No. 24A970

In the Supreme Court of the United States

DAVID YOST, in his official capacity,
Applicant,

v.

CYNTHIA BROWN, *et al.*,
Respondents.

BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY AND TRUST IN ELECTIONS SUPPORTING THE APPLICANT AND THE APPLICATION FOR A STAY

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CORPORATE DISCLOSURE STATEMENT

Restoring Integrity and Trust in Elections, Inc. (RITE), is a 501(c)(4) non-profit organization. It has no parent corporation, and no publicly held corporation holds a 10% or greater ownership interest in it.

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STATEMENT OF *AMICUS* INTEREST*

This case provides the Court with a long-awaited opportunity to decide whether the First Amendment limits the States' sovereign authority to regulate initiative processes. The circuits are hopelessly split on this question.

Some courts have held, correctly, that "the right to free speech ... [is] not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech *associated with* an initiative procedure." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (*en banc*) (per McConnell, J.); *Marijuana Policy Project v. United States*, 304 F.3d 82, 87 (D.C. Cir. 2002) (per Tatel, J.). These courts distinguish "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.

But other courts subject rules governing the initiative process to First Amendment scrutiny. *See Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005); *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012); *Schmitt v. LaRose*, 933 F.3d 628, 640–42 (6th Cir. 2019). And some of *those* courts, including the Sixth Circuit, review the constitutionality of these rules under the *Anderson-Burdick* framework—a framework lower courts treat as a largely open-ended, totality-of-the-circumstances test that "allow[s] a judge easily to tinker with levels of scrutiny to achieve his or her

* No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 37.6.

desired result." *Daunt v. Benson*, 956 F.3d 396, 425 (6th Cir. 2020) (Readler, J., concurring in the judgment) ("*Daunt I*") (alteration accepted, quotation omitted).

The question presented directly implicates the mission of Restoring Integrity and Trust in Elections, Inc. "RITE" is committed to ensuring that "[e]lectoral systems" are "designed, safeguarded, and implemented in a manner that reflects the will of our citizens so that electoral results enjoy the public's full faith and confidence." *Our Mission*, Restoring Integrity and Trust in Elections, https://riteusa.org/our-mission/ (as last visited April 12, 2025). That mission is hindered by decisions like the Sixth Circuit's here, which review initiative-amendment processes under *Anderson-Burdick*. By applying this test to rules governing the processes by which initiatives become law, courts seize immense political power to dictate the way sovereign States govern themselves. That is not the system the Constitution envisions. Nor is it one that will enhance, rather than diminish, public faith in the democratic process.

BACKGROUND

1. Ohioans have reserved for themselves the power "to propose amendments to the constitution and to adopt or reject the same at the polls." Ohio Const., art. II, §1. This reservation originated in the State's 1912 constitutional convention. "The Convention was marked by sharp debate between those favoring" the creation of an amendment-by-initiative process "and those opposed." *See* Ohio Constitution Revision Commission, *Recommendations for Amendments to the Ohio Constitution* 366 (1977). Sharp debate, as it often does, produced a compromise. Perhaps sensing defeat on the ultimate issue, opponents "fought to get as many restrictions as possible into the Constitution." *Id.* And they partially succeeded. The as-ratified provisions

created an initiative process, but that process includes many technical and procedural requirements. These procedural requirements deter overuse. And they ensure that Ohioans adopt amendments only after a methodical process in which reasoned argument is more likely to prevail over momentary passions. All told, the People secured their right to directly alter "the foundational document governing the state," while simultaneously protecting the "public's great interest in the stability of constitutional law." App.9.

The framers of this process appreciated the impracticability of including all the detailed mechanics of the initiative process in the Constitution itself. So they empowered the General Assembly to enact, by ordinary legislation, the mechanics of the initiative process. The relevant provision appears today in Section 1g of article II. As amended, it says: "Laws may be passed to facilitate" the initiative process's "operation," provided they "in no way limit[] or restrict[] either such provisions or the powers herein reserved."

