

In *Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F. 3d 443, 446 (6th Cir. 2018), the Court again employed established First Amendment principles to sustain Ohio's content-neutral single-subject restriction on initiatives. The Court made no mention of modifying First Amendment jurisprudence or eliminating basic protections because initiatives were involved.[2]

No. 18-1518 (U.S. 2019), which is scheduled for consideration at the Supreme Court's October 1, 2019 Conference.

[2] The Panel's conclusion is also in tension with established non-public forum jurisprudence. Even when a state is within its rights in identifying which topics and subjects are proper for discussion (which is arguably true with initiatives), this Court (and many others) have recognized that the First Amendment's prohibition on prior restraints still applies. See, *e.g*., *Miller v. City of Cincinnati*, 622 F.3d 524, 528 (6th Cir. 2010). For this reason, as

Because Ohio's gatekeeper law cannot pass traditional First Amendment scrutiny – a fact the Panel apparently conceded – the Panel chose to make an exception. It relegated initiatives and referenda to "second-order" status. On the First Amendment's scale of importance, oddly enough, direct democracy now ranks below adult entertainment, *see Déjà vu of Nashville*, 274 F.3d 372, pornography, *see Freedman*, 380 U.S. 51, and defamation. *See Near v. Minnesota*, 283 U.S. 697 (1931). With all due respect, such a profound result should be supported by more than a passing reference to a concurring opinion in a dissimilar case. Appellees accordingly request that the Court rehear this important matter en banc.

II. The Panel's Conclusion That Ohio's Gatekeeper Law Cannot Be A Prior Restraint Contradicts This Court's Precedents.

This Court has repeatedly recognized that the right to be free from prior restraints is the most basic First Amendment protection available. *See*, *e.g.*, *Novak v. City of Parma*, __ F.3d __, 2019 WL 3403893, *7 (6th Cir., July 29, 2019) ("The First Amendment guarantees 'greater protection from prior restraints.'") (citations omitted). Saying that initiatives are protected by the First Amendment but not protected by its most basic component is like saying that people, while protected by Equal Protection, can still be subjected to

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the Panel noted, Appellees here did not challenge Ohio's authority to restrict initiatives to particular subjects. *See* Slip op., Doc. No. 40-2, at Page 11 n.3. Appellees did not do so because whether Ohio could or could not, its delegation of content-based discretion to executive agents must still satisfy the doctrine against prior restraints (including both its procedural safeguards and strict scrutiny).

intentional racial discrimination. Carving away a right's most basic protection guts the right.

"A prior restraint" has been broadly defined by this Court to be "an 'administrative' or 'judicial order[ ]' that forbids protected speech in advance." *Id*. Whether a prior restraint exists is not overly formalistic, as this Court made clear in *Novak*, 2019 WL 3403893, at *8: "in light of our long history of guarding against prior restraints on speech, we should not be overly formalistic in defining what counts as an administrative order." (Citations omitted).

Licensing the subject and content of initiatives is the quintessential example of an impermissible prior restraint. *See*, *e.g*., *Hyman v. City of Salem*, __ F. Supp.3d __, 2019 WL 2366015 (N.D. W.Va. 2019) (concluding that West Virginia's delegation of discretion to local elections officials to exclude initiatives constitutes an impermissible prior restraint). For this reason, few States[3] follow Ohio's prior-executive-discretion model. In most States, the subject matter of an initiative cannot be challenged – even judicially – prior to elections. *See* James D. Gordon, III, *et al*., *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 304 (1989).

Had the Panel not relegated popular democracy to second-order status, it could have only reached one conclusion: Ohio's gatekeeper law codifies an unconstitutional prior restraint. It conditions the exercise of core political activity on the prior discretionary approval of an executive official, a practice that has

[3] Only West Virginia, Maine and New York can be identified as modeling Ohio, and in the first two Courts have invalidated the prior approval mechanisms under the First Amendment. *See Hyman*; *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993).

been condemned again and again by the Supreme Court. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), for example, the Supreme Court struck down a Birmingham ordinance because it "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways." *Id*. at 150 (footnote omitted).

In *Plain Dealer*, 486 U.S. at 757, the Court invalidated as an impermissible prior restraint a city's permitting scheme for news racks placed on public property: "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." (Citations omitted).

In order for a restraint of this kind to overcome the First Amendment's presumption of unconstitutionality, it must at bare minimum build in a system of procedural safeguards. *See Freedman*, 380 U.S. 51 at 58. This Court in *Déjà vu of Nashville*, 274 F.3d at 400, summarized these procedural safeguards as including not only prompt executive action, but also prompt judicial review initiated by the censor. Further, as recognized by the Panel, *see* Slip op., Doc. No. 40-2, at Page 7, the judicial review mandated by *Freedman* must be de novo. *See Universal Film Exchange, Inc. v. City of Chicago*, 288 F. Supp. 286, 293 (N.D. Ill. 1968) ("Since *Freedman* . . ., it has been clear that only a de novo judicial determination . . . can justify a valid final restraint of a motion picture in advance of exhibition.").

Ohio's gatekeeper law fails to include these safeguards. It does not provide de novo judicial review. It does not maintain the status quo. It does not place the burden of seeking review on the censor. Simply put, Ohio's gatekeeper law cannot pass established consti-

tutional muster. The Panel's holding contradicts established law and should be reviewed en banc.

III. Refusing to Apply Strict Scrutiny to Content-Based Decisions Contradicts Supreme Court and Sixth Circuit Precedent.

The Panel concluded that Ohio's delegation of content-based discretion to local elections boards is not subject to strict scrutiny. It reached this conclusion in part by mischaracterizing Appellees' argument. It stated in a footnote that because Appellees did not challenge Ohio's legislative authority to restrict its initiatives to certain subjects, *see* Slip op., Doc. No. 40-2, at Page 11 n.3, Appellees somehow did not advance a content-based challenge. Further, it stated, "the focus of Plaintiffs' challenge is the asserted inadequacy of the review afforded to the boards' discretionary judgments. This aspect of the ballot-initiative statutes is plainly content-neutral." *Id*.

The Panel's characterization of Appellees' argument is not correct. Appellees did not concede that Ohio's gatekeeper mechanism is content-neutral nor "focus" on the inadequacy of mandamus. Far from either, Appellees focused on the constitutionality of delegating content-based discretion to executive officials. Regardless of whether Ohio's legislature may otherwise restrict the subject matter of proper initiatives (as with non-public fora it may be able to do so), and irrespective of whether judicial mandamus applies equally regardless of content (one assumes so), the doctrine against prior restraints protects speech from executive discretion. The executive discretion delegated by Ohio's gatekeeper law is plainly content-based. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

Where executive discretion is content-based, this Court has made clear that strict scrutiny applies. In addition to "provid[ing] for prompt judicial review of all decisions denying the right to speak," *Déjà vu of Nashville*, 274 F.3d at 391, prior restraints must "also pass[] the appropriate level of scrutiny." *Id*. And when a restraint on speech is based on subject matter or content, "the law must survive strict scrutiny." *Déjà vu of Nashville*, 274 F.3d at 391.

Appellees' challenge mirrors that in *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993), where Maine had delegated similar discretion to elections officials to exclude initiatives from ballots. The Court there ruled that "[b]ecause the petition process is protected by the first amendment and the Secretary has advanced no compelling interest in executive oversight of the content of the petition prior to its circulation for signature, his refusal to furnish the petition form based on the content of the proposed legislation impermissibly violated Wyman's rights protected by the first amendment." *Id*. at 312.

Contrary to the Panel's conclusion, application of strict scrutiny must also be employed under the *Anderson/Burdick* framework. This Court in *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998), observed that under the *Anderson/Burdick* framework, "[f]irst, and most importantly, a law severely burdens voting rights if it discriminates based on content instead of neutral factors." (Citation omitted). This severe burden must be subjected to "the compelling interest standard." *Id*. (citation omitted).

Because Ohio's executive censors use content to decide which initiatives to allow, their decisions necessarily impose severe burdens on speech. This kind of severe burden must be measured by strict scrutiny, a

standard Ohio's gatekeeper approach plainly cannot satisfy. The Panel apparently recognized as much, conceding that "the State's chosen method for screening ballot initiatives may not be the least restrictive means available." Slip op., Doc. No. 40-2, at Page 12.

IV. The Panel's Rejection of the Ohio Supreme Court's Interpretation of its Own Jurisdiction Constitutes Clear Error.

The Panel concluded that the Ohio Supreme Court's description of its own mandamus authority is incorrect.[4] Mandamus is not really discretionary, as repeatedly explained by the Ohio Supreme Court, it is mandatory and de novo. *See* Slip op., Doc. No. 40-2, at 10-11. And because its review is mandatory and de novo, the Ohio Supreme Court exercises sufficient review for purposes of the First Amendment.

The Panel stepped far outside its assigned role in recreating Ohio law. Ohio's Supreme Court might someday say that its mandamus review is de novo, but it has never once done so. It has repeatedly emphasized the deferential nature of its mandamus review. A federal court's "task is to rule on what the law is, not what it might eventually be." *Garcia v. Texas*, 564 U.S. 940, 941 (2011).

In addition to guiding appellate courts, moreover, announced review standards are important signals to potential litigants, like censors and their censored. Thus, even if mandamus review were to prove effectively de novo in practice, its de jure announcement

[4] Appellees understand that ordinarily mistakes about local law should be reheard by the original panel. *See* 6th Cir. I.O.P. 35(a). The Panel's misreading of Ohio's mandamus law, however, is so entwined with its improper construction of the First Amendment that it should be considered en banc.

would still have a significant impact on speech. Being told they have discretion, boards are incentivized (as the Portage County Board was here) to censor. Being told the decision is discretionary, the subject of censorship is deterred from challenging the decision.

The Panel recognized this fact, though it underestimated its magnitude by half: "It is reasonable to conclude that the cost of obtaining legal counsel and seeking a writ of mandamus disincentivizes some ballot proponents from seeking to overturn the board's decision, thereby limiting ballot access." Slip op., Doc. No. 40-2, at Page 11. The Panel omitted that the discretion granted to elections officials also encouraged them to act. Regardless of whether Ohio's mandamus system is practically de novo, then, it chills speech. This is precisely what the prohibition on prior restraints is designed to prevent. *See Freedman*, 380 U.S. at 60 ("the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected").

V. This Court and the Supreme Court Have Ruled that Common Law Writs Are Not Adequate Procedural Safeguards.

This Court has concluded that review through discretionary common law writs is insufficient to satisfy First Amendment scrutiny. In *Déjà vu of Nashville*, 274 F.3d at 400-01, the Court concluded that Tennessee's common-law review process did not satisfy *Freedman*'s requirements: "Whether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." (Citation omitted).

Similarly, the Supreme Court in *Plain Dealer*, 486 U.S. at 771, ruled that Ohio's writ of mandamus was not sufficient to save a delegation of discretionary power to local officials to pick and choose between news racks: "that review . . . cannot substitute for concrete standards to guide the decision-maker's discretion." For this same reason, Ohio's mandamus mechanism cannot save its delegation of discretionary authority to local elections officials. Because the Panel's conclusion not only re-writes Ohio's view of mandamus, but also contradicts this precedent, Appellees respectfully request that the Court rehear the case en banc.

CONCLUSION

Appellees' respectfully request that this petition be **GRANTED.**

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Appellees certify that they have prepared this document in 14-point Times New Roman proportional font and that excluding the Cover, Signature Block, and Certificates the document contains 3894 words.

s/ Mark R. Brown ___
Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Petition was filed on August 13, 2019 using the Court's electronic filing system and will thereby be served on all parties to this proceeding.

s/ Mark R. Brown ___
Mark R. Brown

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: 05/22/2019]

No. 19-3196

WILLIAM T. SCHMITT, CHAD THOMPSON, DEBBIE BLEWITT,

Plaintiffs-Appellees,

v.

FRANK LAROSE, OHIO SECRETARY OF STATE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio

BRIEF FOR APPELLEES, WILLIAM T. SCHMITT, CHAD THOMPSON, DEBBIE BLEWITT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations
and Financial Interest

Sixth Circuit
Case Number: 19-3196

Case Name: Schmitt v. LaRose

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, William Schmitt, Chad Thompson, Debbie Blewitt
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark R. Brown
303 E. Broad Street
Columbus, OH 43215

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents.
See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case was orally argued twice to the District Court, and the oral arguments appeared to be helpful to the District Court's understanding of Ohio's gatekeeper law. For that same reason, Appellees believe that oral argument may be useful in this Court. Appellees accordingly respectfully request oral argument.

STATEMENT OF THE ISSUE

Whether Ohio's gatekeeper law in O.R.C. § 3501.11(K), which delegates executive discretion to elections officials to determine whether the content and subject matter of initiatives is lawful, and which affords judicial review only by extraordinary writ of mandamus for fraud, abuse of discretion or clear error, violates the First and Fourteenth Amendments.

STATEMENT OF THE CASE

Plaintiffs/Appellees Schmitt and Thompson (hereinafter collectively "Schmitt")[1] are the drafters and circulators of two initiatives proposed for ballots in the Villages of Garrettsville and Windham, Ohio. *See* Verified Complaint, R.1, at PAGEID # 6-7; Exhibit 1, R.1-1; Exhibit 2, R.1-2. Both initiatives included identical proposed ordinances calling for the "decriminalization" of marijuana possession.[2] Both initiatives were found to have satisfied all the procedures required by Ohio law. *Id.* at PAGEID # 7. They were supported by a sufficient number of signatures, were timely, addressed

[1] Plaintiff/Appellee Blewitt is a registered voter living in Windham who signed Schmitt's and Thompson's initiative. She is included without further mention in the collective reference to "Appellees" and "Schmitt."

[2] This was accomplished in the initiatives by removing any penalties for marijuana possession.

single subjects, used the correct forms, and were certified by the two Villages. *Id.*

Schmitt previously circulated several of these initiatives, in identical form, throughout Ohio. Identical copies of the proposed Garrettsville and Windham ordinances had been successfully approved for inclusion on ballots in Oregon, Fremont and Norwood, Ohio. *See* Verified Complaint, R.1, at PAGEID # 8; Exhibit 5, R.1-5; Exhibit 6, R.1-6; Exhibit 7, R.1-7.

Notwithstanding that Schmitt's Garrettsville and Windham initiatives were certified by the Villages to contain the requisite number of voters' signatures and otherwise to have met the technical requirements for inclusion on the Villages' respective ballots, the Portage County Board of Elections on August 20, 2018 ruled that the subject-matter of the two initiatives was unlawful. It accordingly removed them from the two Villages' ballots. The Portage County Board of Elections on August 21, 2018 explained to Schmitt that:

> In *State ex rel. Sensible Norwood v. Hamilton County Board of Elections*, 2016-Ohio-5919, the Oho [sic] Supreme Court said administrative actions are not subject to initiative. Reviewing the language in the proposals presented by the Village of Garrettsville and the Village of Windham, the $0 fine and no license consequences are administrative in nature. The $0 court costs is administrative in nature and is an impingement on the judicial function by a legislature. Accordingly, as the Garrettsville Village and Windham Village petitions deal with subject matter that is not subject to the initiative process, the Board of Elections, in its discretion, has chosen not to certify these issues to the ballot.

Verified Complaint, Exhibit 4, R.1-4 (emphasis added).

