No. 24A970

IN THE

Supreme Court of the United States

DAVID YOST, OHIO ATTORNEY GENERAL,

Applicant,

v.

CYNTHIA BROWN, *et al.*,

Respondents.

On Emergency Application for a Stay of the Injunction Issued by the United States District Court for the Southern District of Ohio

OPPOSITION TO EMERGENCY APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Mark R. Brown
CAPITAL UNIVERSITY
303 E. Broad Street
Columbus, OH 43215

Oliver Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 20910
Washington, DC 20009

Kelsi Brown Corkran
Counsel of Record
Elizabeth R. Cruikshank
Alexandra Lichtenstein
William Powell
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, GEORGETOWN LAW
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 661-6728
kbc74@georgetown.edu

Counsel for Respondents

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INTRODUCTION

The First Amendment's protections are at their "zenith" for the "core political speech" that occurs when citizens circulate ballot initiative petitions. *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988) (internal quotation marks omitted). This case is about an Ohio statute that requires citizens sponsoring a ballot initiative to submit their private political speech—in the form of a summary of their proposed law or constitutional amendment—to Ohio Attorney General David Yost for his preapproval. Only if Yost determines that the citizens' speech is "fair and truthful" may they circulate their petition. Ohio Rev. Code § 3519.01(A). That scheme flagrantly violates the First Amendment. Nothing is more offensive to our Nation's tradition of free speech than a regime that allows the government to decide which viewpoints citizens are allowed to express. *Moody v. NetChoice, LLC*, 603 U.S. 707, 732-33 (2024). It is "the people in our democracy," not the government, who "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 (1978).

In this case, Yost exercised his fair-and-truthful review authority to trap Plaintiffs' petition summary in a Kafkaesque loop of edits. Each time, he would pick nits in Plaintiffs' summary, and then they would make the changes, again collect the 1,000 initial signatures required to obtain Yost's review, and resubmit. And then Yost would find something new to deem unfair and untruthful. On the sixth round, he objected to Plaintiffs' chosen title, "Protecting Ohioans' Constitutional Rights," because he disagreed with its point of view, even though he had said nothing about that title during several prior rounds. Yost's rejections prevented Plaintiffs not only from circulating their petition using their preferred summary language, but from circulating their petition at all. After years of missed election cycles, Plaintiffs filed this lawsuit. The district court

entered a preliminary injunction to permit Plaintiffs to advocate for their petition using their preferred language, without Yost's prior restraint.

Yost now requests an emergency stay from this Court by mischaracterizing both the law and the facts. He claims that the petition summary is actually the government's speech because it is certified by Yost and appears in an "official" petition. But this Court has flatly rejected the notion that the government can transform private speech into government speech merely by affixing an official seal. *Matal v. Tam*, 582 U.S. 218, 235 (2017). And Yost himself disclaims any association with Plaintiffs' efforts to amend the Ohio Constitution. By its very nature, a petition is a vehicle for private speech seeking redress from the government, not the other way around. The challenged provision "regulate[s] private expression," with no indication whatsoever that the "government intends to speak for itself." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022).

Yost also points to an irrelevant circuit split over whether the First Amendment applies to "neutral, procedural regulation[s]" of the ballot initiative process that "do[] not restrict political discussion or petition circulation." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring in the grant of stay). This case does not implicate that alleged split because Ohio's fair-and-truthful certification process *both* "restrict[s] political discussion" *and* blocks "petition circulation." There is nothing neutral or procedural about Yost's control over Plaintiffs' speech. Indeed, he rejected one summary because he disagreed with the viewpoint of its title.

Yost's description of his review as a "commonsense measure" designed to "protect[] the integrity of Ohio's initiative process," Appl. 4, is downright Orwellian in light of how he has actually exercised his authority in this case. Over a period of years, he has repeatedly blocked Plaintiffs from circulating their petition based on a series of objections to the content of their speech that were "increasingly dubious," *Brown v. Yost*, 122 F.4th 597, 622 (6th Cir. 2024) (en

banc) (Kethledge, J., dissenting), and "petty and self-contradictory," *id.* at 619 (Moore, J., dissenting). Yost's word games have nothing to do with safeguarding Ohio's elections and everything to do with his disagreement with Plaintiffs' speech.

Finally, Yost identifies no exigency that requires this Court's immediate attention. The district court's injunction merely permits Plaintiffs to gather signatures—engaging in core political speech in the context of petition circulation—during the pendency of the lawsuit. If Yost ultimately prevails, Plaintiffs concede that any signatures gathered in the meantime would be invalid. The cat could go back in the bag. On the other hand, staying the injunction would impose profound harm on Plaintiffs, who have already been waiting four years to circulate their petition using their desired summary.

In short, it is Yost's conduct, not Plaintiffs' petition summary, that is unfair and untruthful. The Court should deny the stay.