This case concerns a law the legislature passed to facilitate the initiative process, R.C. 3519.01(A). In Ohio, a constitutional amendment proposed by initiative may appear on the ballot only once the amendment's proponents secure "the signatures of ten per centum of the electors." art. II, §1a. Proponents must gather those signatures on a "petition." *Id*. These petitions must include, among other things, the "text of … [the] proposed amendment to the constitution," art. II, §1g. But the text of a proposed amendment is often long and hard to parse. Accounting for this, the General Assembly has long required that petitions include a "summary" of the proposed amendment.

R.C. 3519.01(A). To protect citizens from misleading summaries—to facilitate an honest initiative process—proponents must submit their petitions to the Attorney General. And under what this brief calls the "Summary Review Provision," the Attorney General must review the summary to ensure it is a "fair and truthful statement[]" of the proposed amendment. *Id*. Proponents may begin collecting signatures only once the Attorney General certifies the truth and fairness of the petition's summary.

"Strictly speaking, the statutory procedure under R.C. 3519.01 is not part of the initiative process but is a statutory requirement prior to commencement of the initiative process under the Constitution." *State ex rel. Durrell v. Celebrezze*, 63 Ohio App.2d 125, 130 (10th Dist.). Still, this provision "facilitate[s]" the initiative process, art. II, §1g, because it "helps potential signers understand the content of the [amendment] more efficiently than if they had to rely solely on a review of the entire law …." *Schaller v. Rogers*, 2008-Ohio-4464, ¶46 (10th Dist.). "Requiring a summary on the petition may also help deter circulation fraud and abuse by deterring circulators from misrepresenting the contents or impact" of the proposed amendment. *Id*. at ¶47.

2. This case began when the Ohio Attorney General rejected, under the Summary Review Provision, a proposed summary submitted by proponents of an initiative that would eliminate qualified immunity for state officials. This case presents the question whether the Summary Review Provision violates the proponents' First Amendment rights. The District Court answered that question in the affirmative and entered an order enjoining the Provision's enforcement. But the Court stayed its

injunction pending appeal. Sensibly so. A stay protects the parties and the citizens of Ohio from the thorny questions that would arise if the proponents were allowed to continue the initiative process in violation of a later-upheld Summary Review Provision. "What happens, for example, if the proposal makes it on the ballot but the Attorney General ultimately prevails in this case?" Emergency Application for a Stay ("Ohio Br.") at 27. Must the proposed amendment be removed from the ballot? If voters have already ratified it, will it become or remain part of the constitution? "And what are Ohio voters who support the plaintiffs' proposal (based on an unfair summary) to think of Ohio's initiative process in the end?" *Id.* at 27–28. A stay spares Ohio and its citizens from the complexities these questions pose.

The Sixth Circuit, over the dissent of Judge Bush, lifted the District Court's stay. In an opinion by Judge Moore, the court held that Ohio's Summary Review Provision vests the Attorney General with the power to "exercise editorial discretion over the contents of [the proponents'] petition summaries," which the court regarded as an impingement on "core political speech." App.27. And the court held that the Summary Review Provision fared no better "under the *Anderson-Burdick* balancing test that" the Sixth Circuit "has applied to regulations of the ballot-initiative process." *Id.* (citing *Schmitt*, 933 F.3d at 639). Under the *Anderson-Burdick* framework, "there is no 'litmus-paper test' that will separate valid from invalid restrictions"; courts must instead exercise judgment after "carefully 'consider[ing] the character and magnitude of the asserted injury'" to First Amendment rights. App.32 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Purporting to apply this framework, the Sixth

Circuit held that the Summary Review Provision imposes a "severe" burden on core political speech that cannot be justified by any government interest. *Id.* at 33.