In rejecting Schmitt's initiatives, the Board relied on the "discretion" delegated to it by Ohio's so-called "gatekeeper" law. *See State ex rel. Sensible Norwood v. Hamilton County Board of Elections*, 148 Ohio St.3d 176, 69 N.E.3d 696 (2016). This law, codified in O.R.C. § 3501.11(K), authorizes local elections officials to exercise discretion in choosing which initiative "subject matters" to include on ballots and which to exclude. As explained below, Ohio's gatekeeper mechanism has been construed by the Ohio Supreme Court to vest subject-matter discretion in local elections officials, *see*, *e.g.*, *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015), with only limited, deferential mandamus review in Ohio's courts. *Id.*

A. Ohio's Gatekeeper Law – O.R.C. § 3501.11(K).

Section 3501.11(K) of the Ohio Revised Code, both before and after legislative additions in 2017, *see* page 8, *infra*, provides that local elections boards possess authority to "[r]eview, examine, and certify the sufficiency and validity of petitions and nomination papers . . . ." It has been interpreted by the Ohio Supreme Court to afford local elections boards discretion to decide which topics for initiatives are lawful and those which are not. In sum, "administrative" matters may be excluded at the discretion of elections officials, as might subjects that elections officials decide otherwise fall outside local authority. What is administrative and what falls outside local authority, as explained by Ohio's Supreme Court, present "difficult" legal questions.

Elections officials' authority to consider constitutional questions, meanwhile, is murkier still. According to the Ohio Supreme Court, election boards have authority to decide whether initiatives fall under a municipality's constitutional authority, but they cannot

decide whether initiatives are constitutional. Because review is limited, moreover, executive decisions have generated a large measure of indeterminacy. Not only are the required distinctions "difficult" to make, according to the Ohio Supreme Court, they can according to one Justice (Fischer) be "unnecessarily confusing" and "without meaning." Justice Fischer has offered that all in all, § 3501.11(K) "defie[s] workability."

* * *

Section 3501.11(K) was explained in *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015), to empower local elections officials to "serve as gatekeepers, to ensure that only those measures that actually constitute initiatives or referenda are placed on the ballot." (Emphasis added). "It necessarily follows," the Ohio Supreme Court added, "that the boards have discretion to determine which actions are administrative and which are legal." *Id.* (emphasis added). "Administrative" subjects are not proper subjects of initiatives. *Id.* "Legal" topics are. *Id.*

The Ohio Supreme Court in *Walker* further observed that O.R.C. § 3501.11(K) "vests the board of elections with authority to go beyond the face of the petition in determining validity, and that '[t]he substantive limitation is only that the board of elections has no power to determine that an issue should not be placed on the ballot because if passed it would be unconstitutional or otherwise illegal.'" 144 Ohio St.3d at 364, 43 N.E.3d at 424. Thus, local election boards are entitled "to determine whether a ballot measure falls within the scope of the constitutional power of referendum (or initiative)," *id.*, but are still not permitted "to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms." *Id.*

Walker made much of the fact that the Ohio Supreme Court's authority to review the decisions of elections officials is based in mandamus: "[c]hallenges to his decisions would then come before this court in mandamus, and the question would be whether the secretary abused his discretion." *Id.* at 365, 43 N.E.2d at 424. "As is well-established, abuse of discretion means more than an error of law or of judgment." *Id.* "In close cases, therefore, we might very well be compelled to find that the secretary reasonably disqualified a ballot measure, in the exercise of his discretion, even if we, in the exercise of our constitutional duties, would deem the measure unconstitutional." *Id.*

Subsequent cases have reinforced the Ohio Supreme Court's limited review of elections boards' decisions, as well as the confusion surrounding exactly what kinds of decisions local elections officials can make. Indeed, by its own admission the Ohio Supreme Court has not achieved much success. In *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 247, 95 N.E.3d 329, 332 (2016), which ruled that a local board possessed discretion to reject an initiative creating a private cause of action (which according to the board exceeded local power), the Court conceded the "difficult" nature of the task:

> Our jurisprudence has distinguished between an elections board's determining that a proposed initiative may be unconstitutional and an elections board's determining that a proposed initiative falls outside the scope of the permissible subject matter of a municipal initiative. . . . <u>It is fair to say that it is sometimes difficult to distinguish</u> between a provision that a municipality is not authorized to adopt by legislative action (something an elections board may determine per *Sensible Norwood*) and one that is simply unconstitutional (something an

> elections board may not determine, per *Youngstown*). But that is the line our case law has drawn.

Id. at 247, 95 N.E.3d at 332.[3]

State ex rel. Sensible Norwood v. Hamilton County Board of Elections, 148 Ohio St.3d 176, 69 N.E.3d 696 (2016), which was relied upon by the Portage County Board of Elections in the present matter, involved an initiative that sought to include a marijuana decriminalization ordinance on a local ballot. Its language, like the initiatives at issue here, included a provision reducing local penalties for not only misdemeanor marijuana possession laws, but also felonies. The local elections board refused to place the initiative on the ballot because it believed the initiative exceeded local authority by defining felonies. *Id.* at 177, 69 N.E.3d at 697. The board also concluded that the initiative impermissibly "imposed administrative restrictions on the enforcement of existing laws" by limiting the powers of police officers, prohibiting forfeiture, and restricting drivers' license revocation. *Id.* at 179-80, 69 N.E.3d at 700.

Per Ohio's accepted process, the sponsors of the initiative sought a writ of mandamus in the Ohio Supreme Court directing the elections officials to place the initiative on the ballot. The Ohio Supreme Court refused; it sustained the local elections board's discre-

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[3] The Ohio Supreme Court in *State ex rel. Youngstown v. Mahoning County Board of Elections*, 144 Ohio St.3d 239, 241, 41 N.E.3d 1229, 1232 (2015), ruled that a local elections boards cannot "determine whether a ballot measure falls within the scope of the constitutional power of referendum or initiative." An elections board may conclude that an initiative is "administrative" and reject it, or may determine that it exceeds local power and reject it, but it may not reject an initiative because it exceeds local authority by violating Ohio's constitutional home-rule amendment.

tion on both points, emphasizing its limited power of review under mandamus:

> To be eligible for a writ of mandamus, relators must "establish a clear legal right to the requested relief, a clear legal duty on the part of the board and its members to provide it, and the lack of an adequate remedy in the ordinary course of the law." Relators have failed to establish a clear legal right to their requested relief and a clear legal duty on the part of the board to provide it. As we have previously acknowledged, "[e]lection officials serve as gatekeepers, to ensure that only those measures that actually constitute initiatives or referenda are placed on the ballot.

Id. at 180, 69 N.E.3d at 700-01.

In sum, by 2017 O.R.C. § 3501.11(K) had been authoritatively interpreted by the Ohio Supreme Court to christen local elections officials as executive gatekeepers of Ohio's initiative process. These executive officials possess discretion to block initiatives from ballots based on the elections officials' beliefs that initiatives address "administrative" matters or exceed local power. They are not to exclude initiatives that address only "legal" matters or exceed local power only because of Ohio's constitution. *See State ex rel. Bolzenius v. Preisse*, 155 Ohio St. 3d 45, 47-48, 119 N.E.3d 358, 361-62 (2018). Elections officials' decisions, meanwhile, are reviewed only at the insistence of the aggrieved speaker in a mandamus action, which requires proof that the decision was clearly wrong or an abuse of discretion.

B. Additions to Discretion – House Bill 463.

On April 6, 2017, H.B. 463 took effect in Ohio. While keeping the language in O.R.C. § 3501.11(K) (quoted

above),[4] it added new language, codified as O.R.C. § 3501.11(K)(2). This language states that local elections boards shall:

> [e]xamine each initiative petition, . . . received by the board 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, as described in division (M) of section 3501.38 of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

Id. House Bill 463 also added O.R.C. § 3501.38(M)(1)(a), which requires that a board of elections examine an initiative petition to determine

> [w]hether the petition falls within the scope of a municipal political subdivision's authority to enact via initiative, including, if applicable, the limitations placed by . . . the Ohio Constitution on the authority of municipal corporations to adopt local police, sanitary, and other similar regulations as are not in conflict with general laws, ... The petition shall be invalid if any portion of the petition is not within the initiative power.

Finally, H.B. 463 amended O.R.C. § 3501.39(A)(3) to provide that local elections boards should reject an initiative petition that "falls outside the scope of authority to enact via initiative . . . ."

House Bill 463 not only reaffirmed local elections boards' roles as gatekeepers in deciding whether the subjects of initiatives are proper under O.R.C.

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[4] That exact same language is now located in O.R.C. § 3501.11(K)(1).

§ 3501.11(K), it added to their executive discretion. They are now afforded discretion to decide whether a subject (1) generally falls "within the initiative power," (2) exceeds a local political body's constitutional home-rule powers, or (3) otherwise conflicts with general laws. Although O.R.C. § 3501.11(K) had achieved much the same thing before H.B. 463 was passed, these changes arguably augmented executive control of the initiative process.

Whether H.B. 463's enlargement of executive discretion at the expense of Ohio's courts is valid under Ohio's Constitution's separation-of-powers provision has not been decided. This state-law matter was avoided in *State ex rel. Espen v. Wood County Board of Elections*, 154 Ohio St.3d 1, 110 N.E.3d 1222 (2017), where a local election board certified to Bowling Green's election ballot an initiative titled "Community Rights to a Healthy Environment and Livable Climate." The board's decision was protested under H.B. 463 on the ground that "it exceeded the municipal powers of self-government set forth in the Ohio Constitution." 154 Ohio St.3d 1, 110 N.E.3d at 1224.

A plurality of three Justices in a per curiam opinion in *Espen* concluded that the local board did not abuse its discretion in rejecting the protest. 154 Ohio St.3d 1, 110 N.E.3d at 1225. That same plurality added that "the statutory amendments made by [H.B. 463] do not change this result." 154 Ohio St.3d 1, 110 N.E.3d at 1226. They explained that "[t]his attempt by the General Assembly to grant review power to the election boards violates the [Ohio] Constitution because 'the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *Id.* Authorizing elections boards to entertain

constitutional issues, according to this plurality, is problematic.

Because the fourth vote (that of Justice O'Donnell) supporting the Court's result in *Espen* did not join the per curiam opinion, whether H.B. 463 enlarged local elections officials' gatekeeper duties, and whether it could under Ohio's Constitution, were not answered. *See State ex rel. Khumprakob v. Mahoning Board of Elections*, 153 Ohio St.3d 581, 585, 109 N.E.3d 1184, 1187 (2018) (Fischer, J., concurring) *("Espen* does not resolve this case because the lead opinion in that case, joined by only three justices, did not articulate a holding of this court.").

With or without H.B. 463's grant of added power and discretion, it remains clear under Ohio law that local election boards at bare minimum possess the gatekeeper authority that existed before 2017. The Ohio Supreme Court made this clear in *State ex rel. Bolzenius v. Preisse*, 155 Ohio St. 3d 45, 119 N.E.3d 358 (2018), where local elections officials had rejected an initiative based on its subject. The Ohio Supreme Court ruled the board acted properly, at least it had not abused its discretion. In the course of doing so, it explained that its previous interpretation of O.R.C. § 3501.11(K) remained the law in Ohio:

> In *Sensible Norwood*, we concluded that under former R.C. 3501.11(K), an elections board was authorized to exclude an initiative petition from the ballot <u>if the initiative petition sought to enact municipal legislation that would be beyond a municipality's legislative power</u>. H.B. 463, effective April 6, 2017, introduced new provisions related to the authority and duty of elections boards to review the substantive terms of proposed ballot measures. For example, the act added R.C.

> 3501.11(K)(2), which requires elections boards to examine an initiative petition "to determine whether the petition falls within the scope of authority to enact via initiative." . . . Importantly, H.B. 463 retained the language of former R.C. 3501.11(K), recodifying it as R.C. 3501.11(K)(1).
>
> In *State ex rel. Flak v. Betras*, we held that R.C. 3501.11(K)(1) authorizes elections boards 'to determine whether a ballot measure falls within the scope of the constitutional power of referendum or initiative.' Thus, without relying on the changes introduced by H.B. 463, we again held that an elections board has the authority to determine whether a municipal initiative falls within the municipality's legislative power. Guided by *Flak*, we apply our pre-H.B. 463 case law in this case. Accordingly, we must determine whether the board members abused their discretion in determining that the proposed ordinance exceeds Columbus's legislative power.

Id. at 47-48, 119 N.E.3d at 361-62 (citations omitted).

While it is clear under Ohio law that local elections officials retain discretion to choose which initiative subjects are "administrative" and which are "legal," and to decide which topics constitutionally fall beyond local power and which do not, it remains unclear in Ohio how local elections officials are to draw these fine distinctions. This is illustrated by the current case, where several local elections boards concluded that Schmitt's initiative's subject was "legal," *see* Verified Complaint, R.1, at PAGEID # 8, while Portage County concluded the exact same initiative was "administrative." *Id.*

This indeterminacy led Justice Fischer in *Khumprakob*, 153 Ohio St.3d at 584, 109 N.E.3d at 1187, to write a lengthy concurring plea for changes in the system.[5] He complained that local elections boards are called upon to make decisions that even courts cannot make. They are delegated discretionary authority to "make a substantive, pre-enactment legal determination that a proposed measure exceeds a municipality's legislative power." *Id.* The Court's deferential standard of review, Justice Fischer pointed out, complicated this result by "relinquishing some authority in favor of boards of elections and facilitating inconsistent results among various boards of elections." *Id.*

In the end, Justice Fischer concluded that Ohio's approach was "unnecessarily confusing," "without meaning," and "defied workability." He pleaded for a "more constrained scope of review":

> Questions on both sides of the distinction can present home-rule issues, but there is no clear reason why elections boards have been allowed to decide questions on one side but not questions on the other. . . . Indeed, it is puzzling why an elections board might have authority to make legal determinations about state-law preemption (even though we have rejected the concept) but lacks authority to determine a home-rule-conflict

[5] In *Khumprakob*, a local election board had refused to certify an initiative because it exceeded the city's legislative power. The Court disagreed, stating that "although the proposed amendment would not necessarily be constitutional or legally enforceable if enacted, the board abused its discretion in finding that the measure exceeds Youngstown's legislative power." Justice Fischer concurred with this result, but explained he did not join the opinion because he felt the approach was unworkable.

> question (even if we have decided a case directly on point).
>
> Our existing case law on R.C. 3501.11(K)(1) has shown itself to be unworkable in one other way: . . . it does not lead to consistent results among various county boards of elections. By leaving behind the interpretation of R.C. 3501.11(K)(1) articulated in *Youngstown*, *Sensible Norwood*, and *Flak*, this court not only would maintain the separation of powers but also would ensure greater uniformity in elections board decision-making throughout the state. . . . [T]here is no reason why elections boards cannot decide future cases under a more constrained scope of review without disruption or difficulty.

Id. at 591-92, 119 N.E.3d at 1192-93 (citations omitted and emphasis added).

Justice Fischer observed that House Bill 463, moreover, only made matters worse by expanding the local elections board's discretion: "the H.B. 463 amendments . . . purport to authorize election boards to make legal determinations about subject-area preemption that even courts cannot make." *Id.* at 590, 119 N.E.3d at 1191.

Justice Fischer, together with Justices O'Connor and DeGenaro, returned to the problems presented by Ohio's gatekeeper law in *State ex rel. Maxcy v. Saferin*, __ N.E.3d __, 2018 WL 4846266 (Ohio 2018) (Fischer, J., dissenting), where the Ohio Supreme Court refused to issue mandamus directing elections officials to place a popular charter provision on a local ballot. In addition to the indeterminacy he identified in *Khumprakob*, he pointed to Judge Sargus' conclusion in this very

case that Ohio's gatekeeper law violates the First Amendment:

> That court found that R.C. 3501.11(K) allows a board of elections—part of the executive branch—to determine disputed legal and constitutional issues, thus potentially blocking initiatives from the ballot without providing those parties a right to judicial review. The court then held that this procedure unreasonably infringes on the First Amendment rights of parties aggrieved by the rejection of an initiative petition.