STATEMENT

I. Legal Background

The Ohio Constitution recognizes that "[a]ll political power is inherent in the people," who retain "the right to alter, reform, or abolish the[ir] [government], whenever they may deem it necessary." Ohio Const. art. I, § 2. Over 100 years ago, Ohioans ratified a constitutional provision specifically enshrining the right to propose ballot initiatives that amend the constitution. Ohio Const. art. II, §§ 1-1g. The state legislature may enact laws to "facilitate" the process, but it may in "no way limit[] or restrict[]" the ballot initiative right. *Id.* § 1g.

The Ohio Constitution requires the proponents of an amendment (hereinafter "petitioners") to obtain signatures from 10 percent of the State's electors before their proposed amendment is placed on the statewide ballot, *id.* § 1a—a number currently amounting to over 400,000 signatures, *see* Stay Appl. App. (hereinafter "App.") 22. Before petitioners undertake the process of collecting

these signatures, however, they are statutorily required to submit their proposed amendment, a summary of the amendment, and an initial 1,000 supporting signatures to the Ohio Attorney General, who then has 10 days to "conduct an examination of the ... summary." Ohio Rev. Code § 3519.01(A). The summary is used solely by petitioners to describe the proposed amendment to potential signatories during the circulation stage; the summary neither replaces the actual text of the proposed amendment, which is also included in the circulated petition, nor appears on the ballot. *See* Ohio Const. art. II, § 1g; *id.* art. XVI, § 1 (ballot language for proposed amendments is determined by ballot board).

If the Attorney General determines, "in [his] opinion," that "the summary [is a] fair and truthful statement[] of the proposed … constitutional amendment," he certifies the summary as such and submits it, along with the proposed amendment, to the ballot board. Ohio Rev. Code § 3519.01(A). The ballot board reviews the proposed amendment to determine whether it addresses only one subject and either approves it or subdivides it. *Id.* § 3505.062(A). The proposed amendment, summary, and certification then return to the Attorney General, who files them with the Secretary of State. *Id.* § 3519.01(A). pOnly at that point may petitioners circulate an "Initiative Petition" containing all three elements and begin collecting the hundreds of thousands of signatures necessary for placement on the ballot. *Id.* § 3519.05. The signatures must be submitted to the Secretary of State at least 125 days before the general election in order for the proposed amendment to appear on that election's ballot. Ohio Const. art. II, § 1a.

If the Attorney General rejects the summary as not fair and truthful, petitioners' only recourse under state law is to the Ohio Supreme Court. Ohio Rev. Code § 3519.01(C). Although the Ohio Supreme Court provides for expedited review in election-related cases when an action is filed "within ninety days prior to the election," Ohio S. Ct. R. Prac. 12.08(A)(1), the 125-day ballot

initiative deadline noted above means that rule is of no use for petitioners seeking review of the Attorney General's fair-and-truthful determination. Based on the Ohio Supreme Court's usual timeline for deciding cases, this lack of expedition makes it functionally impossible for petitioners to obtain review before the deadlines for completing the petition process in time to have their proposals appear on the ballot in the upcoming general election. It often takes the court months—sometimes over a year—to decide non-expedited original actions in mandamus. *See, e.g.*, *State ex rel. Lusane v. Kent Police Dep't*, 213 N.E.3d 681 (Ohio 2023) (decided 9 months, 30 days after filing); *State ex rel. Hunt v. City of E. Cleveland*, 220 N.E.3d 792 (Ohio 2023) (decided 1 year, 1 month, 18 days after filing).

II. Factual Background

Respondents (hereinafter "Plaintiffs") are Ohio citizens and members of an initiative petition committee seeking to propose two amendments to the Ohio Constitution. App. 22. The first, "Protecting Ohioans' Constitutional Rights," would create a private right of action against state government actors who deprive a person of state constitutional rights. *Id.* Plaintiffs began collecting signatures for this initiative four years ago. App. 23. Seven separate times, Plaintiffs gathered 1,000 signatures in support of their initiative and submitted their summary and proposed amendment to Applicant David Yost, Ohio's Attorney General. *Id.* Each time, Yost rejected Plaintiffs' summary as not fair and truthful. *Id.* His explanations for the rejections have been described by jurists as "increasingly dubious," *Brown v. Yost*, 122 F.4th 597, 622 (6th Cir. 2024) (*Brown II*) (en banc) (Kethledge, J., dissenting); "petty and self-contradictory," *id.* at 619 (Moore,

J., dissenting); and akin to the work of "an antagonistic copyeditor," App. 15 (opinion of Judge Graham).[1]

To give just a few examples, including both the picayune and the outright wrong: Yost rejected one proposed summary as unfair and untruthful because it said that a "public body or individual *employed by* a public body" would be liable for the deprivation of constitutional rights, which Yost said was untrue because the proposed amendment provides liability "against a 'public body' and a 'person *acting on behalf of*' a public body."[2] In another rejection, Yost claimed that the summary "misstate[d] the proposed amendment" because it stated that an employee could be terminated for a violation of Ohio's Constitution *and laws*, while the proposed amendment provides for termination for violations "only [of] the Constitution."[3] This rationale was demonstrably wrong: The proposed amendment stated, "A court's finding that an employee violated a right guaranteed by the *laws or* constitution of Ohio is just cause for terminating the employment…."[4]