Judge Bush dissented. Of most relevance to this brief, he took issue with circuit precedent subjecting laws that regulate the initiative process—laws like the Summary Review Provision—to First Amendment scrutiny. He explained that, although "the First Amendment protects public debate about legislation, it confers no right to legislate …." App.44 (quoting *Marijuana Pol'y Project*, 304 F.3d at 85). Thus, States, as sovereigns all their own, are not limited by the First Amendment when they adopt processes by which initiatives become law; while States may "not regulate the communicative conduct of persons advocating a position on the initiative," *id*, they do not implicate the First Amendment when they impose procedural or even content-and viewpoint-based limitations on initiatives. In holding otherwise, the Sixth Circuit contradicts decisions from at least the Tenth and D.C. Circuits.

SUMMARY OF ARGUMENT

The circuits are split concerning whether the First Amendment applies to rules governing the initiative process. *See* Ohio Br.13–15. And at least four members of this Court have signaled an interest in resolving the question. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616–17 (2020) (Roberts, C.J., joined by Alito, Gorsuch, and Kavanaugh, JJ., concurring in the grant of stay). The Court should eventually grant review in this case to hold that the First Amendment does not apply to rules governing the initiative process. *See* Ohio Br.17–22. And it should grant Ohio's stay application to preserve the Court's ability to do so.

This brief explains why the First Amendment does not apply to rules governing the process by which initiatives become law. *See below* 8–10. Because Ohio (along with lower courts and appellate judges across the country) have done so already, RITE will not belabor this point. RITE's primary goal is to emphasize that the lower courts' application of *Anderson-Burdick* to these disputes is especially misguided. *See below* 11–21. The Court should grant a stay to protect its ability to hold, in this case, that the *Anderson-Burdick* framework is inapplicable to lawsuits challenging the constitutionality of rules governing the initiative process.

ARGUMENT

In deciding whether to grant a stay, this Court considers, among other things, whether the applicant is "likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). This factor may "encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case." *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application of injunctive relief). Here, the Court is likely to grant certiorari and to rule for Ohio on the merits. For one thing, the Sixth Circuit erred by applying the First Amendment to this dispute. But perhaps more importantly, the Sixth Circuit has repeatedly subjected restrictions on Ohio's initiative process to *Anderson-Burdick* scrutiny. Applying the *Anderson-Burdick* test to this context effects an immense intrusion upon state sovereignty—an intrusion that is incompatible with our federalist Constitution and that cannot be permitted to continue.

I. Laws regulating the initiative process do not implicate the Free Speech Clause.

Properly understood, the First Amendment's Free Speech Clause has no bearing on state laws governing the citizen-initiative process.

Begin with first principles. The Free Speech Clause forbids Congress to make any law "abridging the freedom of speech." U.S. Const., am. 1. Through the Fourteenth Amendment, the same prohibition applies to the States. The "freedom of speech" includes the freedom to engage in political speech; citizens have a right to advocate for and against political change. This follows from the fact that "the First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quotation marks omitted).

"The First Amendment undoubtedly protects the political speech that typically attends an initiative campaign, just as it does speech intended to influence other political decisions." *Walker*, 450 F.3d at 1099. It follows that "States" have little power "to dictate who can speak or how they speak when citizens try to persuade one another of an initiative's merits." *Brown v. Yost*, 122 F.4th 597, 605 (6th Cir. 2024) ("*Brown II*") (Thapar, J., concurring in the denial of the preliminary injunction). Thus, laws regulating who may support an initiative or how they do so implicate (and almost always violate) the First Amendment. Accordingly, this Court has struck down, as violative of the First Amendment, laws that prohibit paying people to solicit signatures to support an initiative, laws allowing only registered voters to gather signatures, laws requiring signature gatherers to wear identification, and laws

requiring the disclosure of information concerning those who gather signatures. *Meyer v. Grant*, 486 U.S. 414, 416 (1988); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186 (1999). These laws implicated the First Amendment because they "regulated the process of advocacy itself: the laws dictated *who* could speak (only volunteer circulators and registered voters) or *how* to go about speaking (with name badges and subsequent reports)." *Walker*, 450 F.3d at 1099.