Id. at *11 (citation omitted).[6]

Ohio's law both before and after the 2017 statutory additions has been addressed at length here (as it was in the District Court) to insure that this Court, like the District Court, has a full understanding of Ohio's gatekeeper law and the Ohio Supreme Court's interpretations of it. This Court need not wade into the state-law questions surrounding whether Ohio's Constitution allows H.B. 463 to add even more executive power. Whether it can or does is not relevant to resolution of this action. The Ohio Supreme Court has authoritatively ruled that O.R.C. § 3501.11(K) by itself, both before and after 2017, vests discretion in local elections officials to pick and choose between initiatives based on subject matter, topic and content. The Portage County Board of Elections exercised this authority. Ohio's gatekeeper mechanism (as authoritatively construed by the Ohio Supreme Court) continues to operate as a prior restraint. It continues to employ

[6] Justices Fischer, O'Connor and DeGenaro had no difficulty understanding that Judge Sargus' judgment was based on the First Amendment.

"difficult," "puzzling" and "unworkable" content-based standards.

C. The Proceedings Below.

On August 20, 2018, Schmitt's de-criminalization initiatives for Windham and Garrettsville were rejected by the Portage County Board of Elections. *See* Verified Complaint, R.1, at PAGEID # 7. On August 28, 2018, Schmitt filed this official-capacity action in the District Court against the Board and Appellant[7] seeking relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments. *See id.* at PAGEID # 1. Schmitt argued that the executive license afforded local elections boards by Ohio' gatekeeper mechanism constitutes an impermissible prior restraint. Schmitt sought to have the two initiatives restored to the two Villages' ballots and a permanent injunction issued barring enforcement of the gatekeeper law.

Schmitt relied on the First Amendment and the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). The District Court agreed.

In his September 19, 2018 Order directing that Schmitt's initiatives be restored to the Windham and Garrettsville ballots, Judge Sargus explained that Ohio's fault lied in its failure to provide an immediate, de novo legal remedy to one whose initiative is rejected by a local election board. Ohio, he explained, only allows a mandamus action, which requires that the aggrieved party prove "(1) a clear right to the

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[7] Ohio's Secretary of State is Ohio's chief election officer charged with enforcing Ohio's election laws and insuring that local elections officials comply with it. *See* O.R.C. § 3501.05; *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992) (stating that Ohio's Secretary of State "compel[s] compliance with election law requirements by election officials").

requested relief, (2) a clear legal duty on the part of the board to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." Opinion and Order, R. 22, at PAGEID # 164 (citations omitted). "When the Ohio Supreme Court . . . reviews a decision by a county board of elections, such court may only issue the writ if the board 'engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions.'" *Id.* (citations omitted and emphasis added).

This limited mandamus review, the District Court concluded, by itself violated the procedural safeguards mandated by the First and Fourteenth Amendments. Judge Sargus stated that he could find

> no legitimate state interests in preventing an adequate legal remedy for petitioners denied ballot access by a board of elections. While the availability of mandamus relief is essentially a judicially imposed remedy when the law does not otherwise provide one, the high burden on petitioners to prove entitlement to an extraordinary remedy is no substitute for de novo review of the denial of a First Amendment right.

Id. at PAGEID # 168 (emphasis added). He added:

> Ohio's regulatory scheme unreasonably infringes on Plaintiffs' First Amendment rights by allowing an executive board to determine disputed legal and even constitutional issues, thereby potentially blocking initiatives from the ballot, and then denying rejected petitioners a right to review. No legitimate state interest is protected by a lack of appellate review.

Id. at PAGEID # 169 (emphasis added). Following their restoration to the ballot, Schmitt's initiative in

Windham passed by a vote of 237 to 206 and the Garrettsville's initiative narrowly failed by a vote of 515 to 471.[8]

On February 11, 2019, following additional argument, the District Court granted permanent relief. The Court stated that it "**REINSTATES** and **CONVERTS** to permanent injunction the preliminary injunctive relief granted in its Opinion and Order issued on September 19, 2018." Opinion and Order, R. 37, at PAGEID # 293. The Court accordingly granted to Plaintiffs the only permanent injunctive relief they requested, that is, "a permanent injunction . . . prohibiting Defendants from enforcing or acting under O.R.C. § 3501.11(K), . . . to authorize local elections boards to act as 'gatekeepers' of initiatives." Verified Complaint, Doc. No. 1, at PAGEID # 16 ¶ D.

Judge Sargus succinctly explained in that Order:

> Given the availability of mandamus relief is extraordinary and only exercised when the law does not otherwise provide an adequate remedy, the high burden on petitioners to prove entitlement to an extraordinary remedy is no substitute for *de novo* review of the denial of a constitutionally protected liberty interest. Therefore, the Court finds Plaintiffs prevail on their constitutional challenge to Ohio's ballot initiative process.

Opinion and Order, R. 37, at PAGEID # 292 (emphasis added).

Two weeks later, on February 25, 2019, the Secretary moved for a "clarification" of the Court's February 11,

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[8] *See* Portage County General Election, Nov. 6, 2018, Summary Report, (https://www.co.portage.oh.us/sites/portagecountyoh/files/uploads/final_unofficial_results.pdf) (last visited Nov. 7, 2018).

2019 Opinion. *See* Defendants' Motion for Reconsideration, R. 39. On March 12, 2019, the Secretary lodged its Notice of Appeal,[9] *see* R. 41, and sought a stay of the District Court's permanent injunction. *See* Defendants' Motion for Stay, R. 42.

On March 18, 2019, the District Court granted Defendants' motion to stay for ten days "out of an abundance of caution" to facilitate the Secretary's filing an emergency motion for Stay with this Court. *See* Order, R. 46 at PAGEID # 359. The District Court explained that not only was the Secretary "not likely to prevail on the merits of his appeal," *id.* at PAGEID # 358, "there is no evidence that the Secretary will be irreparably harmed absent a stay." *Id.* Appellant chose not to seek an emergency stay at that time.

On April 15, 2019, the District Court granted the Secretary's motion for "clarification." *See* Order, R. 50, at PAGEID # 369 n.1. The District Court did not change or limit the extent of its previously entered orders, but instead reiterated that it had previously "granted Plaintiffs the relief they requested in paragraph D of the Complaint." *Id.* at PAGEID # 371. It explained:

> the Court granted Plaintiffs a permanent injunction that prohibited Defendants – i.e., the Portage County Board of Elections and the Ohio Secretary of State – from enforcing the gatekeeper function in any manner that fails to provide a constitutionally sufficient review process to a party aggrieved by the rejection of an initiative petition.

Id. (citation omitted).

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[9] The Portage County Board of Elections did not join this appeal.

On April 17, 2019, Appellant sought a stay in this Court. This Court denied that motion and ordered expedited briefing.

SUMMARY OF THE ARGUMENT

1. As is true with all ballot access laws, the First Amendment applies to a State's initiative process. *See City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186 (1999); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296-97 (6th Cir. 1993).

2. The First Amendment loathes prior restraints, whether they are employed to regulate adult businesses, restrict parades, zone news racks, or restrict elections. *Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001). Ohio's gatkekeeper law found in O.R.C. § 3501.11(K) is a prior restraint. It vests executive discretion in local elections officials to determine which initiatives proposed by private citizens address proper subject matters. Ohio law provides little guidance beyond providing local elections officials with difficult legal distinctions that the Justices of the Ohio Supreme Court find confusing.

3. The Supreme Court has long warned of the dangers presented by prior restraints. In order to guard against these dangers, in *Freedman v. Maryland*, 380 U.S. 51, 58 (1965), it ruled that in those rare instances where government may insert executive license between speech and the public marketplace of ideas, government must include and abide by "procedural safeguards." These procedural safeguards, as explained by this Court in *Déjà vu of Nashville*, 274 F.3d at 400, require

that the executive's decision must be made within a specified, brief period of time, and the status quo must be maintained pending prompt, de novo judicial review that is initiated by the executive seeking to restrain speech.

Ohio's gatekeeper law fails all of these procedural safeguards. In particular, judicial review is restricted to mandamus, which by definition presumes the executive's decision is correct and places the burden on the speaker to show that it is either clearly erroneous or an abuse of discretion.

4. Because it is content-based, Ohio's gatekeeper law is subject to strict First Amendment scrutiny. *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998). It cannot pass. Most States eschew Ohio's executive-license approach in favor of one that delays substantive challenges to initiatives until after elections. Ohio can easily do the same. Hence, there is absolutely no reason that Ohio must vest executive discretion in its elections officials. Ohio's gatekeeper law is not necessary to achieve any governmental interest, let alone a compelling one.

ARGUMENT

Appellant devotes a significant portion of its Brief to debunking a legal argument that Schmitt did not present below, that was not relied upon by the District Court, and frankly has little to do with the merits of this case. Ignoring the fact that the First Amendment is at the center of this case, Appellant claims that Schmitt and the District Court improperly relied upon Procedural Due Process. *See*, *e.g.*, Brief for Appellant, Doc. 25, at PAGEID # 34.

In making its argument, Appellant asserts that Judge Sargus somehow and for some reason became

dissatisfied with his First Amendment ruling, "dropped that rationale," *id.* at PAGEID # 15, and then replaced it with one premised solely (and unjustifiably) on Procedural Due Process. Schmitt (who never made such an argument in the District Court) somewhere along the way came to agree with Judge Sargus's change of heart, then later came to regret that decision, "abandoned" it, and "retreated" back to the First Amendment. *Id.* at PAGEID # 15. Schmitt is even likely, Appellant claims, to do it all again. "So a fourth rationale may well be coming in the plaintiffs' merits-stage briefing." *Id.*

Appellant's surmise is, to put it gently, incorrect. It finds no support in the Record. Contrary to Appellant's claim, Schmitt has never altered his legal theory, a fact that is corroborated by the Record below. The District Court never "dropped" its First Amendment conclusion in favor or Procedural Due Process, another fact that is corroborated by the Record. The District Court's opinions and orders make clear that it found Ohio's gatekeeper mechanism unconstitutional under the First Amendment. It explained that in order for Ohio to satisfy the First Amendment, it needed to implement the required procedural safeguards. It went out of its way to make clear to Appellant, the only confused party to these proceeding, that it had permanently enjoined Ohio's gatekeeper law under the First Amendment. Justices on Ohio's Supreme Court understand Judge Sargus's rationale, *see State ex rel. Maxcy v. Saferin*, __ N.E.3d __, 2018 WL 4846266 (Ohio 2018) (Fischer, J., dissenting); discussed at page 14 & footnote 6, *supra*, as apparently does the Portage County Board of Elections (which chose not to appeal).

As Appellant well knows, this case is, and always has been, about the First Amendment. It is about a

citizen's right to freely participate in the political process through state-authorized popular initiatives and referenda. The Supreme Court has noted that popular measures form a "basic instrument of democratic government." *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003) (citation omitted). First Amendment principles, it has found, "dovetail[] with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government." *Id.*[10]

For the present matter, as further explained below, the First Amendment requires that executive license – that is, a prior restraint – be checked by procedural safeguards. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965). Here, Ohio has failed to satisfy this fundamental requirement. Because it has not employed the proper procedural safeguards to limit the discretion it has vested in its elections officials, Ohio has – as found by the District Court – violated the First and Fourteenth Amendments.[11]

Because this appeal raises only pure questions of law, the standard of review is de novo. *See Rebel Motor Freight v. Interstate Commerce Commission*, 971 F.2d 1288, 1290 (6th Cir. 1992).

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[10] Even if Appellant's description of events below were correct – and it plainly is not – this Court has made clear that "[t]he prevailing party below . . . may defend a judgment on any ground, including grounds rejected by the district court or not even relied upon." *Waste Management of Ohio v. City of Dayton*, 169 Fed. Appx. 976, *12 (6th Cir. 2006). Schmitt argued this case under the First and Fourteenth Amendments.

[11] The Fourteenth Amendment Due Process Clause, of course, incorporates the First Amendment's speech protections. *See Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

I. The First Amendment Protects Initiatives and Applies to the Initiative Process.

Appellant makes the remarkable claim that "[t]he First Amendment does not govern ballot-access procedures." Brief for Appellant, Doc. 25, at PAGEID # 43. Appellant is wrong. It is clear that the First Amendment applies to ballot access procedures in general, and the initiative process in particular. *See City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186 (1999).

In *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296-97 (6th Cir. 1993), this Court made that clear; although "the right to initiate legislation is a wholly state-created right," the First Amendment still restricts states to placing "nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation." *See also Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F. 3d 443, 446 (6th Cir. 2018).

Appellant makes much of the fact that there is no First Amendment right to utilize an initiative. *See* Brief for Defendant, Doc. 25, at PAGEID # 44. States may allow them, but need not. And because there is no right to initiative, the argument goes, the First Amendment is not implicated at all. The argument fails for a number of reasons, most importantly because it flies in the face of a wealth of precedent to the contrary. In addition, it fails for the even more basic reason that if accepted it would unravel First Amendment protections across the board. Government, after all, is not required by the First Amendment to elect most of

its government officials. It is not required to have sidewalks or parks. It is not required to allow phone service or cable television. But when it does, the First Amendment applies to each and every one of them.

Appellant relies upon *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). The Court in *Carrigan* held (as it has on many occasions, *see*, *e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006)) that when a government official acts as a governmental official he acts as government. His speech is not his own. It is not protected by the First Amendment. "[A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal." 564 U.S. at 125-26.

Appellant would have this Court believe that *Carrigan* means much more; according to Appellant, it insulates anything and everything related to the legislative process from the First Amendment. Appellant's argument is breathtaking in its scope. If true, then political parties have no First Amendment rights. Nor do candidates. Nor do people running independent advertisements supporting candidates. All, after all, seek to enact or influence legislation.

Carrigan, of course, says no such thing. According to *Carrigan*, government officials have no First Amendment protection when they are legislating. This leaves candidates, *see*, *e.g.*, *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018) (holding that presidential candidate is protected by the First Amendment), political parties, *see*, *e.g.*, *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 396 (6th Cir. 2016) (holding that Republican Party was not engaged in state action), voters at polling places, *see*, *e.g.*, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (holding that voters have First Amendment right to wear political apparel at polling

place), candidates, *see*, *e.g.*, *Ohio Council 8 American Federation of State*, *County and Municipal Employees v. Husted*, 814 F.3d 329 (6th Cir. 2016) (applying First Amendment to judicial candidates' identifiers on ballots), and common, everyday citizens who are petitioning government, *see Buckeye Community Hope Foundation*, 538 U.S. 188, with their full panoply of First Amendment protections.

II. Ohio's Delegation of Discretion to Elections Boards Fails First Amendment Scrutiny Because it Constitutes An Impermissible Prior Restraint.

Ohio's gatekeeper mechanism restricts speech based on its subject matter and content. As such, it is a prior restraint. A "'prior restraint' exists when the exercise of a First Amendment right depends on the prior approval of public officials." *Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001). "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Id.* (quoting *Freedman*, 380 U.S. at 57) (emphasis added).

As explained in more detail below, *see* page 30, *infra*, the Supreme Court has long warned of the dangers presented by prior restraints. In order to guard against these dangers, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965), ruled that in those rare instances where government may insert executive license between speech and the public marketplace of ideas, government must include and abide by "procedural safeguards." This Court in *Déjà vu of Nashville*, 274 F.3d at 400, explained:

> First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the

> merits. Second, the licensing scheme "must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor.

(Citations omitted).

These procedural safeguards were, according to the Court in *Freedman*, 380 U.S. at 58, embedded in the First Amendment by Procedural Due Process:

> we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser v. Randall*, 357 U.S. 513, 526, "Where the transcendent value of speech is involved, due process certainly requires * * * that the State bear the burden of persuasion . . . .

(Emphasis added).

The Court in *Board of Regents v. Roth*, 408 U.S. 564, 575 n.14 (1972), explained that this marriage of First Amendment principles with Due Process procedures is not uncommon, especially in the context of prior restraints:

> When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected

> under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1969). Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Bantum Books v. Sullivan*, 372 U.S. 58 (1961). *See Freedman v. Maryland*, 380 U.S. 51 (1965).

(Emphasis added). *See also Federal Communications Commission v. Fox Television Stations*, 567 U.S. 239, 253 (2012) ("When speech is involved, rigorous adherence to those [Due Process] requirements is necessary . . . .").