After Yost had repeatedly faulted them for alleged minor deviations from the amendment text, Plaintiffs submitted a summary that tracked the language of the proposed amendment.[5] Yost

[1] Plaintiffs' submissions and Yost's rejections are available on the Ohio Attorney General's website, https://www.ohioattorneygeneral.gov/Legal/Ballot-Initiatives/Petitions-Submitted-to-the-Attorney-General-s-Offi.
[2] Letter from Dave Yost, Ohio Attorney General, to Chandni Patel (May 12, 2021 Rejection), https://www.ohioattorneygeneral.gov/getattachment/6205af5d-ac6d-48b4-b02e-d063a4f9939b/Civil-Action-for-Deprivation-of-Constitutional-Rights-Amendment.aspx.
[3] Letter from Dave Yost, Ohio Attorney General, to Kyle Pierce (June 2, 2023 Rejection), https://www.ohioattorneygeneral.gov/getattachment/80203270-c1b2-41a7-b687-6d1b86ff208c/Protecting-Ohioans-Constitutional-Rights-(Resubmission).aspx.
[4] Proposed Initiative Petition, Protecting Ohioans' Constitutional Rights (May 24, 2023 Submission), https://www.ohioattorneygeneral.gov/getattachment/b265dab7-b2b9-4bb7-92b7-d8a488770b4c/Protecting-Ohioans-Constitutional-Rights-(Resubmission).aspx.
[5] Proposed Initiative Petition, Protecting Ohioans' Constitutional Rights (Aug. 9, 2023 Submission), https://www.ohioattorneygeneral.gov/getattachment/fd21bd39-d20a-45ea-a007-3d26d3fe1240/Protecting-Ohioans-Constitutional-Rights-(Sixth-Submission).aspx.

rejected that summary as being *too* similar to the amendment,[6] even though he had previously approved a summary submitted by a different initiative committee that contained the language of the amendment verbatim.[7] Yost also claimed that "the summary mischaracterized the definition of 'political subdivision' as '*anybody* corporate or politic…', when the proposed amendment defined it as '*any body* corporate or politic….'"[8] He did not explain why the space mattered.

Yost rejected another summary because it stated that a lawsuit can be brought "in the Court of Common Pleas for the county where the public employee who is named as a defendant resides or works at the time the action is filed,"[9] which in Yost's view would "misle[a]d [potential signers] into believing that the proposed amendment limits the type and number of potential governmental defendants" by disallowing suit against multiple public employees.[10] Yost also faulted the summary for noting that a prevailing plaintiff can be awarded "reasonable attorney's fees," which Yost said was untruthful because it "omits that a prevailing party is entitled to those fees

[6] Letter from Dave Yost, Ohio Attorney General, to Kyle Pierce (Aug. 18, 2023 Rejection), https://www.ohioattorneygeneral.gov/getattachment/34e73670-3a03-477e-96d0-1f0c166df239/Protecting-Ohioans-Constitutional-Rights-(Sixth-Submission).aspx.
[7] *See* Letter from Dave Yost, Ohio Attorney General (June 24, 2022, Medical Right to Refuse Approval), https://www.ohioattorneygeneral.gov/getattachment/fd0735f9-ea48-499a-8202-bdef19385671/Medical-Right-to-Refuse.aspx; Proposed Initiative Petition, Medical Right to Refuse (June 15, 2022 Submission), https://www.ohioattorneygeneral.gov/getattachment/ad2172d4-47de-4845-ad01-6b3c6208d9b5/Medical-Right-to-Refuse.aspx.
[8] Letter from Dave Yost, Ohio Attorney General, to Kyle Pierce (Aug. 18, 2023 Rejection), https://www.ohioattorneygeneral.gov/getattachment/34e73670-3a03-477e-96d0-1f0c166df239/Protecting-Ohioans-Constitutional-Rights-(Sixth-Submission).aspx.
[9] Proposed Initiative Petition, Protecting Ohioans' Constitutional Rights (Nov. 8, 2023 Submission), https://www.ohioattorneygeneral.gov/getattachment/20d982b2-c311-4daf-abee-adf99eb2bea6/Protecting-Ohioans-Constitutional-Rights-(Seventh-Submission).aspx.
[10] Letter from Dave Yost, Ohio Attorney General, to Mark Brown, Esq. (Nov. 17, 2023 Rejection), https://www.ohioattorneygeneral.gov/getattachment/137a02b7-98be-4186-8a09-818ecc0a85b7/Protecting-Ohioans-Constitutional-Rights-(Seventh-Submission).aspx.