Although "the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." *Id*; *accord Marijuana Policy Project*, 304 F.3d at 85. Neither does anything else in the 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." *Doe No. 1 v. Reed*, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring). When States permit direct initiatives, they empower their citizens to make law. And the First Amendment does not bear on the lawmaking process—that amendment "confers" no "right to use government mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). That is why, for all of American history, Congress and the States have "restrict[ed] legislators' speech during the lawmaking process and … limit[ed] the laws they [can] pass." *Brown II*, 122 F.4th at 605 (Thapar, J., concurring in the denial of the preliminary injunction). It is also why, for as long as direct democracy has existed, States have imposed "various content-based checks on initiative proposals." *Id.* at 606. While citizens have a right to advocate for and

against initiatives, they have no right to hijack the legislative machinery—which is what initiative petitions are—to disseminate their preferred political message.

All told, courts must distinguish "between laws that regulate or restrict the communicative conduct of persons advocating" for an initiative or referendum, "which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Walker*, 450 F.3d at 1100; *accord Mari Wellwood v. Johnson*, 172 F.3d 1007, 1009 (8th Cir.1999); *Schmitt*, 933 F.3d at 644 (Bush, J., concurring in part); *Brown v. Yost*, 103 F.4th 420, 454 (6th Cir. 2024) (Bush, J., dissenting), *reh'g en banc granted, opinion vacated,* 104 F.4th 621; *Brown II*, 122 F.4th at 605–06 (Thapar, J., concurring in the denial of the preliminary injunction).

It follows that, "[a]s an original matter, Ohio law governing the initiative process does not impinge upon any First Amendment right held by initiative proponents, particularly where, as here, the law does not regulate the communicative conduct of persons advocating a position on the initiative." App.44 (Bush, J., dissenting). Just so with the Summary Review Provision. The Provision imposes no limits whatsoever on the proponents' speech; they are "free to lobby, petition, and engage in all First Amendment-protected activities to advocate for their proposed amendment." App.49 (Bush, J., dissenting). The Summary Review Provision regulates only the content of the petition itself, which is part of the legislative machinery through which no one has a First Amendment right to "convey a message." *Carrigan*, 564 U.S. at 127. The Provision does not, therefore, run afoul of the Free Speech Clause.

II. The *Anderson-Burdick* test must not be applied to rules governing the process by which initiatives become law.

The Sixth Circuit has erred by repeatedly subjecting rules governing the initiative process to First Amendment scrutiny. It has erred grievously by reviewing those rules under the *Anderson-Burdick* framework.

A. The judge-empowering version of *Anderson-Burdick* that lower courts apply is not grounded in the Constitution or required by this Court's cases.

1. The *Anderson-Burdick* framework takes its name from two cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). And while their names often appear alongside one another, the latter case significantly limited the scope of the first.

Anderson, for its part, concerned Ohio's rules governing ballot access for candidates (as opposed to initiatives). Ohio law required independent presidential candidates, like John Anderson, to gather signatures and to submit them with other required documents. And Ohio set a late-March deadline for submitting these signatures and documents. 460 U.S. at 786. After independent candidate John Anderson missed the deadline, he and his supporters challenged the deadline, arguing that it violated their First Amendment rights. The Supreme Court agreed. Relevant here, it held that the early-March deadline undermined "the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused." *Id.* at 806.

The Court's opinion never discusses the First Amendment's text or history. Instead, it relies on broad values undergirding the Amendment, proclaiming that "the

primary values protected by the First Amendment—a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open—are served when" independent candidates can get on the ballot. *Id.* at 794 (quotation marks omitted). The Court conceded that States may permissibly adopt ballot-access rules and set *some* compliance deadline. *Id.* at 788 & n.9. But—again, without recourse to the Constitution or its history—*Anderson* held that courts have the power to determine whether such requirements go too far. What does going "too far" entail? The Court opted for a Goldilocks approach. It rejected any "litmus-paper test" that would separate valid restrictions from invalid ones. *Id.* at 789. Instead, the Court fashioned a test that requires courts to weigh the benefits and burdens of ballot-access laws and then make a judgment about the rule's justification. *Id.* at 789–90. Applying that test, *Anderson* deemed the early March deadline impermissibly burdensome.