Here, Ohio's gatekeeper law violates these First Amendment principles because it fails to incorporate the required procedural safeguards. Schmitt does not challenge Ohio's authority to vertically separate powers between local and State officials. He does not question Ohio's power to define what may be put to voters through initiatives. Schmitt's claim is that Ohio's gatekeeper law fails because it violates the procedural protections required by the doctrine against prior restraints. Specifically, Ohio's gatekeeper approach to initiatives impermissibly (1) vests discretion in executive agents to restrain speech, (2) fails to authorize de novo review by Ohio's courts, (3) fails to maintain the status quo during the pendency of judicial review, and (4) fails to place the burden of seeking "prompt" judicial review on the gatekeeper.

A. Ohio's Gatekeeper Law Vests Discretion Over Subject Matter and Content in Local Elections Officials.

Laws that grant discretion to executive agents without concrete guidance – like Ohio's gatekeeper law here – represent the quintessential examples of unconstitutional prior restraints. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), for instance, the Supreme Court struck down a Birmingham demonstration permit requirement because it "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways." *Id.* at 150 (footnote omitted). The Court stated:

> This ordinance as it was written fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

Id. at 150-51 (footnote omitted) (emphasis added).

In *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1990), the Court reiterated this principle: "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" (Citations omitted). "To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* (quoting *Shuttlesworth).* And in *City of Lakewood v. Plain*

Dealer, 486 U.S. 750, 757 (1988), the Court invalidated as an impermissible prior restraint a city's permitting scheme for news racks placed on public property: "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." (Citations omitted).

When a restraint on speech is based on subject matter or content, of course, "the law must survive strict scrutiny." *Déjà vu of Nashville*, 274 F.3d at 391; *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Additionally, "[s]ystems of prior restraint will be upheld only if they provide for prompt judicial review of all decisions denying the right to speak, while also passing the appropriate level of scrutiny." *Déjà vu of Nashville*, 274 F.3d at 391 (emphasis added) (citing *Freedman v. Maryland*, 380 U.S. at 58-59).

Where a licensing scheme is neutral and otherwise follows objective criteria, it can pass First Amendment scrutiny. The Sixth Circuit In *Ohio Ballot Board*, 885 F.3d at 448, which sustained Ohio's limit on the number of subjects (one) placed in an initiative, explained:

> Ohio's single-subject rule does not prohibit certain types of constitutional amendments based on the topics or ideas contained in those amendments. . . . [W]hether Plaintiffs violate Ohio's single-subject rule depends not on what they say, but simply on where they say it—in one initiative petition or in two.

Executive licensing that follows concrete, content-neutral requirements therefore does not run afoul of the First Amendment. *See Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002).

Ohio's delegation of authority under its statutory gatekeeper mechanism, however, is not content-neutral. Nor does it employ concrete criteria. It relies on discretion. It relies on subject matter. It relies on content. Worse yet, it relies on legal judgment. As the Ohio Supreme Court explained, it requires that executive officials render difficult legal conclusions over "which actions are administrative and which are legal." Opinion and Order, R.22, at PAGEID # 162 (quoting *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015)).

Far from setting clear, concrete, explicit limits, Ohio asks its elections officials to draw complicated legal conclusions. Complex legal conclusions are the antitheses of clear, concrete and neutral guidelines. The Supreme Court's recent decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), makes this clear – even in the context of subsequent punishment imposed on speech in a non-public forum.[12] There, Minnesota forbad any person from wearing a "political badge, political button, or other political insignia . . . at or about the polling place." *Id.* at 1883. "Minnesota election judges—temporary government employees working the polls on Election Day—have the authority," the Supreme Court explained, "to decide whether a particular item falls within the ban." *Id.* While the election judges could not restrain the offensive attire, they were empowered to initiate punitive proceedings after-the-fact.

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[12] Because prior restraints are particularly noxious, they are invalid even when subsequent punishment is permitted. *See Kunz v. New York*, 340 U.S. 290, 295 (1951). Consequently, because subsequent punishment using the standard in *Mansky* was impermissible, a prior restraint under this same kind of standard would necessarily be unconstitutional.

The Supreme Court ruled that because Minnesota failed to "articulate some sensible basis for distinguishing what may come in from what must stay out." *id.* at 1888, its law facially violated the First Amendment. The Court explained:

> the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test [applied to speech in non-public fora].

Id. Of particular note, the Supreme Court pointed to the legal nature of the distinctions Minnesota asked its election judges to draw; they "pose[d] riddles that even the State's top lawyers struggle to solve." *Id.* at 1891. This kind of content-based power could not pass even the reduced level of scrutiny applied to a non-public forum.

Ohio's gatekeeper mechanism fails First Amendment scrutiny for this same reason. What is administrative and what is legal present questions that even Ohio's Supreme Court Justices find difficult to assess. Like Minnesota election officials, Ohio's elections officials are required to answer legal "riddles that even the State's top lawyers struggle to solve." Ohio's distinction is even more objectionable than Minnesota's because Ohio's distinction is administered through a prior restraint (which was not the case in Minnesota).[13] In either situation, whether by prior restraint (as

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[13] Even if Ohio's initiative is analogized to a non-public forum, like the polling place in *Mansky*, it is still subject to *Freedman's* requirement of procedural safeguards for prior restraints. *See Miller v. City of Cincinnati*, 622 F.3d 524, 528 (6th Cir. 2010), discussed *infra.*

in Ohio) or through subsequent punishment (as in Minnesota), resolving difficult legal riddles requires inquiries into content. And in the absence of concrete, content-neutral criteria, delegating this power to executive officials violates the First Amendment.

This conclusion is reinforced by *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), which invalidated a content-based sign ordinance under the First Amendment. The Court there succinctly explained the difference between content-based and content-neutral restrictions on speech:

> Government regulation of speech is content based if a law applies to particular speech <u>because of the topic</u> discussed or the idea or message expressed . . . . . Some facial distinctions based on a message are obvious, defining regulated speech by particular <u>subject matter</u>, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

(Emphasis added).

Here, Ohio delegates discretion to local boards of elections to decide what subject matter and content is proper. An initiative serving "administrative" goals or "exceeding the scope" of local governmental power, as determined by the elections officials, is improper. "Legislative" matters, in contrast, are allowed. What is administrative, what is legislative, and what exceeds constitutional power, unfortunately, present "difficult" questions – even for Justices of the Ohio Supreme Court. *See*, *e.g.*, *State ex rel. Flak v. Betras*, 152 Ohio St.3d 244, 247, 95 N.E.3d 329, 332 (2016) (stating that "it is sometimes difficult to distinguish").

Ohio's approach, like that in *Reed* and *Mansky*, is plainly content-based.

B. Ohio Courts Do Not Review Executive Gatekeeping Decisions De Novo.

The Supreme Court has made clear that First Amendment matters – including fact as well as law – generally demand de novo review. *See Bose v. Consumers Union, Inc.*, 466 U.S. 485, 508 n.27 (1984) ("The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's de novo review."). This holds particularly true for prior restraints and the procedures mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965).[14] *Universal Film Exchange, Inc. v. City of Chicago*, 288 F. Supp. 286, 293 (N.D. Ill. 1968) ("Since *Freedman v. State of Maryland*, it has been clear that only a de novo judicial determination that a motion picture is unprotected by the First Amendment can justify a valid final restraint of a motion picture in advance of exhibition.").

Ohio's Supreme Court has repeatedly stated that local elections officials' decisions to exclude initiatives from ballots based on improper subject matter can only be reviewed by writ of mandamus. This writ, meanwhile, offers only limited relief. It can only be

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[14] Professor Monaghan, whose work played a profound part in fashioning the Supreme Court's views on this topic, so stated five years after *Freedman*. *See* Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 526 (1970) *("Freedman* requires only that the court make a separate, independent judgment on the administrative record."). *See also* Note, Allan Tanambaum, *"New and Improved": Procedural Safeguards for Distinguishing Commercial From Non-Commercial Speech*, 88 COLUM. L. REV. 1821, 1825 n.3 (1988) *("Freedman* seems to insist on de novo judicial review.").

granted to correct clear error or an abuse of discretion. Mandamus review is not de novo.

For example, in *State ex rel. Sensible Norwood v. Hamilton County Board of Elections*, 148 Ohio St.3d 176, 69 N.E.3d 696 (2016), which involved an initiative that sought to include a marijuana decriminalization ordinance on a local ballot, the Court sustained the local election board's decision to remove the initiative because the initiative's sponsors could not, as required for a writ of mandamus, prove that the board was clearly wrong:

> To be eligible for a writ of mandamus, relators must "establish a clear legal right to the requested relief, a clear legal duty on the part of the board and its members to provide it, and the lack of an adequate remedy in the ordinary course of the law." Relators have failed to establish a clear legal right to their requested relief and a clear legal duty on the part of the board to provide it. As we have previously acknowledged, "[e]lection officials serve as gatekeepers, to ensure that only those measures that actually constitute initiatives or referenda are placed on the ballot.

Id. at 180, 69 N.E.3d at 700-01.

This Court has previously concluded that review by discretionary writ, such as mandamus, is insufficient to satisfy First Amendment scrutiny under the doctrine against prior restraints. In *Déjà vu of Nashville*, 274 F.3d at 400-01, which addressed the validity of licensing law for adult-businesses, the Court concluded that Tennessee's common-law review process did not satisfy *Freedman's* requirements: "Whether the common law writ of certiorari will issue is a matter

of discretion. It is not issued as a matter of right." (Citation omitted).

Similarly, the Supreme Court in *City of Lakewood v. Plain Dealer*, 486 U.S. at 771, ruled that Ohio's procedure authorizing writs of mandamus to review executive licensing decisions was not sufficient to save an ordinance challenged as an impermissible prior restraint: "that review comes only after the mayor and the City Council have denied the permit. . . . Even if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decision-maker's discretion." Ohio's gatekeeper/ mandamus mechanism fails for this same reason.

Appellant belatedly claims that Ohio law "suggests" sponsors of initiatives might be able to seek immediate review through "injunctive-relief actions" in Ohio's Courts of Common Pleas. *See* Brief for Appellant, Doc. 25, at PAGEID # 13-14. This argument, which was not presented to the District Court and is therefore waived, *see Scottsdale Ins. Co. v. Flowers*, 514 F.3d 546, 552 (6th Cir. 2008), finds absolutely no support in Ohio law. The two cases relied upon by Appellant, *Myers v. Schiering*, 271 N.E.2d 864, 866 (Ohio 1971), and *City of Cincinnati v. Hillenbrand*, 133 N.E. 556 (Ohio 1921), involved actions in Courts of Common Pleas by those challenging a referendum and initiative, respectively, and seeking to enjoin their placements on election ballots. No case in Ohio suggests that the sponsors of popular measures may seek judicial review in Ohio's Courts of Common Pleas in order to restore their initiatives to local election ballots. No case in Ohio suggests that sponsor of initiatives may appeal as of right executive gatekeeper decisions under O.R.C. § 3501.11(K).

Indeed, Appellant effectively admits that no such action exists. "For centuries, litigants have invoked the writ of mandamus to vindicate important interests." Brief for Appellant, Doc. 25, at PAGEID # 39. This writ, Appellant states, is "the sole vehicle to challenge" the "discretionary" decisions of executives that are "by statute, not subject to direct appeal." *Id.* (emphasis added and citation omitted). As Appellant concedes, Ohio law provides no statutory basis for appellate review (in the Courts of Common Pleas or anywhere else) of local elections officials decisions to remove initiatives. Indeed, Appellant complains that the District Court's judgment is improper because it "demands that Ohio courts accept such appeals even without statutory authority to do so." *Id.* at PAGEID # 22.

A federal court's "task is to rule on what the law is, not what it might eventually be." *Garcia v. Texas*, 564 U.S. 940, 941 (2011). Ohio may eventually develop a mechanism whereby executive censors of initiatives are required to promptly seek de novo review. But that is now only conjecture. If Appellant's argument were even plausible, one would think that Ohio's Supreme Court would have mentioned it in one of its many mandamus opinions addressing just this kind of case. The Ohio Supreme Court would be happy to relieve itself of that burden. But it has never "suggested" that its mandamus review, which assumes "the lack of an adequate remedy in the ordinary course of the law," *Sensible Norwood*, 148 Ohio St.3d at 180, 69 N.E.3d at 700-01, supplements an existing "injunction-relief action" in the Courts of Common Pleas. If such an action existed, after all, mandamus would not be needed nor even proper. The reality is that no such procedure exists under Ohio law. And even if it did, as

hypothetically configured by Appellant, it still would not satisfy *Freedman*.[15]

C. Ohio's Gatekeeper Law Does Not Maintain the Status Quo While Judicial Review is Being Sought.

Even if Ohio law were to authorize an original action in the Court of Common Pleas, it would still fail *Freedman's* requirements. Ohio law nowhere states that the status quo will be maintained "pending a final judicial determination on the merits." *Déjà vu of Nashville*, 274 F.3d at 400. Instead, Ohio's framework for mandamus review – and even that supporting a hypothetical original action in the Court of Common Pleas (assuming this were possible) – allows the censor to change the status quo. This change to the status quo is accepted unless the speaker can succeed through judicial review. Here, for example, both of Schmitt's initiatives had already been certified for the ballot. The status quo had the initiatives being submitted to voters. Nothing in O.R.C. § 3501.11(K) or Ohio law provides that certification remains in place after an elections official decides to remove a previously certified initiative. Certification, which reflects the status quo, is not maintained while judicial review is being sought. This change in the status quo violates *Freedman*.

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[15] As explained below, the procedural safeguards needed to guard against unconstitutional prior restraints include not only prompt de novo review, but also demand that the status quo be preserved while the censor seeks immediate judicial review. Appellant's hypothetical action in Ohio's Courts of Common Pleas does not satisfy *Freedman's* promptness requirement, its command that the status quo be maintained, nor its requirement that the burden of seeking review be borne by the censor.

D. Ohio's Gatekeeper Mechanism Does Not Place the Burden on Local Elections Officials to Seek Judicial Review.

Even if Appellant's hypothetical procedure provided de novo review on an expedited basis and maintained the status quo in the interim, it would still fail *Freedman*. It does not, as *Freedman* requires, "place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor." *Déjà vu of Nashville*, 274 F.3d at 400.

E. Content-Neutral Time, Place and Manner Restrictions Can Also Constitute Improper Prior Restraints.

Many of the Supreme Court's prior restraint cases involve content-neutral time, place and manner restrictions. In *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 757 (1988), for example, where the city restricted news racks on public property, there was no claim that the city restricted them based on content. Rather, the basic restriction was a content-neutral time, place and manner restriction. Still, the Supreme Court applied its prior restraint jurisprudence to invalidate how the city implemented this neutral restriction: "even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion." *Id.* at 764.[16] *See also*

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[16] *Lakewood* refutes Appellant's claim that because Schmitt may still advocate for or against his ballot proposals there can be no First Amendment violation. That newspapers remained free to distribute their news in other fashions in that case not defeat the fact that vesting discretion in an executive official over

Ohio Citizen Action v. City of Englewood, 671 F.3d 564, 567 (6th Cir. 2012) (district court invalidated prohibition on door-to-door canvassing and solicitation after 6 PM that gave city manager authority to grant permit for good cause; following city's repeal of measure Sixth Circuit dismissed as moot).

The Supreme Court reiterated this point in *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002), where it ultimately sustained a content-neutral parade permit ordinance that included definite, concrete and objective standards:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.

(Citations omitted). *See also Six Star Holdings v. City of Milwaukee*, 821 F.3d 795, 799 (7th Cir. 2016) ("Prior restraints that are viewpoint- and content-neutral and impose a limitation only on the time, place, and manner of speech are more likely to pass muster. They are permissible if, and only if, there are procedural safeguards that ensure that the decisionmaker approving the speech does not have 'unfettered discretion' to grant or deny permission to speak.") (emphasis added).

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whether to allow news racks on public property was an impermissible prior restraint.