'regardless of whether the attorney provided services on an hourly, contingent, or pro bono basis.'"[11]

Yost based his sixth rejection, in March 2024, on the proposed amendment's title: "Protecting Ohioans' Constitutional Rights."[12] The previous four submissions had each included that same title without objection from Yost. But this time Yost took the position that the title was misleading because he disagreed with the "subjective hypothesis" that imposing liability for constitutional wrongdoing would help protect Ohioans' constitutional rights.[13] In addition to his complaint about the title, Yost asserted that readers would be confused by the summary's use of the phrase "all claims." Here is the purportedly misleading summary language and the relevant amendment provision:

Summary: "A claim made under this Amendment must be commenced no later than six years from the date that the deprivation of a constitutional right is alleged to have occurred. All claims must be commenced no later than six years from the date the alleged constitutional violation is alleged to have occurred."[14]	Amendment: "A claim made under this Section shall be commenced no later than six years from the date that deprivation of a constitutional right is alleged to have occurred."[15]

In each of his rejection letters, Yost asserted that his objections were "just a few examples of the summary's omissions and misstatements," reserving the right to raise additional problems

[11] *Id.*
[12] Letter from Dave Yost, Ohio Attorney General, to Mark Brown, Esq. (Mar. 14, 2024 Rejection), https://www.ohioattorneygeneral.gov/getattachment/70a9e57d-703f-47bd-bf05-e44d17aa4394/Protecting-Ohioans-Constitutional-Rights.aspx.
[13] *Id.*
[14] Proposed Initiative Petition, Protecting Ohioans' Constitutional Rights (Mar. 5, 2024 Submission), https://www.ohioattorneygeneral.gov/getattachment/719cd5e3-739a-4bf2-bb86-874e1fd22e08/Protecting-Ohioans-Constitutional-Rights.aspx.
[15] *Id.*

with future submissions.[16] In other words, making Yost's requested changes (and then obtaining another 1,000 signatures) would not suffice to ensure approval of the summary in the next round; Yost could, and indeed did, continue to block Plaintiffs from circulating their petition by identifying new, previously undisclosed objections each time they resubmitted.

Faced with the prospect of removing their chosen title and the likelihood that even that substantial revision to their summary would not prompt Yost to accept their next submission, Plaintiffs decided to challenge Yost's rejection of the March 2024 summary in the Ohio Supreme Court. But that court declined to expedite the proceedings, *see State ex rel. Brown v. Yost*, 229 N.E.3d 1216, 1216 (Ohio 2024) (table) (Mar. 26, 2024), which meant there would be no way for Plaintiffs to get a favorable ruling in time to meet the July 3, 2024, signature-collection deadline for placing their proposed amendment on the November 2024 election ballot.[17] Plaintiffs thus filed suit in the U.S. District Court for the Southern District of Ohio, arguing that the fair-and-truthful certification requirement, combined with the lack of timely judicial review, violated their First Amendment rights. App. 23. The district court initially denied preliminary injunctive relief. *Brown v. Yost*, No. 2:24-cv-1401, 2024 WL 1793008, at *13 (S.D. Ohio Apr. 25, 2024). A Sixth Circuit panel reversed, holding that the fair-and-truthful certification requirement likely violated Plaintiffs' First Amendment rights by forcing them to change the content of their summary and thereby interfering with their speech during the circulation process. *Brown v. Yost*, 103 F.4th 420, 425-26 (6th Cir.) (*Brown I*), *vacated*, 104 F.4th 621, 622 (6th Cir. 2024) (en banc). Yost's petition for rehearing en banc was granted, vacating the panel opinion. The vacatur of the panel's

[16] *E.g.*, Letter from Dave Yost, Ohio Attorney General, to Mark Brown, Esq. (Nov. 17, 2023 Rejection), https://www.ohioattorneygeneral.gov/getattachment/137a02b7-98be-4186-8a09-818ecc0a85b7/Protecting-Ohioans-Constitutional-Rights-(Seventh-Submission).aspx.

[17] After nearly two months passed with no further action from the Ohio Supreme Court, Plaintiffs dismissed their state action, as it had become futile.

preliminary injunction foreclosed any possibility of Plaintiffs obtaining the requisite signatures in time to qualify their proposed amendment for the 2024 general election ballot.

In July 2024, while the en banc case was pending, Plaintiffs decided to give the fair-and-truthful review process an eighth try: After collecting another 1,000 signatures, they resubmitted their summary, revised to address Yost's purported concerns by accepting his latest edits and removing the title altogether.[18] Yost responded by rejecting the submission for lacking a title. App. 23. Plaintiffs again filed a challenge in the Ohio Supreme Court, which again refused to expedite review. *State ex rel. Brown v. Yost*, 239 N.E.3d 408, 408 (Ohio 2024) (table).