Anderson's analysis drew an immediate rebuke. As then-Justice Rehnquist recognized in dissent, "Article II of the Constitution provides that 'each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors' who shall select the President of the United States." *Id.* at 806 (Rehnquist, J., dissenting) (alteration accepted). This language, which comes from the Electors Clause, "'recognizes that in the election of a President the people act through their representatives in the legislatures, and *leaves it to the legislature exclusively to define the method of effecting the object.*'" *Id.* at 806–07 (alterations accepted) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)). State legislatures are not required to choose

electors through elections; they are free to appoint electors directly and they did so for years after the Constitution's ratification. *See McPherson v. Blacker*, 146 U.S. 1, 27–33 (1892); Joseph Story, *Commentaries on the Constitution of the United States*, v.III, §1451 (1833). It follows that ballot-access rules cannot violate the First Amendment, at least with respect to presidential elections: if States can appoint electors directly without infringing the rights of those who choose "to associate together to express their support for [someone's] candidacy and the views he espoused," *Anderson*, 460 U.S. at 806, the same must be true when States allow only candidates satisfying some set of procedural prerequisites to appear on the ballot.

Perhaps because of *Anderson*'s shaky foundations, the Supreme Court eventually set about limiting it. That effort began in *Burdick v. Takushi*, 504 U.S. 428. Justice White, one of the *Anderson* dissenters, wrote for the Court. *Burdick*, like *Anderson*, dealt with the ability to vote for candidates—not an initiative or referenda. The case asked whether Hawaii violated the First Amendment by prohibiting write-in votes. *Id*. at 430. *Burdick* answered that question in the negative. In the process, and of more relevance here, *Burdick* restructured *Anderson's* loosey-goosey framework.

Burdick began by observing that "[c]ommon sense, as well as constitutional law, compels the conclusion that the state must play an active role in structuring elections." *Id*. at 433. As a result, any election law will impose *some* burden on individual voters. *Id.* "Each provision of" an election code, "whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to

vote and his right to associate with others for political ends." *Id.* (quoting *Anderson*, 460 U.S. at 788). "Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest … would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* Further, *Burdick* apparently recognized the problem with the balancing test *Anderson* envisioned, because it abandoned that test. It distinguished between laws imposing "severe" restrictions on voters' First and Fourteenth Amendment rights and laws imposing only "reasonable, nondiscriminatory restrictions"; the former are subject to strict scrutiny, while the latter are "generally justified by "a State's important regulatory interests." *Id.* at 434 (quoting *Anderson*, 460 U.S. at 788). The second of these standards, applicable to non-severe burdens, amounts to rational-basis review—a deferential test that courts are used to applying and that does not entail the sort of pure balancing *Anderson* called for.

All told, *Burdick* admirably retreated from the unrestrained balancing test that *Anderson* invented; it "forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J, concurring in the judgment). Specifically, it calls for a "two-track approach" under which "a deferential 'important regulatory interests' standard" applies to "nonsevere, nondiscriminatory restrictions," while "strict scrutiny" applies to "laws that severely restrict the right to vote." *Id.* at 204–05.

2. Notwithstanding *Burdick*'s commendable effort to refashion *Anderson*, the framework remains a "dangerous tool." *Daunt I*, 956 F.3d at 424 (Readler, J.,

concurring in the judgment). That is largely because lower courts have not consistently observed *Burdick*'s two-track approach. *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020) (noting that the Sixth Circuit has deviated from the two-track approach *Burdick* demands).

Anderson-Burdick "requires the reviewing court to (1) determine the 'character and magnitude' of the burden that the challenged law imposes on constitutional rights, and (2) apply the level of scrutiny corresponding to that burden." *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 137 (3d Cir. 2022) (quoting *Burdick*, 504 U.S. at 434). Courts review laws imposing minor burdens under what amounts to rational basis review, while strictly scrutinizing laws imposing "severe" burdens." That much is consistent with *Burdick*. But lower courts have said that, in "cases fall[ing] between these two extremes," the "*Anderson-Burdick* framework departs from the traditional tiers of scrutiny and creates its own test." *Mays*, 951 F.3d at 784. "For these intermediate cases," courts "must weigh that burden against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id*. (quotation marks omitted). Under this "flexible" standard, courts "must ultimately 'make the hard judgment that our adversary system demands.'" *Id*. (quoting *Crawford*, 553 U.S. at 190 (op. of Stevens, J.)) (some quotation marks omitted).