F. Ohio's Gatekeeper Law Is An Impermissible Prior Restraint Even if Initiatives Are Treated as a Non-Public Forum.

Restrictions in a non-public forum[17] – whether content-neutral or content-based – are subject to the same procedural protections applied to prior restraints in traditional public settings. For instance, in *Miller v. City of Cincinnati*, 622 F.3d 524, 528 (6th Cir. 2010), the Sixth Circuit invalidated under the First Amendment a city's rule that delegated discretion to "Department Heads" to decide who should be allowed to solicit in city buildings. Although the interior of a public building – like city hall – was "at most, a limited public forum," *id.* at 535, the Sixth Circuit applied established prior restraint doctrine:

> This distinction is irrelevant, however, because in *City of Lakewood* the Court held that an arbitrary prior restraint on protected speech provides standing regardless of the forum. Hence, when a plaintiffs protected-speech activities are subject to restriction at the government's unfettered discretion, the plaintiff has suffered an injury in fact.

Id. at 528.[18]

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[17] Non-public and limited public fora are subject to the same test: restrictions must be reasonable and viewpoint neutral. *See Miller*, 622 F.3d 524at 535-36; *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123, 128 & n.2 (2d Cir. 1998).

[18] *See also Barrett v. Walker County School District*, 872 F.3d 1209, 1226 (11th Cir. 2017) ("the unbridled-discretion doctrine can serve the same purpose in a limited public forum that it serves in a nonpublic forum: combating the risk of unconstitutional viewpoint discrimination. Naturally, then, the unbridled-

III. Ohio's Gatekeeper Mechanism Cannot Pass Strict First Amendment Scrutiny.

Because Ohio's discretionary gatekeeper mechanism restricts speech based on subject matter and content, it is subject to strict scrutiny. This Court in *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998), observed that under the *Anderson/Burdick* framework, "[t]he Supreme Court has identified two factors in determining whether a regulation burdens voting rights severely or only incidentally: content-neutrality and alternate means of access. First, and most importantly, a law severely burdens voting rights if it discriminates based on content instead of neutral factors." (Citation omitted). "[I]f a regulation burdens voting rights severely, the regulation is reviewed under the compelling interest standard. Under this standard, a court will uphold the regulation only if it is "narrowly drawn to advance a state interest of compelling importance." Id. (citation omitted).

No court has held that a content-based system like Ohio's satisfies this level of scrutiny under the First Amendment. In *Wyman v. Secretary of State*, 625 A.2d 307, 309 (Me. 1993), for example, Maine did what Ohio does now; it delegated to its secretary of state the authority to decide whether the subject of an initiative was proper before allowing it on the ballot. The Supreme Judicial Court of Maine ruled this system violated the First Amendment:

> Because the petition process is protected by the first amendment and the Secretary has advanced no compelling interest in executive oversight of the content of the petition prior to its circulation

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discretion doctrine applies in a limited public forum."); *Amandola v. Town of Babylon*, 251 F.3d 339, 344 (2d Cir. 2001).

> for signature, his refusal to furnish the petition form based on the content of the proposed legislation impermissibly violated Wyman's rights protected by the first amendment.

Id. at 312.

To be sure, many (if not most) of the restrictions placed on initiatives across the United States are constitutionally proper. As explained below, *see* page 48, *infra*, signature requirements, single-subject rules, word limitations/requirements, and other content-neutral measures for initiatives have been sustained. But this is because they are not content-based. When executives begin focusing on subject matter, topic and content, the constitutional rules change. And as demonstrated by *Wyman*, passing these stricter constitutional scrutiny is extremely difficult.

Far from offering a compelling justification for Ohio's law, Appellant complains only about inconvenience. Application of the First Amendment to Ohio's gatekeeper law, Appellant complains, "would obligate the State to 'initiate litigation every time it' rejected a proposed ballot-initiative." Brief for Appellant, Doc. 25, at PAGEID # 55. Appellant adds to this a potential parade of horribles; "every single State that permits legislation by initiative is acting in violation of the Constitution." *Id.* at PAGEID # 55-56.

Neither of Appellant's laments is true, let alone compelling. The fact is that Ohio's gatekeeper approach – vesting discretion in executive officials to pick and choose between initiatives based on their subjects before elections – is an outlier in the world of popular democracy. In many States that permit popular measures, initiatives are automatically included on ballots once they are found to satisfy the objective

procedural requirements, like supporting signatures, single topic, required descriptions, *etc.* Challenges proceed only after elections, if and when the initiatives have passed. Ohio need only follow this path; it does not have to litigate again and again before elections.

For example, Nevada, California, and Washington, all prohibit elections officials from deciding whether the content or subject matter of initiatives is proper. *See Las Vegas Taxpayer Accountability Committee v. City Council of City of Las Vegas*, 125 Nev. 165, 174 & n.2, 208 P.3d 429, 435 & n.2 (2009) (holding that Nevada election officials do not have this authority and noting that neither do officials in California and Washington) (citations omitted).

Other states, meanwhile, authorize executive officials (like attorneys general) to render "non-binding advice on the form or substance" of initiatives to their proponents. *See* Scott L. Kafker & David A. Rusccol, *The Eye of the Storm: Pre-election Review By The State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1291 (footnotes omitted). States also allow executive pre-election review for "the form of the amendment," but "defer[] questions of substance" until after elections. *Id.* (footnote omitted). "Most courts will not entertain a challenge to a measure's substantive validity before the election." James D. Gordon, III, *et al.*, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 304 (1989). The end result is that initiatives are routinely included on ballots and then litigated (if need be) only after elections. *Id.*[19]

[19] To be sure, some states "require a more searching review to ensure that the amendment meets subject-matter and other substantive and procedural requirements," Kafker, *supra*, at

To Schmitt's knowledge, only three states, Maine, New York and West Virginia, have delegated content-based executive licensing power like that found in Ohio to elections officials. And in each of these three instances, the laws have been challenged (twice successfully) under the First Amendment.

Maine's law, as explained above, was invalidated in *Wyman*, 625 A.2d at 309. West Virginia's approach, which is much like Ohio's in that it relies on mandamus review to check elections officials' discretion,[20] was recently preliminarily enjoined by the federal District Court for the Northern District of West Virginia as constituting an impermissible prior restraint. *See Hyman v. City of Salem*, No. 19-75 (N.D. W.Va., April 19, 2019) (written opinion forthcoming); Matt Harvey, *Fed. judge: Salem, WV, officials must put marijuana measure on June 4 ballot,* WVNEWS, April 19, 2019.[21] Only New York's law survived challenge, *see Herrington v. Cuevas*, 1997 WL 703392 * 9 (S.D.N.Y. 1997) (Sotomayor, J.), and that was because the matter was dismissed as moot on March 6, 2002 after the election.

1291, but these states often (unlike Ohio) do this "before time, energy, and money are spent on gathering signatures."

[20] Under West Virginia law, an aggrieved person's only recourse when local elections officials remove an otherwise properly prepared and presented initiative from the ballot is (like in Ohio) to seek mandamus. *See State ex rel. Home v. Adams*, 154 W.Va. 269, 175 S.E.2d 193 (1970). Courts in West Virginia are authorized to issue mandamus only when a government official fails to perform a legal duty and clearly violates state law. *See State ex rel. Ray v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993).

[21] *See* https://www.wvnews.com/news/wvnews/fed-judge-salem-wv-officials-must-put-marijuana-measure-on/article_68328a12-9b4b-52b0-aed1-6406cbfc1b97.html (last visited May 16, 2019).

Appellant has failed to cite a single case rejecting a First Amendment challenge to a gatekeeper mechanism like the one found in Ohio. The cases Appellant does cite, are inapposite for at least three reasons; either because (1) they involved content-neutral laws that restricted the number of subjects, initiatives or voters required to place matters on ballots; (2) they addressed whether governments may vertically apportion powers between superior and inferior governmental bodies (they can) as opposed to focusing on executive discretion, or (3) they involved procedures that are significantly different from those found in Ohio.

Jones v. Markiewicz-Qualkinbush, 892 F.3d 935 (7th Cir. 2018), falls squarely into the first category. Like the Sixth Circuit's holding in *Ohio Ballot Board*, 885 F. 3d 443, *Jones* sustained a concrete, content-neutral restriction on the number (three) of initiatives that may be certified to a ballot. *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), which rejected a challenge to a content-neutral supermajority requirement for initiatives is of this same ilk.[22]

Marijuana Policy Project v. United States, 304 F.3d 82 (D.C. Cir. 2002), falls into the second category. It holds that government may vertically apportion powers within its branches. Far from deciding whether an executive gatekeeper mechanism for initiatives constitutes an impermissible prior restraint,[23] the court

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[22] *Aye v. Mahoning County Board of Elections*, 2008 WL 554700 (N.D. Ohio 2008), likewise involved concrete, content-neutral requirements (*e.g.*, education, experience, term limits) that are placed on candidates: "[Ohio law] does not give discretionary authority to the Sheriff . . . and clearly defines the threshold requirements that any candidate for office must satisfy."

[23] The plaintiffs in *Marijuana Policy Project* did not challenge any discretion vested in executive officers to pick and choose

addressed only whether "the First Amendment restrict[s] Congress's ability [under the Barr Amendment] to withdraw the District [of Columbia's] authority to reduce marijuana penalties?" *Id.* at 85. The challengers claimed that regardless of the procedures, Congress was precluded by the First Amendment from restricting the District's power to regulate marijuana.

The D.C. Circuit correctly disagreed: "The Barr Amendment merely requires that, in order to have legal effect, their [i.e., voters'] efforts must be directed to Congress rather than to the D.C. legislative process." *Id.* It simply and unremarkably held that Congress, like the States, may apportion powers vertically between different branches of government. Schmitt does not claim to the contrary. Ohio certainly may limit local governmental power over marijuana. What it cannot do is vest executive discretion in local election officials to decide this matter before elections.

Port of Tacoma v. Save Tacoma Water, 422 P.3d 917 (Wash. App. 2018), falls into the third category. Washington denies to executive officials the authority to decide what is and what is not a proper subject for initiatives. The question in *Save Tacoma Water* was whether a court could, consistent with the First Amendment, conclude before an election that an initiative is improper. *Id.* at 920.[24] There, a pre-election judicial challenge to an initiative was bought by groups who wanted to exclude an initiative from a

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initiative topics; they instead argued that a well-defined subject could not be reserved to the Congress. Because the prohibited subject in *Marijuana Policy Project* was well-defined, it left no discretion at all in ballot officials.

[24] Schmitt does not deny that a court can, in an action instituted by a censor, do exactly that (assuming the *Freedman* safeguards are otherwise met).

ballot. *Id.* This group was properly saddled with the burden of going to court. More importantly, the court there did not defer to a pre-election executive decision; it acted de novo. Given this procedural posture, the court in *Save Tacoma Water* was perfectly justified in addressing whether the initiative at issue fell outside the scope of the state's initiative process.

Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005), also falls into this third category. There, the First Circuit sustained Massachusetts' pre-election review process for initiatives that vested initial review authority in the state attorney general. Massachusetts' process was different from Ohio's in three important ways: (1) the attorney general was not given unbridled discretion; (2) the excluded subjects were specifically identified in a finite list, "including, *inter alia*, appointment or compensation of judges; the powers, creation or abolition of the courts; and specific appropriation of state money," *id.* at 275; and (3) the executive's decision was subject to immediate, de novo judicial review before the election. *See Mazzone v. Attorney General*, 432 Mass. 515, 520, 736 N.E.2d 358, 364 (2000) ("Our review of that certification is de novo.").

After ruling that the law was subject to First Amendment scrutiny, the First Circuit concluded it survived as a content-neutral measure. *Id.* at 276. Regardless of whether this particular aspect of the First Circuit's reasoning remains correct,[25] because immediate de novo review was available under Massachusetts law, *Freedman* (which apparently was

[25] The First Circuit's finding that the law was content-neutral likely does not survive the Supreme Court's more recent rulings in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), and *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

not argued) and the First Amendment would not necessarily have been violated.

IV. Invalidation of Ohio's Gatekeeper Law Is Not Confusing.

Appellant professes confusion over the District Court's decision. "[I]t is not entirely clear what the District Court's injunction does." Brief for Appellant, Doc. 25, at Page 22. "Ohio's county election boards," moreover, "[are] in the dark as to what they are supposed to be doing." *Id.*

The only thing confusing about the District Court's judgment is Appellant's confusion. Ohio's Supreme Court understands the judgment, *see State ex rel. Maxcy v. Saferin*, as do Ohio's legal encyclopedias. *See* 56 OHIO JUR.3d, *Initiative and Referendum* § 12 (2019) *(Schmitt* holds that "availability of mandamus relief was no substitute for de novo review of denial of a First Amendment right"). The District Court made clear that Appellant and Ohio's local officials[26] cannot enforce Ohio's gatekeeper mechanism, the very kind of relief federal courts routinely order.

This particular injunction does not require that Ohio pass legislation creating a new process for judicial review – though it could choose to do so – nor does it demand that Ohio's courts accept "appeals even without the statutory authority to do so." Brief for Appellant, Doc. 25, at PAGEID # 22. It simply means that Ohio must join the mainstream and not allow local elections officials to exercise discretion under O.R.C. § 3501.11(K). The subjects of initiatives cannot,

[26] Because the Portage County Board of Elections, which apparently does not share Appellant's confusion, did not appeal, it has apparently decided to remain bound by the District Court's judgment regardless of the outcome of this Appeal.

before elections, unilaterally be deemed unlawful by executive agents. Elections officials cannot, prior to elections, be allowed discretion to render determinative legal opinions on "riddles that even the State's top lawyers struggle to solve." *Mansky*, 138 S. Ct. at 1891.

Instead, as is true in most states, initiatives that have met the procedural requirements spelled out by law will are to be placed on ballots. If elections officials (or anyone else) have substantive challenges, they can be made in appropriate courts after elections in due course.

V. Section 1983 Plaintiffs Can Not Be Compelled to Use the Procedures They Challenge Under the First Amendment.

Appellant argues that because Schmitt did not avail himself of Ohio's mandamus mechanism to challenge the Portage County Board of Elections' decision, he is somehow precluded from seeking relief under the First and Fourteenth Amendments. Brief for Appellant, Doc. 25, at PAGEID # 40. Appellant is wrong. Claims brought under 42 U.S.C. § 1983 for First and Fourteenth Amendment violations need not be exhausted. *See Patsy v. Board of Regents*, 457 U.S. 496 (1982).

A plaintiff who challenges a prior restraint, in particular, need not first resort to the very process that she challenges. The Supreme Court in *Shuttlesworth*, 394 U.S. at 151, made this clear: "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."

CONCLUSION

The District Court's judgment should be **AFFIRMED.**

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Appellees certify that they have prepared this document in 14-point Times New Roman font and that excluding the Cover, Corporate Disclosure Statement, Tables, Statement in Support of Oral Argument, Signature Block, Certificates and Addendum, the document contains 12,996 words.

s/ Mark R. Brown
Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Brief was filed on May 22, 2019 using the Court's electronic filing system and will thereby be served on all parties to this proceeding.

s/ Mark R. Brown
Mark R. Brown

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Verified Complaint, R.1, PAGEID # 1, 6-8, 16

Verified Complaint, Exhibit 1, R.1-1

Verified Complaint, Exhibit 2, R.1-2

Verified Complaint, Exhibit 3, R.1-3

Verified Complaint, Exhibit 4, R.1-4

Verified Complaint, Exhibit 5, R.1-5

Verified Complaint, Exhibit 6, R.1-6

Verified Complaint, Exhibit 7, R.1-7

Opinion and Order, R. 22, PAGEID # 164, 168, 169

Opinion and Order, R. 37, PAGEID # 292-93

Defendants' Motion for Reconsideration, R. 39,

Notice of Appeal, R. 41

Defendants' Motion for Stay, R. 42

Order, R. 46, PAGEID # 358-59

Order, R. 50, PAGEID # 369, 371

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: 10/22/19]

Case No. 2:18-cv-966

SCHMITT, et al.,

Plaintiffs,

v.