On the day of the Sixth Circuit en banc oral argument, the Ohio Supreme Court issued a decision in an unrelated case holding that Yost's fair-and-truthful review did not include authority to review the titles of proposed ballot initiatives. *See State ex rel. Dudley v. Yost*, 250 N.E.3d 50, 60 (Ohio 2024).[19] That court accordingly remanded Plaintiffs' state law challenge to Yost so that he could reconsider their title-less July 2024 summary and proposed amendment. *State ex rel. Brown v. Yost*, 245 N.E.3d 798 (Ohio 2024) (table). During Yost's 10-day review period, the Sixth Circuit issued an en banc per curiam opinion holding that Plaintiffs' original preliminary injunction motion was moot because it sought relief targeted at the November 2024 election, which had now passed. *Brown II*, 122 F.4th at 602. Recognizing that Plaintiffs' First Amendment challenge remained live, however, the en banc court remanded the case to the district court for further proceedings. *Id.* Shortly thereafter, Yost certified Plaintiffs' July 2024 summary and forwarded

[18] Proposed Initiative Petition for Constitutional Amendment (July 5, 2024 Submission), https://www.ohioattorneygeneral.gov/getattachment/6c5240b1-cd0e-4cef-99ee-b8263ea7ba67/Untitled-Petition-for-Constitutional-Amendment.aspx.

[19] The Ohio legislature subsequently amended the law to extend the Attorney General's review to titles of summaries certified after April 9, 2025. *See* Ohio Rev. Code § 3519.01(A), (D).

their petition to the ballot board, which confirmed that the proposed amendment complied with the single-subject rule. App. 24.

III. Preliminary Injunction Decision

On remand to the federal district court, Plaintiffs amended their complaint. They continued to argue that the fair-and-truthful certification requirement violates the First Amendment by empowering Yost to review and reject the content of the summaries they prepare and use to communicate with potential signatories about their proposed initiative, which is quintessential political speech. But the factual basis for their claims changed. Although Yost had now certified and advanced their July 2024 petition, his rejections of their previous summaries had caused them to make unwanted changes to the July 2024 summary, including omitting the title, removing a reference to the title in the body of the summary, and rewording the description of the statute of limitations. App. 6-7. Plaintiffs thus sought relief in the form of an order requiring Yost to certify their preferred March 2024 summary for use in the petition circulation process. App. 7. The amended complaint also explained that Plaintiffs planned to propose a second constitutional amendment, entitled the "Ohio Wrongful Conviction and Justice Reform Amendment," and were in the process of gathering the 1,000 signatures needed to submit their petition to Yost. *Id.* With respect to this proposed amendment, Plaintiffs requested a pre-enforcement injunction prohibiting Yost from exercising his fair-and-truthful review authority over Plaintiffs' summary. *Id.*

The district court granted Plaintiffs' motion for a preliminary injunction. App. 1-17. Believing it was bound by Sixth Circuit precedent to apply the *Anderson-Burdick* framework to Plaintiffs' challenge, the court began "by weighing 'the character and magnitude of the burden the State's rule imposes' on a plaintiff's First Amendment rights against 'the interests the State contends justify that burden,'" considering "the extent to which the State's concerns make the burden necessary." App. 10 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358

(1997)). Here, the court explained, the burden on Plaintiffs' First Amendment interests is "severe." App. 12. Section 3519.01 "expressly directs the Attorney General to review the content of the summary written by [P]laintiffs," which is "a statement or expression of the political change for which [P]laintiffs advocate." App. 10-11. The summary thus "unavoidably conveys a political message" that the fair-and-truthful review provision authorizes Yost "to reject … based on its content," with "[n]o express standards guid[ing] or restrain[ing]" his assessment of "what is fair or truthful." App. 11. By "subject[ing] one component of [P]laintiffs' speech—the summary they compose and circulate to potential signers of their petition—to the state's editorial review," the fair-and-truthful certification requirement empowers Yost to "effectively control[] the message" Plaintiffs seek to communicate to potential supporters, severely burdening their speech. App. 12 (internal quotation marks omitted). And when Yost refuses to certify a summary, it "prevents [P]laintiffs from advancing their amendment to the next step of the initiative process," a burden "exemplifie[d]" here by Yost's repeated rejection of Plaintiffs' summaries based on his "subjective evaluations of what was fair and truthful." *Id.*

The district court rejected Yost's argument that Plaintiffs' summary "represents government speech and not the speech of [P]laintiffs," which would render the First Amendment inapplicable. App. 12-13. This argument was "unconvincing in light of the factors which distinguish government speech from private speech: the degree of government control, the history of the type of expression, and public perception of who is speaking." App. 13. While the State "maintains tight control over ballots," it does "far less so with petitions," which "are produced and circulated by citizens," and for which citizens write the summary. *Id.* Citizen petitions also historically serve citizen purposes: They give "proponents a natural opportunity to engage and persuade the public and thereby generate the needed basis of support." *Id*. Finally, while citizens