It is the intermediate, "flexible" standard that can make *Anderson-Burdick*, as often applied in lower courts, so dangerous. Courts misuse this standard to justify

invalidating ordinary election laws. They do so by diminishing the importance of state interests (like the interests in preventing fraud or building public confidence), embellishing the difficulty of complying with "the usual burdens of voting," *Crawford*, 553 U.S. at 198 (op. of Stevens, J.), and declaring that the balance tips in favor of the challengers.

This abuse arises because *Anderson-Burdick* "does little to define the key concepts a court must balance, including when a burden becomes 'severe.'" *Daunt I*, 956 F.3d at 424 (Readler, J., concurring in the judgment). As such, any competent judge can plausibly describe most any law imposing less-than-negligible burdens on voters as imposing a moderate burden. And once they do that, *Anderson-Burdick* (as applied in the lower courts) requires that they "undertake the metaphysical task of weighing a state's interests in maintaining its election laws against the burden those laws impose on a plaintiff's rights, such as the right to vote." *Daunt v. Benson*, 999 F.3d 299, 323 (6th Cir. 2021) ("*Daunt II*") (Readler, J., concurring in the judgment). This analysis can quickly become unprincipled. After all, "to weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 393 (2023) (Barrett, J., concurring in part). But the burdens on voters and the interests of States are neither judicially cognizable nor comparable; claims about the character and magnitude of burdens and interests reflect "incommensurable" value judgments. *Id.* Thus, "the weighing of [these] incomparable interests is like judging 'whether a particular line is longer than a particular rock is heavy.'" *Truesdell v. Friedlander*, 80 F.4th 762, 774 (6th Cir. 2023) (quoting

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment)).

The outcome in any *Anderson-Burdick* balancing case, is therefore "almost entirely reliant on the predilections of the jurist who undertakes" the task. *Daunt II*, 999 F.3d at 325 (Readler, J., concurring in the judgment). And that is inevitable; when judges are asked to "juggle incommensurable factors, a judge can do little but announce his gestalt." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

The upshot is that the *Anderson-Burdick* framework, at least in cases presenting intermediate burdens, is treated as demanding "an ad hoc totality-of-the-circumstances examination of burdens and interests …." Derek T. Muller, *The fundamental weakness of flabby balancing tests in federal election law litigation*, Excess of Democracy (Apr. 20, 2020), https://perma.cc/YGH5-9Z7G. This gives courts immense "discretion" to resolve "sensitive policy-oriented cases" based on their own sense of what makes good policy. *Daunt I*, 956 F.3d at 424 (Readler, J., concurring in the judgment). As with any other "subjective balancing approach," this "forces judges to act more like legislators who decide what the law should be, rather than judges who 'say what the law is.'" *United States v. Rahimi*, 602 U.S. 680, 732 (2024) (Kavanaugh, J., concurring) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). That entails "a value-laden and political task that is usually reserved for the political branches." *Id.*; *accord National Pork Producers*, 598 U.S. at 393 (Barrett, J., concurring in part). For good

reason, then, these tests are not "the ordinary approach to constitutional interpretation." *Rahimi*, 602 U.S. at 732 (Kavanaugh, J., concurring).

B. *Anderson-Burdick* should not be extended to the initiative context.

As the foregoing shows, this Court developed the *Anderson-Burdick* framework to guide its review of laws "respecting the right to vote," such as laws governing "voter qualifications, candidate selection, or the voting process." *Crawford*, 553 U.S. at 204 (Scalia, J., concurring in the judgment). Whatever the framework's merits in that context, it has none in the context of rules governing the initiative process—especially the constitutional initiative process.