LAROSE, et al.,

Defendants.

Judge Edmund Sargus, Jr.

Magistrate Judge Elizabeth Deavers

PLAINTIFFS' RENEWED MOTION FOR ATTORNEYS' FEES AND COSTS UNDER 42 U.S.C. § 1988(b) AGAINST DEFENDANT-LAROSE

Pursuant to Federal Rule of Civil Procedure 54 and Local Rule 54.2, Plaintiffs file this renewed Motion for costs and attorney's fees under 42 U.S.C. § 1988(b) against Defendant-LaRose based on Plaintiffs' success in winning preliminary relief restoring their initiatives to the Windham and Garrettsville ballots and having those initiatives voted on at that November 2018 general election. *See* Order (September 19, 2018), Doc. No. 22; Order (October 3, 2018), Doc. No. 26; Order (October 4, 2018), Doc. No. 28. This Motion

replaces Plaintiffs' March 15, 2019 Motion for Fees from Defendant-LaRose, *see* Doc. No. 45,[1] and otherwise renews Plaintiffs' Motion for attorney's fees against Defendant-LaRose is only for the time and expense invested in successfully winning preliminary relief against Defendant-LaRose and (except for the time devoted to preparing this Motion, described below) does not include their time and effort invested after November 2, 2018, when the time for appealing this Court's preliminary injunction expired and their efforts shifted to winning permanent relief.

Plaintiffs' costs are for the filing fee of $400.00, paid on August 28, 2018. *See* Doc. Entry No. 1 (receipt # 0648-6577999). Their attorney's fees for their two lawyers, Mark Brown and Mark Kafantaris, who expended 47.3 hours and 10.2 hours, respectively, on Plaintiffs' successful claims to temporary and preliminary permanent relief between August 21, 2018 and November 2, 2018. *See* Declaration of Mark Brown, Doc. No. 45-1; Declaration of Mark Kafantaris, Doc. No. 45-2. Multiplied by Brown's reasonable hourly rate ($400), and Kafantaris's reasonable hourly rate ($350), Brown's and Kafantaris's fees come to $18,920.00 and

[1] Plaintiffs also sought fees and costs from Defendant-Portage County Board of Elections on March 15, 2019. *See* Doc. No. 45. Rather than re-brief the issue, Defendant-Portage County Board of Elections responded to Plaintiffs' motion for attorney's fees on September 30, 2019. *See* Doc. No. 66. Plaintiffs replied on October 3, 2019. *See* Doc. No. 67. Briefing on that aspect of Plaintiff's motion for attorney's fees is therefore complete, and Plaintiffs' respectfully incorporate by reference those documents into this Motion. Defendant-LaRose, meanwhile, has requested that Plaintiffs re-brief their Motion for fees from him. Plaintiffs accordingly with this Motion replace their prior March 15, 2019 Motion for attorney's fees, Doc. No. 45, with this renewed Motion for attorney's fees based on their success relative to Defendant-LaRose.

$3570.00, respectively. Brown also expended 8.8 hours researching and preparing this renewed Motion for Attorney's Fees. *See* Declaration of Mark Brown, Exhibit 1 (attached). Multiplied by his reasonable hourly rate ($400.00), this comes to $3520.00.

Plaintiffs' total costs, including attorney's fees, due from Defendant-LaRose for Plaintiffs' preliminary success is intended to replace the sum previously sought by Plaintiffs on March 15, 2019, *see* Doc. No. 45, and now totals as follows:

Costs (filing fee):	$400.00.
Attorney's fees (Brown) for preliminary relief:	$18,920.00.
Attorney's fees (Kafantaris) for preliminary relief:	$3570.00.
Attorney's fees (Brown) for preparing Motion:	$3520.00
TOTAL:	$26,410.00

Plaintiffs reserve the right to amend this Motion to include any reasonable additional time incurred in this matter in this Court, in the United States Court of Appeals for the Sixth Circuit, and in the Supreme Court of the United States. [2] In support of this Motion, Plaintiffs incorporate by reference the Declarations previously filed with this Court on March 15, 2019, *see*

[2] Review in the Supreme Court is being sought by Plaintiffs. Northwestern University's Supreme Court Litigation Practicum, with the assistance of Sidley & Austin, has taken the case and will timely petition the Supreme Court for review on Plaintiffs' behalf. To the extent this petition proves successful, Plaintiffs reserve the right to amend their Motion to include time and effort devoted to that success in both the Court of Appeals and Supreme Court as well as this Court.

Docs. No. 45-1 and 45-2, their previously filed Motion for attorney's fees against Defendant-Portage County Board of Elections, *see* Doc. No. 45, their previously filed Reply, Doc. No. 67, to Defendant-Portage County Board of Elections' Response, Doc. No. 66, to that Motion for Attorney's Fees, the attached Declaration of Mark Brown, and the following Memorandum of Law.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be **GRANTED**.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR COSTS AND ATTORNEY'S FEES

INTRODUCTION

Plaintiffs filed their initial Motion for costs and attorney's fees under 42 U.S.C. § 1988(b) against both Defendants on March 15, 2019. *See* Doc. No. 45. In that Motion, Plaintiffs sought fees not only for their preliminary successes, but also their permanent success in having Ohio's gatekeeper mechanism permanently enjoined under the First and Fourteenth Amendments to the United States Constitution. Final judgment had been entered in Plaintiffs' favor, *see* Opinion and Order, Doc. No. 37; Entry of Judgment, Doc. No. 38, making Plaintiffs prevailing parties on all their claims, both preliminary and permanent.

Neither Defendant appealed the Court's award of preliminary relief to Plaintiffs. Following final judgment, Defendant-LaRose alone appealed this Court's permanent injunction prohibiting enforcement of Ohio's gatekeeper law to the Court of Appeals.

Because of the pending appeal, this Court on April 1, 2019 delayed briefing on Plaintiffs' Motion for Attorney Fees following. *See* Order, Doc. No. 49. The Court directed Plaintiffs to renew their Motion for attorney's fees within 45 days following the issuance of mandate from the United States Court of Appeals on Defendant-LaRose's appeal. *See* Order, Doc. No. 49.

The Sixth Circuit on August 7, 2019 reversed and vacated this Court's permanent injunction. *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019). Importantly, the only issue in that appeal was the propriety of Plaintiffs' facial challenge to Ohio's gatekeeper law and the permanent injunction it had won. The validity of this

Court's preliminary orders restoring Plaintiffs' initiatives as-applied to the Villages of Windham and Garrettsville ballots was not at issue on appeal. The Sixth Circuit explained:

> We note that Plaintiffs' as-applied challenge is moot. Under Article III, we "may adjudicate only actual, ongoing cases or controversies." The district court enjoined the Secretary of State to place the Plaintiffs' initiatives on the Portage County ballots, and the election was conducted in November 2018. The State made clear at oral argument that it does not seek to relitigate the district court's decision on the as-applied challenge. Accordingly, we will not consider it here, ...

Id. at 636 n.2 (emphasis added and citation omitted).

Not only did Defendant-LaRose admit to the Sixth Circuit that it was not challenging the validity of this Court's preliminary order restoring Plaintiffs' initiatives to the ballot, it also conceded to the Sixth Circuit that this Court's order restoring Plaintiffs' two initiatives to the ballot was correct. During Appellant's oral argument, the Court inquired whether "it matter[s] that you have the exact same petitions submitted to different municipalities and they decide it in different ways?" United States Court of Appeals for the Sixth Circuit: Audio Files of Completed Arguments, *Schmitt v. LaRose*, No. 19-3196, June 26, 2019, at 12:59.[3] General Flowers, counsel for Defendant-LaRose, responded: "It doesn't . . . we have mandamus to correct boards of

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[3] http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/06-26-2019%20-%20Wednesday/19-3196%20William%20Schmitt%20v%20Frank%20LaRose%20et%20al.mp3&name=19-3196%20William%20Schmitt%20v%20Frank%20LaRose%20et%20al (last visited September 30, 2019).

elections that err. And frankly, if they had sought a writ of mandamus, they would have got it. This was a legislative ballot initiative, in all likelihood, it should have been placed on the ballot." *Id*. at 13:10 (emphasis added).

Further, during rebuttal at oral argument, the Sixth Circuit asked whether Defendant-LaRose challenged this Court's order directing that the initiatives be placed on the ballot: "But the one that passed,[4] doesn't our decision affect what happens to it?" *Id*. at 37:24. General Flowers responded, "No." The Court inquired farther: "The question then is whether its validly on the ballot, and . . . if we vacate the injunction what happens to the initiative that passed?" *Id*. at 37:43. General Flowers answered: "Someone could challenge it and say it was not properly on the ballot, but that would fail because it was a legislative action. I don't see any basis for ruling it wasn't." *Id*. (emphasis added). Defendant-LaRose thus made clear that the two initiatives this Court restored to the ballot were improperly removed from the ballot by Defendant-Portage County Board of Elections. The two initiatives were properly legislative matters as opposed to improper administrative matters. This Court's preliminary orders restoring them to the ballot were both correct and left unchallenged on appeal.

On September 13, 2019, the Sixth Circuit released its mandate. *See Schmitt v. LaRose*, No. 19-3196, (6th Cir., Sept. 13, 2019), Doc. No. 43. Operating under the Court's April 1, 2019 Order, Plaintiffs now renew their

[4] Windham's initiative, one of the two that had been restored by this Court's order to the ballot, had passed by a vote of 237 to 206 and became law.

Motion for attorney's fees in this Court.[5] As explained below, notwithstanding Defendant-LaRose's successful appeal of the facial challenge and permanent relief, Plaintiffs remain entitled to costs and attorneys' fees for their preliminary success on their as-applied challenge, which was not appealed.

ARGUMENT

I. Plaintiffs Are Prevailing Parties.

Plaintiffs are and remain prevailing parties in the above-styled action and therefore remain entitled to attorney's fees under 42 U.S.C. § 1988(b) based on their having won preliminary relief in this Court. That preliminary relief directed that Plaintiffs' two initiatives be restored to the ballot. Defendant-LaRose complied with that order, did not appeal, and the initiatives were voted on at the November 2018 general election. Windham's initiative passed and is now the law in that Village.

In *Lefimine v. Wideman*, 568 U.S. 1, 4 (2012), the Supreme Court stated:

> A plaintiff "prevails," we have held, "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that

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[5] Plaintiffs also sought attorney's fees from Defendant-Portage County Board of Elections in their Motion filed on March 15, 2019. *See* Doc. No. 45. Defendant-Portage County Board of Elections chose to respond to Plaintiffs' March 15, 2019 Motion for attorney's fees on September 30, 2019, *see* Doc. No. 66, rather than fully re-brief the matter. Plaintiffs replied on October 3, 2019. *See* Doc. No. 67. Briefing on that aspect of Plaintiff's motion for attorney's fees is therefore complete, and Plaintiffs' respectfully incorporate by reference those documents into this Motion for attorney's fees against Defendant-LaRose.

> directly benefits the plaintiff." And we have repeatedly held that an injunction or declaratory judgment, like a damages award, will usually satisfy that test.

(Citation omitted). In *Lefimine*, 568 U.S. 1, police were enjoined from unlawfully interfering with the plaintiff's peaceful protests. The injunction, the Supreme Court held, made the plaintiff a prevailing party entitled to attorney's fee: "that ruling worked the requisite material alteration in the parties' relationship. Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner." *Id*. at 5. *See also Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598 (2001).

In the present case, the preliminary injunction forcing Defendants to restore Plaintiffs' initiatives to the ballot, like the injunction in *Lefimine*, "worked the requisite material alternation in the parties' relationship" to render Plaintiffs prevailing parties. "Before the ruling," Defendants intended to preclude the initiatives from the ballot. "[A]fter the ruling," they could not do so. The initiatives were placed on the ballot, voted on, one passed, and it is now the law. This "material alteration" makes Plaintiffs prevailing parties.

Defendant-LaRose's successful appeal from Plaintiffs' facial challenge and the resulting permanent injunction entered against Ohio's gatekeeper law does not change this fact. Instead, it only means that Plaintiffs' fee request must be limited to the time and effort Plaintiffs expended in winning preliminary relief based on their as-applied challenge, as opposed to any time devoted to winning permanent relief on their facial challenge. It is for this reason that Plaintiffs

have modified their fee request to seek only compensation from Defendant-LaRose for the time Plaintiffs devoted to winning preliminary relief under their as-applied challenge.[6]

Like the Sixth Circuit before it, this Court made clear in *Libertarian Party of Ohio v. Husted*, 2013 WL 4833033 (S.D. Ohio 2013), that preliminary success may support an award of attorney's fees notwithstanding ultimate reversal by the Sixth Circuit. There, the Libertarian Party won preliminary relief in this Court directing the Secretary of State to restore its candidates to Ohio's 2012 election ballots. The Secretary complied with the Court's order and the Libertarian Party fully participated in the 2012 election. Ohio, meanwhile, had appealed the District Court's order. Because the election had passed and Ohio had then repealed the law being challenged, however, the Court of Appeals vacated the District Court's order and directed it to dismiss the case. *See Libertarian Party of Ohio v. Husted*, 497 Fed. Appx. 581, 583 (6th Cir. 2012).

In doing so, the Sixth Circuit noted the plaintiffs' continuing right to attorney's fees; it accordingly stated: "We express no opinion regarding any entitle-

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[6] As explained above, Plaintiffs also seek fees from Defendant-Portage County Board of Elections based on their successful as-applied challenge as well as their successful facial challenge. Plaintiffs, however, do not seek a double recovery from Defendant-Portage County Board of Elections and Defendant-LaRose on either basis. Rather, Defendant-LaRose should be held jointly and severally responsible along with Defendant-Portage County Board of Elections for the fees incurred by Plaintiffs for successfully winning preliminary relief under their as-applied challenge. Defendant-Portage County Board of Elections, meanwhile, is singularly responsible for Plaintiffs' fees based on the award of permanent relief.

ment the LPO may have to attorney's fees under 42 U.S.C. § 1988(b). That case-specific inquiry is best left in the first instance to the district court. *McQueary v. Conway,* 614 F.3d 591, 601 (6th Cir.2010)." *Libertarian Party*, 497 Fed. Appx. at 583.

Notwithstanding that this Court's preliminary relief was vacated and the case dismissed at the direction of the Sixth Circuit, this Court, following the Sixth Circuit's note on attorney's fees, concluded that the plaintiffs were still entitled to costs and attorneys' fees based on their successful claim for preliminary relief. Relying on the Sixth Circuit's holding in *McQueary v. Conway,* 614 F.3d 591, 601 (6th Cir. 2010), the Court stated that "to determine whether a 'preliminary-injunction winner' is a prevailing party, courts conduct a 'contextual and case-specific inquiry.'" 2013 WL 4833033 at *2. "The Sixth Circuit has gone on to clarify that to receive attorney's fees, a plaintiff who wins a preliminary injunction must obtain a 'material change in the legal relationship' that directly benefits the plaintiff by modifying the defendant's behavior towards her." *Id*. (quoting *McQueary,* 614 F.3d at 597–98).

"When 'the claimant receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time,' the plaintiff is a prevailing party and may be entitled to attorney's fees." 2013 WL 4833033 at *2 (quoting *McQueary*, 614 F.3d at 599). "Plaintiffs received temporary relief that compelled Defendant to act and had permanent effect because it effectively granted Plaintiffs all the relief they sought. Plaintiffs sought a preliminary injunction to restore their 2011 and 2012 ballot access." 2013 WL 4833033 at *2. "Although Plaintiffs also requested additional relief in the form of declaring certain

amendments to voting regulations unconstitutional and enjoining their enforcement, a plaintiff becomes a 'prevailing party' by succeeding on a single claim, 'even if he loses on several others and even if that limited success does not grant him the 'primary relief' he sought.'" *Id*. at *3 (quoting *McQueary*, 614 F.3d at 603) (emphasis added).