"expect a certain sanctity to the polling place, free from intrusion by private speech," "the petition circulator and the common citizen at a town square or public market carry no such expectation." *Id*. To the contrary, a "public forum by tradition allows for 'uninhibited, robust, and wide-open debate on public issues.'" *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)). All of the factors thus confirmed that the summaries on citizen petitions are citizen speech, not government speech. *Id.*

The district court also rejected Yost's argument that the government's interest in deterring fraud and confusion justifies the burden imposed on Plaintiffs' political speech by the fair-and-truthful certification requirement. Although the State's interest in protecting the public from election-related fraud and confusion is "generally recognized as compelling," the certification requirement is not narrowly tailored to advance that interest. App. 14. The certification "is not necessary to ensure that potential signers can determine the nature of what they are being asked to support," as "[t]he petition itself must contain the full text of the proposed amendment." *Id.* And "our democracy relies on its citizens … to be able to sift through political speech and decide what is fair, what is truthful, and what change is desirable." App. 14-15. Yost's denials of Plaintiffs' summaries, moreover, demonstrated that even in practice Yost did not use the least restrictive means to deter fraudulent summaries, but rather "played the role of an antagonistic copyeditor" who "went beyond ensuring that citizens could ascertain what they were being asked to support." App. 15.

Finally, the district court found the remaining preliminary injunction factors supported granting Plaintiffs' motion. App. 16-17. Although Yost argued that Plaintiffs would not be irreparably harmed absent injunctive relief because they now "lack[ed] a realistic hope" of gathering enough signatures to make the deadline for the November 2025 ballot," the district court

found that "they have a protectible First Amendment interest in having the opportunity to try." App. 17. And "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Id.* (quoting *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989)).

Yost filed a notice of appeal and the district court, in a "confounding" decision, App. 25, granted Yost's motion for a stay of the preliminary injunction pending appeal, App. 18-19. Plaintiffs then filed a motion in the Sixth Circuit to lift the stay, which was granted in a 2-1 panel decision. App. 20-55. The Sixth Circuit agreed with the district court that Plaintiffs are likely to succeed on the merits of their claim, but explained that this was true even without applying the *Anderson-Burdick* framework. App. 26-32. Under *Meyer v. Grant*, 486 U.S. 414 (1988), the circulation of ballot-initiative petitions is recognized as core political speech for which First Amendment protection is "at its zenith": "The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421, 425. The Sixth Circuit explained that the petition summary "is a form of advocacy material used by initiative supporters" to effectuate that political expression and discussion, App. 27, and that the fair-and-truthful certification requirement thus empowers the Attorney General to editorially control the content of Plaintiffs' political speech, something he has done with "a heavy hand" in practice, App. 28. All of this raised "serious First Amendment concerns." App. 29.

The Sixth Circuit rejected Yost's argument that the First Amendment is not implicated by the certification requirement because it is "just one of the rules governing the process for enacting laws by direct democracy." App. 30 (internal quotation marks and ellipses omitted). The court explained that Yost's fair-and-truthful review authority "is unlike most reasonable,

nondiscriminatory rules affecting the ballot-initiative process because it concerns the content of a summary that is used as part of petitioners' advocacy in support of a proposed amendment." *Id.* The summary is instead akin to "the protected advocacy documents that petition supporters use to promote initiatives," which the Supreme Court recognized as "protected by the First Amendment" in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). *Id.* The court also rejected Yost's assertion that the petition summary is government speech, observing that none of the factors for ascertaining whether speech can be attributed to the government supported Yost's claim. App. 30-31.

Like the district court, the Sixth Circuit recognized the State's significant interest in combatting voter fraud but found no evidence that "the content-based review undertaken by the Attorney General is narrowly tailored to achieve [that] purpose." App. 31. The panel concluded that Plaintiffs are thus "likely to succeed on their claim that the fair-and-truthful certification process violated their First Amendment rights" under *Grant* and *McIntyre*. App. 32. In the alternative, the Sixth Circuit agreed with the district court that the fair-and-truthful certification requirement fails scrutiny under *Anderson-Burdick*. App. 32-34.

The court of appeals found that the remaining stay factors also favored lifting the stay. The court observed that "Plaintiffs need to collect more than 400,000 signatures in less than three months to have a chance at making the ballot." App. 35. But "[w]hile the stay is in place, Yost need not send Plaintiffs' preferred initiative summary to the ballot board for approval, leaving Plaintiffs unable to begin circulating their petition and collecting signatures in support of the proposed ballot amendment." *Id.* "Even if Plaintiffs have no First Amendment right to put their proposed constitutional amendment on the ballot," the court explained, "they are unquestionably, irreparably harmed by the limitation on the time in which they can try." *Id.* Yost, by contrast, failed

to identify any meaningful harm to the State from allowing Plaintiffs to circulate and collect signatures while the litigation proceeds. "Plainly, Plaintiffs prevail on the equities here." App. 36.