Return once more to first principles. The Framers of our Constitution "split the atom of sovereignty … into one Federal Government and the States." *Seila L. LLC v. CFPB*, 591 U.S. 197, 223 (2020) (quotation omitted). Thus, "each State is a sovereign entity." *Allen v. Cooper*, 589 U.S. 248, 254 (2020) (quotation omitted). When these sovereign entities joined the Union, they surrendered some of their sovereign authority to the federal government. But they reserved for themselves and their citizens the rest of that authority. *See* U.S. Const., am. 10. "Among those retained powers is the power of a State to 'order the processes of its own governance.'" *Trump v. Anderson*, 601 U.S. 100, 110 (2024) (*per curiam*) (quoting *Alden v. Maine*, 527 U.S. 706, 752 (1999)). "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). And States do this through constitutions—

foundational documents that dictate the structure of state government and the distribution of government power.

The question of whether and how the citizens may wield the initiative power thus bears directly on the States' sovereignty. "It is" therefore "essential to the independence of the states, and to their peace and tranquillity [sic]," that such decisions "should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900). The Constitution, however, does not speak directly to the processes by which citizens may wield legislative power. To the contrary, and as explained above, "the people of each State, *acting in their sovereign capacity*," are entitled to "decide whether and how to permit legislation by popular action." *Doe No. 1*, 561 U.S. at 212 (Sotomayor, J., concurring) (emphasis added). And when they permit constitutional initiatives, they empower themselves to quite literally change the way the State is constituted—they secure the right to alter the structure and power distribution that "defines" the State "as a sovereign." *Gregory*, 501 U.S. at 460.

The *Anderson-Burdick* framework is ill-suited to govern review of matters so central to the States' sovereign authority. Our Constitution provides for a union of sovereign States. That is inconsistent with a system in which judges apply an open-ended balancing test to veto the choices those sovereigns make concerning the structure and distribution of their sovereign authority. Perhaps the fundamental-yet-unenumerated right to vote requires resort to a flexible standard under which courts "ultimately 'make the hard judgment'" regarding which laws go too far. *Mays*, 951

F.3d at 784 (quoting *Crawford*, 553 U.S. at 190 (op. of Stevens, J.)). Even assuming that is so, affording courts the same flexibility to review and reject the processes that States use to constitute their governments is fundamentally incompatible with the States' sovereign status, and so fundamentally incompatible with the country's federalist structure.

"Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991) (quotation omitted). Sometimes, however, "the rule of law may dictate confining the precedent, rather than extending it further." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 543 (6th Cir. 2021) (*en banc*) (Bush, J., concurring) (quotation omitted). And courts must always "resolve questions about" precedents' "scope … in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. PCAOB.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); *accord Seila Law*, 591 U.S. at 220; *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). Just so here. The Court has strived to limit *Anderson-Burdick* and has never once applied it to a law governing the processes by which initiatives become law. *See Walker*, 450 F.3d at 1099; *Brown II*, 122 F.4th at 611–12 (Thapar, J., concurring in the denial of preliminary injunction). To do so would thus require an extension of *Anderson-Burdick*. And neither the Constitution nor the rule of law permits, let alone requires, that extension: the First Amendment does not govern the processes by which initiatives become law and, even if it did, extending *Anderson-Burdick* to this context would entail the usurpation of the States' retained

right to "order the processes of [their] own governance." *Alden v. Maine*, 527 U.S. 706, 752 (1999).

This case will provide the Court with an opportunity to remove any doubt about *Anderson-Burdick*'s relevance to the initiative context. By cabining the framework, the Court will keep lower courts from improperly meddling with the States' reserved authority to govern themselves; it will keep the judiciary from being dragged into highly charged political disputes that must often be resolved on an expedited basis; and it will limit the occasions in which the courts make what amounts to a naked policy call. All told, holding *Anderson-Burdick* inapplicable to rules governing the initiative process will keep courts "out of this area, where [they] have no right to be, where [they] do neither [themselves] nor the country any good by remaining." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

CONCLUSION

The Court should grant Ohio's emergency application for a stay.

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