Because the plaintiffs in *Libertarian Party*, 2013 WL 4833033 at *2, "sought relief in relation to a specific event and received ostensibly temporary relief that had permanent effect once the 2012 election passed," the Court properly deemed them to be prevailing parties for that preliminary relief and awarded them costs and fees. "'The significance of the relief obtained goes only to the amount of fees' a prevailing party may recover, not to whether the party is prevailing." *Id*. at *3.

Numerous Courts, including this Court, the Sixth Circuit and the Supreme Court, have recognized that when a plaintiff wins a significant part of what it seeks, through a preliminary injunction or otherwise, it is entitled to attorneys' fees for the effort devoted to winning that relief. *See, e.g., Tex. State Teacher's Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 791–92 (1989) ("If the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind.") (quotation marks and alteration omitted); *Diffenderfer v. Gomez–Colon,* 587 F.3d 445, 450 (1st Cir. 2009) (awarding attorney's fees after vacating an injunction as moot); *Grano v. Barry,* 783 F.2d 1104, 1110 (D.C. Cir.1986) (awarding attorney's fees after successfully holding off a demolition until after an election); *see also Young v. City of Chicago,* 202 F.3d 1000 (7th Cir.

2000) (awarding fees to protestors who obtained a preliminary injunction to protest at a convention); *Watson v. County of Riverside,* 300 F.3d 1092, 1096 (9th Cir. 2002) (awarding fees to a government employee who sought to exclude a report from an administrative hearing and received an injunction allowing him to do so). *See also Miller v Davis*, 267 F. Supp.3d 961 (E.D. Ky. 2017) (awarding attorney's fees based on preliminary injunction notwithstanding its subsequent vacatur); *Michigan State A. Phillip Randolph Institute v. Johnson*, 2019 WL 2314861 (E.D. Mich. 2019) (awarding attorney's fees based on preliminary injunction even though permanent injunction was vacated on appeal and could not support attorney's fees); *Messmer v. Harrison*, 2016 WL 316811 (E.D.N.C. 2016) (awarding attorney's fees based on preliminary injunction even though case was rendered moot by subsequent intervening events).

The present situation is controlled by the Supreme Court's, the Sixth Circuit's and this Court's precedents. Here, Plaintiffs won ballot access through their as-applied challenge. Their initiatives were restored to the ballot. They were voted on. One passed and is now the law in Windham Village. No appeal was taken from this preliminary relief.

Following the election, this Court's award of preliminary relief, just like the award of preliminary relief in *Libertarian Party*, became moot. The Sixth Circuit in the present case recognized this fact:

> We note that Plaintiffs' as-applied challenge is moot. Under Article III, we "may adjudicate only actual, ongoing cases or controversies." The district court enjoined the Secretary of State to place the Plaintiffs' initiatives on the Portage County ballots, and the election was conducted in

> November 2018. The State made clear at oral argument that it does not seek to relitigate the district court's decision on the as-applied challenge. Accordingly, we will not consider it here, ...

Schmitt, 933 F.3d a 636 n.2 (emphasis added and citation omitted).

Not only did Defendant-LaRose admit to the Sixth Circuit that it was not challenging the propriety of this Court's preliminary relief, it also conceded to the Sixth Circuit that this Court's preliminary orders restoring Plaintiffs' two initiatives to the ballot were correct. During Appellant's oral argument, the Court inquired whether "it matter[s] that you have the exact same petitions submitted to different municipalities and they decide it in different ways?" United States Court of Appeals for the Sixth Circuit: Audio Files of Completed Arguments, *Schmitt v. LaRose*, No. 19-3196, June 26, 2019, at 12:59.[7] General Flowers, counsel for Defendant-LaRose responded: "It doesn't . . . we have mandamus to correct boards of elections that err. And frankly, if they had sought a writ of mandamus, they would have got it. This was a legislative ballot initiative, in all likelihood, it should have been placed on the ballot." *Id*. at 13:10 (emphasis added).

During Rebuttal, the Sixth Circuit inquired whether Defendant-LaRose challenged this Court's order directing that the initiatives be placed on the ballot: "But the one that passed, doesn't our decision affect what happens to it?" *Id*. at 37:24. General Flowers responded,

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[7] http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/06-26-2019%20-%20Wednesday/19-3196%20William%20Schmitt%20v%20Frank%20LaRose%20et%20al.mp3&name=19-3196%20William%20Schmitt%20v%20Frank%20LaRose%20et%20al (last visited September 30, 2019).

"No." *Id*. The Court pressed farther: "The question then is whether its validly on the ballot, and . . . if we vacate the injunction what happens to the initiative that passed?" *Id*. at 37:43. General Flowers answered: "Someone could challenge it and say it was not properly on the ballot, but that would fail because it was a legislative action. I don't see any basis for ruling it wasn't." *Id*. (emphasis added). Defendant-LaRose thus made plain to the Sixth Circuit that the two initiatives this Court restored to the ballot were improperly removed from the ballot in the first place. This Court's preliminary orders restoring them to the ballot were plainly correct. They were not challenged on appeal.

Plaintiffs here "sought relief in relation to a specific event and received ostensibly temporary relief that had permanent effect once the [2018] election passed," just like the plaintiffs in *Libertarian Party*, 2013 WL 4833033 at *2. As in *Libertarian Party*, Plaintiffs' success was thereafter mooted by Defendants' compliance with the Court's preliminary order and the conduct of the election. *Id*. That Plaintiffs ultimately failed to win permanent relief does not change this result, as was made clear in *Libertarian Party*, 2013 WL 4833033 at *3 ("Although Plaintiffs also requested additional relief in the form of declaring certain amendments to voting regulations unconstitutional and enjoining their enforcement, a plaintiff becomes a 'prevailing party' by succeeding on a single claim, 'even if he loses on several others and even if that limited success does not grant him the 'primary relief' he sought.'") (citation omitted).

Plaintiffs in this case, just like the plaintiffs in *Libertarian Party*, 2013 WL 4833033, are prevailing parties on their specific as-applied claim to ballot access. Plaintiffs are therefore entitled to costs and

fees incurred in order to restore their initiatives to the ballot and to insure that they were voted on. The Court's preliminary orders to that effect were never appealed and were not challenged in Defendant-LaRose's appeal from the permanent injunction.

II. Determining the Lodestar.

Courts in the Sixth Circuit generally look to the twelve factors found in *Johnson v Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), to assess the reasonableness of an award of attorney's fees. *See*, *e.g*, *Perry v. Autozone Stores, Inc*., 624 Fed. Appx. 370, 372 (6th Cir. 2015) ("Among the factors the district court may consider are the twelve described in *Johnson v. Georgia Highway Express*"); *Jordan v. City of Cleveland*, 464 F.3d 584 (6th Cir. 2006); *see also Jiminez v. Wood County*, 621 F.3d 372 (5th Cir. 2010).

These 12 factors, which need not all prove relevant, include: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-719.

A review of these 12 factors indicates that Plaintiffs' attorneys are entitled to be compensated for the reasonable number of hours they have submitted to the Court and for the reasonable hourly rates they claim.

A. Time and Labor Expended.

The "hours claimed or spent on a case . . . are a necessary ingredient to be considered," *Johnson v Georgia Highway Express, Inc*., 488 F.2d 714, 717 (5th Cir. 1974); indeed, they are viewed as "the most useful starting point for determining the amount of a reasonable fee." *Hensley v. Eckerhardt*, 461 U.S. 424 (1983). In seeking an award of fees, attorneys have an obligation to exercise "billing judgment." *Id*. at 434. That is, attorneys should exclude time devoted to unsuccessful claims, should apportion time shared by more than one client and/or case, and should generally avoid billing time that is not fairly attributable to success in the case at hand.

Here, Plaintiffs' lawyers have kept and submitted for the Court's review contemporaneous time-records in six-minute (one-tenth of an hour) increments. They have exercised billing judgment by billing only for those hours that supported Plaintiffs' successful temporary, preliminary and permanent injunctions. Plaintiffs' counsel have further exercised billing judgment by not billing for many communications with their clients, between themselves and with Defense counsel that were shorter than six minutes.

Time constitutes "the starting point" for determining the amount of Plaintiffs' reasonable fee. *Hensley v Eckerhardt*, 461 U.S. at 434. It is not uncommon, of course, for lawyers in complex cases to dedicate hundreds and even thousands of hours to success. *See*, *e.g*., *Lightfoot v. Walker*, 826 F.2d 516, 522 (7th Cir. 1987) (finding that more than 6,000 hours claimed by the plaintiffs' attorneys in litigating a lengthy and complex prison conditions suit were reasonable when the district court "carefully reviewed the attorneys' time sheets and considered their testimony regarding the

division of tasks."). Ultimately the question is whether those hours are reasonable. Here, Plaintiffs' lawyers have been careful to insure that the limited number of hours invested in the case were tailored and necessary to the successful outcome. Their time is reasonable. They should be compensated for all of the time they invested in their clients' success.

B. Difficulty of Questions Presented.

This case involved difficult constitutional questions under the First and Fourteenth Amendments to the United States Constitution. The preliminary question was whether Ohio's gatekeeper mechanism was properly used to remove Plaintiffs' initiatives from the ballot. This turned on difficult questions under the First and Fourteenth Amendments. The Court correctly concluded that the initiatives should be returned to the ballot, a determination that Defendant-LaRose on appeal conceded was correct.

C. Skill Requisite to Perform the Legal Service Properly.

This criterion is addressed to the Court's assessment of the attorneys based upon its observation of "the attorney's work product, . . . his preparation, and general ability before the court." *Johnson*, 488 F.2d at 718. The judge is to apply his or her expertise gained from his or her own career, both as a lawyer and as a judge. *Id*.

This criterion asks, initially, whether a plaintiff's lawyer was competent and experienced to do the job assigned and, thereby, whether the prevailing plaintiff is deserving of the reasonable hourly rates for lawyers engaged in this type of litigation. The fact that the Plaintiffs here won temporary, preliminary and permanent relief in less than six months is testament to

their skill and services. Plaintiffs' lead counsel, Brown, has won ballot access for minor parties and candidates before in Ohio and has been previously awarded fees under § 1988(b) by this Court. *See*, *e.g.*, *Moore v. Brunner*, 2010 WL 317017 (S.D. Ohio 2010) (successful ballot access case against the Ohio Secretary of State for Socialist Party candidate); *Libertarian Party of Ohio v. Husted*, 2013 WL 4833033 (S.D. Ohio 2013) (successful ballot access case for Libertarian Party of Ohio). Kafantaris has also been successful in past civil rights cases involving ballot access in this District. *See*, *e.g.*, *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569 (S.D. Ohio 2014) (striking down Ohio law that removed Libertarians from ballot). Both lawyers possess the requisite skills needed to efficiently prosecute ballot access litigation.

D. The Preclusion of Employment by Attorneys Due to Acceptance of the Case.

Plaintiffs' lawyers do not claim that they were precluded from taking other employment because of this case.

E. The Customary Fee.

This Court in *Hines v. DeWitt*, 2016 WL 2342014 at * 3 (S.D. Ohio 2016), took "judicial notice of the most recent Ohio State Bar Association Report as evidence of prevailing local market rates; *see* Ohio State Bar Ass'n, The Economics of Law Practice in Ohio in 2013." Using this Report, the Court observed that "$350 per hour is the *median* rate for civil-rights attorneys in Ohio, and the Court is confident that the median attorney in that survey would be competent to undertake this litigation." *Id*. at *4 (emphasis added).

Plaintiffs' two lawyers' compensation should be compensated at or above this median rate. Brown should

be awarded the rate of $400/hour based on his thirty-plus years of practice and skill in the specialty of ballot access. Kafantaris should be awarded the median of $350.00/hour based on his thirteen years of practice and skill in the specialty of ballot access. Brown has been licensed for over 30 years, teaches Constitutional Law and Constitutional Litigation at Capital University Law School, and has practiced civil rights and ballot access litigation for many of the years he has been licensed. Kafantaris has been licensed for thirteen years and has practiced civil rights and ballot access litigation throughout that time. They both are at or above the median rate.

F. Awards in Similar Cases.

The hourly rates paid to lawyers in civil rights cases in the Southern District support this median rate. In *McConaha v. City of Reynoldsburg*, 2008WL2697310 (S.D. Ohio 2008), for example, this Court sustained an attorney fee award in a § 1983 case based on a rate of $400.00 per hour. In *Landsberg v. Acton Enterprises, Inc.*, 2008WL2468868 (S.D. Ohio 2008), the Court awarded $350.00 per hour in a civil rights case. In *Kauffman v. Sedalia Medical Center*, 2007 WL 490896 (S.D. Ohio 2007), the Court awarded $325.00 per hour in another civil rights case. Six years ago – before the Ohio State Bar Association Report relied on by this Court was released – Brown was awarded fees based on a $300.00 hourly rate in a ballot access case. *Libertarian Party of Ohio v. Husted*, 2013 WL 4833033 (S.D. Ohio 2013). As made clear by the more recent Ohio State Bar Association study and similar cases, the median rate has increased to $ 350 since that time, which should now serve as the benchmark for judging Brown's and Kafantaris's reasonable rates.

G. Experience, Reputation and Ability of the Attorneys.

Attorneys Brown and Kafantaris are accomplished constitutional litigators who have been involved in a significant amount of constitutional litigation over the course of several years. Brown's civil rights experience traces back over 25 years. *See*, *e.g*., *Beattie v. City of St. Petersburg Beach*, 733 F. Supp. 1455 (M.D. Fla. 1990). Kafantaris has succeeded in enjoining an Ohio law banning non-residents from circulating candidates' part-petitions, *see Libertarian Party of Ohio v. Husted*, 2013 WL 11310689 (S.D. Ohio 2013), as well as Ohio's law removing Libertarian candidates from ballots. *See Libertarian Party of Ohio v. Husted*, 2014 WL 11515569 (S.D. Ohio 20140. Their experience and expertise allows them to pursue complex cases with fewer hours than might ordinarily be required. Their expertise, which translates into less time, justifies a premium rate.

H. Whether the Fee Is Fixed or Contingent.

The fee here was contingent. The clients themselves paid nothing. Plaintiffs' lawyers expected payment only based on their success. Consideration of contingency as a factor in determining the reasonableness of the hourly rate is appropriate, and counsel's rates are well within the range of hourly rates charged even for non-contingency work. *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable?*," 126 U. PA. L. REV. 281, 324-25 (1977) ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk"). Given the contingent nature of the fee recovery in this case, premium rates are appropriate.

I. Time Limitations Imposed by the Client or the Circumstances.

Because of the late date at which Plaintiffs' initiatives were removed from the Portage County ballots and the closely approaching 2018 election, time was a constant concern for Plaintiffs. Plaintiffs' lawyers were required to act quickly in order to win both temporary and preliminary relief. The demand for quick and efficient action by Plaintiffs' lawyers justifies a premium rate and corroborates Plaintiffs' reasonable hours.

J. The Results Obtained.

As explained above, Plaintiffs achieved excellent preliminary results and significant success. Plaintiffs initiatives were restored to Ohio's ballot, were voted on, and one passed. The Windham initiative is now the law in that Village. This success justifies premium rates and corroborates Plaintiffs' reasonable hours.

K. Undesirability of the Case.

Plaintiffs do not claim their case was undesirable.

CONCLUSION

Plaintiffs respectfully request that their Motion for the following amounts to be paid by Defendant-LaRose be **GRANTED**:

Costs (filing fee):	$400.00.
Attorney's fees (Brown) for preliminary relief:	$18,920.00.
Attorney's fees (Kafantaris) for preliminary relief:	$3570.00.
Attorney's fees (Brown) for preparing Motion:	$3520.00
TOTAL:	$26,410.00

Respectfully submitted,

s/ *Mark R. Brown*

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APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: 08/28/18]

Case No. 2:cv-18-966

WILLIAM SCHMITT, JR., CHAD THOMPSON,
and DEBBIE BLEWITT,

Plaintiffs,

v.