The Sixth Circuit denied Yost's motion for initial en banc review but set an expedited briefing schedule. Yost's principal brief is due April 23, 2025; Plaintiffs' principal brief is due May 7, 2025; and Yost's optional reply brief is due 7 days after Plaintiffs file their brief.

STANDARD OF REVIEW

"A stay is an intrusion into the ordinary processes of administration and judicial review and accordingly is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Id.* at 433-34. In deciding whether to grant a stay, this Court considers "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA*, 603 U.S. 279, 291 (2024) (citing *Nken*, 556 U.S. at 434). The applicant must also demonstrate a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," which is a prerequisite to ultimate success on the merits in this Court. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see also Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

ARGUMENT

I. There Is No Emergency Warranting Extraordinary Relief.

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). Stays pending appeal are designed to address "the dilemma" that arises "when there is insufficient time to resolve the merits and irreparable harm may result from delay." *Nken*, 556 U.S. at 432.

Yost's failure to identify any irreparable harm justifying his demand for emergency relief is reason alone to deny the application.

All that will happen under the preliminary injunction is that Plaintiffs will be able to collect signatures for their initiatives using their desired summary language during the pendency of the litigation. The Sixth Circuit has ordered expedited briefing to ensure that its decision is rendered well before ballots are printed for the November 2025 election. If Yost ultimately prevails and the challenged certification requirement is upheld, then Plaintiffs will have to start over, either by seeking Yost's approval of their preferred summaries or by moving forward solely with the July 2024 summary that Yost already approved. The only cost would be Plaintiffs' wasted effort, which is not a reason to grant Yost a stay.

If this Court stays the preliminary injunction, however, Plaintiffs will face irreparable injury: After four years of delay due to Yost's repeated summary rejections, Plaintiffs will once again be unable to circulate their petitions using their preferred summaries and unable to attempt to meet the July signature collection deadline for placing their proposed amendments on the ballot for November's general election. There will be no way to unwind this injury if Plaintiffs ultimately prevail on their challenge—at best, they will be able to try for the November 2026 election. If "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion), then surely constraining Plaintiffs' First Amendment rights for a fifth year qualifies. This First Amendment injury would persist even if Plaintiffs capitulated to Yost's editorial control and circulated their first proposed amendment with the July 2024 summary that Yost approved. Because that summary does not include Plaintiffs' preferred title or language, it reflects the "inability to advocate for and speak about the proposed amendment how they wish" that constitutes

a "continuing, present" First Amendment harm. *Brown I*, 103 F.4th at 430 (internal quotation marks omitted).

Yost barely argues otherwise. His irreparable injury argument is two paragraphs long and relies primarily on the generalized claim that states are always irreparably injured by orders enjoining state law. Appl. 27. But a state suffers no harm when it is enjoined from enforcing an unconstitutional law. *See, e.g.*, *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd*., 354 F.3d 249, 261 (4th Cir. 2003) (government "is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing" a policy that "is likely to be found unconstitutional"). In any event, the preliminary injunction is party-specific. This is not an injunction that has any impact on the State's enforcement of the certification requirement beyond Plaintiffs' summaries of the two proposed amendments identified in their preliminary injunction motion. App. 17. The certification requirement remains in force for all other proposed amendments. And as noted above, all the injunction does is allow Plaintiffs to circulate their petitions with their desired summaries right now, while the case is pending; it does not establish whether those signatures will ultimately be considered valid.

Finally, Yost provides no support for his suggestion that Ohio voters might be confused by Plaintiffs' preferred summary of their first proposed amendment if Plaintiffs are allowed to proceed with circulation. Appl. 27-28. The only difference between Plaintiffs' preferred summary and the summary approved by Yost is that it contains Plaintiffs' chosen title—"Protecting Ohioans' Constitutional Rights"—and a few small wording changes. *See Brown II*, 122 F.4th at 614 (Moore, J., dissenting) (describing Yost's edits as "a nit or two"). The notion that those differences will confuse voters is implausible, especially given that the full text of the proposed amendment is circulated alongside the summary, *see* Ohio Rev. Code § 3519.05(A), and circulators are available

to answer any questions. And even if any confusion did arise, it would be far from irreparable, as Yost may use his own public platform to address it.

The Court need go no further: Because Yost "has not demonstrated irreparable harm" and because the balance of the equities tips strongly in Plaintiffs' favor, Yost's stay application should be denied. *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring).

II. The State Is Unlikely to Succeed on the Merits.

Even if Yost had not wholly failed to establish the irreparable harm necessary to justify his emergency application, a stay would be improper because he is unlikely to succeed on the merits.

As the Sixth Circuit explained, Plaintiffs' "petition summary is a form of advocacy material used by initiative supporters to persuade electors to sign their petition," App. 27, and thus constitutes "core political speech," *id.* (quoting *Grant*, 486 U.S. at 422). By vesting the Attorney General with editorial control over that private political speech, the fair-and-truthful certification requirement runs roughshod over the First Amendment. Nothing is more antithetical to the First Amendment than a law permitting government officials to censor political speech they do not think is "fair." *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 21-22 (2018); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790-91 (1978). It is "the people in our democracy," not the government, who "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791.