JON HUSTED, in his Official Capacity
as Ohio Secretary of State, and
CRAIG M. STEPHENS, PATRICIA NELSON,
DORIA DANIELS, and ELAYNE J. CROSS,
in their official capacities as members of
the Portage County Board of Elections,

Defendants.

PRELIMINARY INJUNCTION
and TRO REQUESTED

VERIFIED COMPLAINT

Introduction

1. Plaintiffs in this facial and as-applied *Ex parte Young*, 209 U.S. 123 (1908), action brought under the First Amendment to the United States Constitution seek to restrain Defendants from enforcing or applying provisions in O.R.C. § 3501.11(K), O.R.C.

§ 3501.38(M)(1)(a), and O.R.C. § 3501.39(A) that separately and collectively authorize local elections boards to scrutinize the subject matter and content of ballot initiatives.

2. The aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, have been authoritatively construed by the Ohio Supreme Court to vest in local elections boards the responsibility to act as "gatekeepers" to Ohio's popular initiative ballots. *See State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015) (holding that elections officials "serve as gatekeepers, to ensure that only those measures that actually constitute initiatives or referenda are placed on the ballot.").

3. Exercising this authority, local elections boards study the subject matter and content of otherwise properly submitted and certified initiatives to determine whether those initiatives fall "within the initiative power" and may be placed on Ohio's ballots. *See* O.R.C. § 3501.11(K)(2).

4. The aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, have been authoritatively construed by the Ohio Supreme Court to vest discretion in local elections boards to decide which initiatives may and which may not be placed on Ohio's ballots. *See*, *e.g.*, *State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015) ("As is well-established, abuse of discretion means more than an error of law or of judgment. In close cases, therefore, we might very well be compelled to find that the secretary reasonably disqualified a ballot measure, in the exercise of his discretion, even if we, in the exercise of

our constitutional duties, would deem the measure unconstitutional.").

5. The "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, requires that local boards exercise their discretion to make content-based decisions. *See*, *e.g.*, *State ex rel. Sensible Norwood v. Hamilton County Board of Elections*, 148 Ohio St.3d 176, 69 N.E.3d 696 (2016).

6. The "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to include objective, content-neutral standards to limit local elections boards' discretion to select some initiatives but not others for inclusion on ballots.

7. The "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to require that otherwise properly submitted and certified initiatives that are denied ballot access by local elections boards based on their content shall remain on ballots "pending a final judicial determination on the merits." *See Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001).

8. The "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately

and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to require "a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *See Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001).

9. The "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to "place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor [here, the boards of elections] rather than the exhibitor [here, the supporters of the initiatives]." *See Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001).

10. Because Ohio's "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, authorizes local elections boards to make content-based decisions, it is subject to strict scrutiny under the First Amendment to the United States Constitution. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

11. Ohio cannot pass strict scrutiny by demonstrating that its "gatekeeper" mechanism is absolutely required to achieve a compelling state interest.

12. Because Ohio's "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A),

separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, vests discretion in local elections boards to select which initiatives to include on ballots, the "gatekeeper" mechanism is an impermissible prior restraint under the First Amendment to the United States Constitution. *See*, *e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("This ordinance as it was written fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.").

13. Because Ohio's "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to include content-neutral, objective standards limiting the discretion vested in local elections boards, the "gatekeeper" mechanism is an impermissible prior restraint under the First Amendment to the United States Constitution. *See*, *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1990) ("To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id*. (citations omitted).

14. Because Ohio's "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to require that otherwise properly submitted and certified initia-

tives that are denied ballot access by local elections boards based on their content shall remain on ballots "pending a final judicial determination on the merits," the "gatekeeper" mechanism is an impermissible prior restraint under the First Amendment to the United States Constitution. *See Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001).

15. Because Ohio's "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to require "a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license, " the "gatekeeper" mechanism is an impermissible prior restraint under the First Amendment to the United States Constitution. *See Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001).

16. Because Ohio's "gatekeeper" mechanism created by the aforementioned laws, O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, fails to "place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor [here, the boards of elections] rather than the exhibitor [here, the supporters of the initiatives]," the "gatekeeper" mechanism is an impermissible prior restraint under the First Amendment to the United States Constitution. *See Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 372, 400 (6th Cir. 2001).

Facts

17. Plaintiffs William Schmitt and Chad Thompson are drafters and circulators of initiatives calling for reductions of penalties in local ordinances in Ohio for those charged with possessing marijuana.

18. Plaintiffs William Schmitt and Chad Thompson in 2018 circulated an initiative calling for reductions of penalties for the charged with possessing marijuana in the Village of Garrettsville, Ohio with the intent of having the initiative placed on the Village's November 2018 election ballot. *See* Exhibit 1 (Initiative).

19. Plaintiffs William Schmitt and Chad Thompson in 2018 circulated an identical initiative calling for reductions of penalties for the charged with possessing marijuana in the Village of Windham, Ohio with the intent of having the initiative placed on the Village's November 2018 election ballot. *See* Exhibit 2 (Initiative).

20. Both initiatives circulated for inclusion on Windham's and Garrettsville's respective election ballots complied with Ohio law and were supported by the required numbers of voters' signatures. *See* Exhibit 3 (Board Minutes) (stating that both initiatives contained the required numbers of signatures).

21. Notwithstanding that both identical initiatives were supported by the required numbers of signatures, were timely, and otherwise complied with Ohio law, the Portage County Board of Elections on August 20, 2018 refused to certify either one. *See* Exhibit 3 (Board Minutes).

22. The Portage County Board of Elections on August 20, 2018 rejected both initiatives, *see* Exhibits 1 and 2, because it concluded their content was not

proper for inclusion on Ohio's ballots; the Board's minutes state that both identical initiatives were rejected "because the initiatives are administrative in nature, rather than legislative. Administrative actions are not appropriate for initiative petitions." Exhibit 3.

23. Because of the Portage County Board of Elections action on August 20, 2018, neither initiative will appear on Ohio's November 2018 election ballot.

24. Plaintiffs William Schmitt and Chad Thompson were notified by e-mail that their initiatives had been rejected by the Portage County Board of Elections on August 20, 2018. See Exhibit 4.

25. The August 20, 2018 notification, however, did not explain the reason for the Board's action; it merely stated: "This email will serve as notice that the Portage County Board of Elections did not certify the initiative petitions regarding marijuana penalties filed for Garrettsville Village and Windham Village to the November 6, 2018 General Election ballot." Exhibit 4 at page 2.

26. After Plaintiff Chad Thompson inquired why the Portage Board of Elections had rejected the initiatives, he was informed by the Portage County Board of Elections on August 21, 2018 that:

> In *State ex rel. Sensible Norwood v. Hamilton County Board of Elections, 2016-Ohio-5919,* the Oho [sic] Supreme Court said administrative actions are not subject to initiative. Reviewing the language in the proposals presented by the Village of Garrettsville and the Village of Windham, the $0 fine and no license consequences are administrative in nature. The $0 court costs is administrative in nature and is an impingement on the judicial function by a legislature. Accordingly,

> as the Garrettsville Village and Windham Village petitions deal with subject matter that is not subject to the initiative process, the Board of Elections, in its discretion, has chosen not to certify these issues to the ballot.

Exhibit 4 at page 1 (emphasis added).

27. Plaintiff Debbie Blewitt is a registered Ohio voter who lives in Windham, Ohio.

28. Plaintiff Debbie Blewitt signed Plaintiffs William Schmitt's and Chad Thompson's initiative that was circulated for inclusion on the Windham ballot. *See* Exhibit 2.

29. But for the Portage County Board of Elections action on August 20, 2018, Plaintiffs' Garrettsville and Windham initiatives would have been included on those two Villages November 6, 2018 ballots.

30. Plaintiffs William Schmitt and Chad Thompson circulated initiatives proposing ordinances that are identical to those proposed for Garrettsville and Windham in Norwood, Ohio, Fremont, Ohio and Oregon Ohio. *See* Exhibits 5 (Norwood), 6 (Fremont) and 7 (Oregon).

31. Plaintiffs initiatives circulated in Norwood, Ohio, Fremont, Ohio and Oregon Ohio all were certified for the respective localities' November 6, 2018 election ballots.

32. None of the initiatives circulated in Norwood, Ohio, Fremont, Ohio and Oregon Ohio were deemed by the relevant local elections boards as falling outside the initiative power.

33. None of the initiatives circulated in Norwood, Ohio, Fremont, Ohio and Oregon Ohio were rejected

by the relevant local elections boards as presenting improper administrative matters.

Parties

34. Plaintiff Chad Thompson is a resident of Toledo, Ohio and is qualified under Ohio law to circulate petitions supporting initiatives.

35. Plaintiff William Schmitt is a resident of Bellaire, Ohio and is qualified under Ohio law to circulate petitions supporting initiatives.

36. Defendant Jon Husted is the Ohio Secretary of State and, pursuant to Ohio Rev. Code § 3501.04, is the chief elections officer in Ohio responsible for enforcing and defending Ohio's election laws, including O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A); he is sued in only his official capacity.

37. Defendant, Jon Husted, as the Ohio Secretary of State and chief elections officer in Ohio is vested with the authority to compel local elections boards to comply with Ohio's election laws, including O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A). *See* O.R.C. § 3501(M) (stating that Secretary of State has power to "[c]ompel the observance by election officers in the several counties of the requirements of the election laws"); *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992) (observing that Secretary of State "compel[s] compliance with election law requirements by election officials").

38. Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross are the four members of the Portage County Board of Elections responsible for removing Plaintiffs' initiatives from the Garrettsville and Windham ballots.

39. Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross are residents of Ohio and are sued in their official capacities only.

40. Because Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross are sued in their official capacities, Plaintiffs' action is effectively against the Portage County Board of Elections.

41. The Portage County Board of Elections is a local elections board vested with discretion by O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A) to remove initiatives based on subject matter and content.

42. Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross, the Portage County Board of Elections and Defendant-Secretary of State were at all relevant and material times acting under color of Ohio law within the meaning of 42 U.S.C. § 1983 and engaged in state action within the meaning of the First and Fourteenth Amendments to the United States Constitution.

Jurisdiction and Venue

43. Federal jurisdiction is claimed under the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983.

44. Venue lies in this district under 28 U.S.C. § 1391(b) because Defendant-Secretary of State resides in this district and all the Defendants reside in Ohio, or alternatively because a substantial part of the events giving rise to Plaintiffs' claim occurred in the district.

Claim One (Facial First Amendment Challenge against Defendant-Secretary and the Portage County Board of Elections for Enforcing Content-Based Restriction)

45. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 44.

46. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violate the First Amendment to the United States Constitution, as incorporated and applied to Ohio by the Fourteenth Amendment to the United States Constitution.

47. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, is content-based and cannot survive strict scrutiny.

48. Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violates the First Amendment.

49. Defendant Secretary of State's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violates the First Amendment.

Claim Two (Facial First Amendment Challenge against Defendant-Secretary and the Portage County Board of Elections for Enforcing Prior Restraint)

50. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 49.

51. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violate the First Amendment to the United States Constitution, as incorporated and applied to Ohio by the Fourteenth Amendment to the United States Constitution.

52. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, operate as a content-based prior restraint.

53. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly vest discretion in local elections boards in violation of the First Amendment.

54. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly fail to limit local boards of elections' discretion with content-neutral, objective standards in violation of the First Amendment.

55. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the

Ohio Supreme Court, impermissibly fail to require that otherwise properly submitted and certified initiatives that are denied ballot access by local elections boards based on their content shall remain on ballots "pending a final judicial determination on the merits," in violation of the First Amendment.

56. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly fail to require "a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial," in violation of the First Amendment.

57. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly fails to "place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor [here, the boards of elections] rather than the exhibitor [here, the supporters of the initiatives]," in violation of the First Amendment.

58. Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violates the First Amendment.

59. Defendant Secretary of State's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violates the First Amendment.

Claim Three (As-Applied First Amendment Challenge against Defendant-Secretary and the Portage County Board of Elections for Enforcing Content-Based Restriction)

60. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 59.

61. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violate the First Amendment to the United States Constitution, as incorporated and applied to Ohio by the Fourteenth Amendment to the United States Constitution.

62. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, is content-based and cannot survive strict scrutiny.

63. Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, violates the First Amendment as-applied.

64. Defendant Secretary of State's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, violates the First Amendment as-applied.

Claim Four (As-Applied First Amendment Challenge against Defendant-Secretary and the Portage County Board of Elections for Enforcing Prior Restraint)

65. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 64.

66. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, facially violate the First Amendment to the United States Constitution, as incorporated and applied to Ohio by the Fourteenth Amendment to the United States Constitution.

67. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, operate as a content-based prior restraint.

68. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly vest discretion in local elections boards in violation of the First Amendment.

69. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly fail to limit local boards of elections' discretion with content-neutral, objective standards in violation of the First Amendment.

70. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately

and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly fail to require that otherwise properly submitted and certified initiatives that are denied ballot access by local elections boards based on their content shall remain on ballots "pending a final judicial determination on the merits," in violation of the First Amendment.

71. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly fail to require "a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial," in violation of the First Amendment.

72. Ohio Revised Code § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, impermissibly fails to "place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor [here, the boards of elections] rather than the exhibitor [here, the supporters of the initiatives]," in violation of the First Amendment.

73. Defendants Craig M. Stephens, Patricia Nelson, Doria Daniels, and Elayne J. Cross's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, violates the First Amendment as-applied.

74. Defendant Secretary of State's enforcement of O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court, violates the First Amendment as-applied.

RELIEF REQUESTED

WHEREFORE, Plaintiffs request the following relief pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983 and 42 U.S.C. § 1988(b):

A. a declaration under 28 U.S.C. § 2201 that O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court to authorize local elections boards to act as "gatekeepers" of initiatives are facially unconstitutional under the First Amendment;

B. a declaration under 28 U.S.C. § 2201 that O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court to authorize local elections boards to act as "gatekeepers" of initiatives are unconstitutional as-applied under the First Amendment;

C. a temporary restraining order and/or preliminary injunction under 42 U.S.C. § 1983 prohibiting Defendants from enforcing or acting under O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court to authorize local elections boards to act as "gatekeepers" of initiatives;

D. a permanent injunction under 42 U.S.C. § 1983 prohibiting Defendants from enforcing or acting under O.R.C. § 3501.11(K), O.R.C. § 3501.38(M)(1)(a), and O.R.C. § 3501.39(A), separately and/or collectively, as authoritatively construed by the Ohio Supreme Court to

authorize local elections boards to act as "gatekeepers" of initiatives;

E. a temporary restraining order and/or preliminary injunction under 42 U.S.C. § 1983 directing Defendants to restore Plaintiffs' Garrettsville and Windham initiatives to the ballots of those Villages;

F. a reasonable attorney's fee and costs pursuant to 42 U.S.C. § 1988(b);

G. such other and further relief as may be just and proper.

Dated: August 28, 2018

Respectfully submitted,

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Attorneys for Plaintiffs

VERIFICATION of WILLIAM SCHMITT, JR.
(Pursuant to 28 U.S.C. § 1746(2))

I, William Schmitt, Jr., verify under penalty of perjury that the foregoing is true and correct.

Executed on 8-28-2018

/s/ William T. Schmitt, Jr.
William Schmitt, Jr.

VERIFICATION of CHAD THOMPSON
(Pursuant to 28 U.S.C. § 1746(2))

I, Chad Thompson, verify under penalty of perjury that the foregoing is true and correct.

Executed on 8/28/2018

/s/ Chad Thompson
Chad Thompson

VERIFICATION of Debbie Blewitt
(Pursuant to 28 U.S.C. § 1746(2))

I, Debbie Blewitt, verify under penalty of perjury that the foregoing is true and correct.

Executed on 8-28-18

/s/ Debbie Blewitt
Debbie Blewitt