Moreover, the fair-and-truthful certification requirement, as applied to Plaintiffs, has functioned as a practically impassable roadblock barring access to petition circulation. As this Court has explained, "First Amendment protection" is "at its zenith" for "circulation of ballot-initiative petitions," which involves "interactive communication concerning political change." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186-87 (1999) (*ACLF*) (internal quotation marks omitted) (quoting *Grant*, 486 U.S. at 422, 425). At a minimum, the burden that Yost's

review imposes on the petition circulation process is subject to First Amendment scrutiny under the *Anderson-Burdick* balancing test, and the fair-and-truthful certification requirement flunks that test as well.

A. The Summary Certification Requirement Violates the First Amendment by Directly Restricting Core Political Speech.

Yost's stay application concedes most of the main issues on the merits. He recognizes that "States that choose to have an initiative process cannot abridge private speech during the process." Appl. 17. And he admits that "the 'freedom of speech' includes the right to communicate during an initiative campaign." *Id.* Accordingly, he acknowledges that "laws that regulate or restrict the communicative conduct of persons advocating a position as to an initiative ... implicate the First Amendment." Appl. 18 (internal quotation marks omitted) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006)). Those uncontested propositions resolve this case. The fair-and-truthful certification requirement gives Yost editorial control over private speech during the initiative process and is therefore unconstitutional.

1. The petition summary is private speech. It is written by the private citizens who propose an initiative, and it is used solely for the purpose of communicating with voters during petition circulation. This Court has held that "the circulation of a petition involves the type of interactive communication concerning political change"—including "both the expression of a desire for political change and a discussion of the merits of the proposed change"—"that is appropriately described as 'core political speech.'" *Grant*, 486 U.S. at 421-22; *see also Brown II*, 122 F.4th at 623 (Kethledge, J., dissenting) (explaining that petition circulation "is itself core political activity protected by the First Amendment"). The summary is exactly that sort of core political speech because it "is the leading description of the proposed amendment that initiative circulators can rely on to persuade the public to sign the petition." App. 27.

Yost suggests that the First Amendment does not cover petition summaries because they are used as part of a "legislative process." Appl. 19. But this Court has squarely rejected the notion that speech is unprotected merely because it bears some relationship to lawmaking. For instance, the Court held that "compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment" because the act of signing a referendum petition "expresses a view on a political matter." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Although signing a referendum petition may be a "legally operative legislative act," the Court "d[id] not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment." *Id.* at 195. Nor is Yost's review of summaries a matter of legislative "mechanics." Appl. 17. Yost's editorial control over petition summaries has a more direct effect on protected private speech than the ban on paid petition circulators that this Court struck down in *Grant*, notwithstanding the procedural nature of that law.

It is true, of course, that no one has a First Amendment right to enact any particular law, Appl. 18, but Plaintiffs assert no such right. They do not claim a right to place their proposed constitutional amendments on the ballot or to have their proposals adopted by the electorate. Plaintiffs seek only the opportunity to communicate with potential signatories using their chosen message. Crucially, "[t]he petition summary is not the text of the initiative, nor is it the language that will appear on the ballot." App. 27. Rather, the summary merely describes the proposed initiative to potential petition signatories. Yost is thus wrong to compare the summaries to the content of bills in the legislature. Appl. 21-22. The text of Plaintiffs' proposed amendments may be akin to a bill, but the summary is more like a legislator's speech on the steps of the Statehouse aimed at drumming up support for his legislative agenda. Surely that is protected by the First Amendment.

Yost also suggests, in rather noncommittal terms, that the summary may be the government speech: "It *perhaps* helps to think of things through the lens of the government-speech doctrine." Appl. 19 (emphasis added). But as the district court and Sixth Circuit both found, the government-speech doctrine does not apply—or even *perhaps* apply—to the petition summaries at issue here. *See* App. 12-13, 30-31. Yost's claim that he can convert Plaintiffs' private speech about their initiative petition into government speech merely by slapping a certification on it is a "dangerous misuse" of the government-speech doctrine. *Matal v. Tam*, 582 U.S. 218, 235 (2017). Indeed, this Court has emphatically rejected Yost's theory: "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id.*

To distinguish between private speech and government speech, the Court "conduct[s] a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). As part of that inquiry, the Court looks to three factors: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.* Consideration of those factors "is not mechanical" and must be "driven by a case's context." *Id.* At bottom, "the real question in government-speech cases" is always "whether the government is *speaking* instead of regulating private expression." *Id.* at 262 (Alito, J., concurring).

Governments have not historically used citizen petitions "to speak to the public." *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (public monuments); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209-12 (2015) (license plates). Quite the opposite: the whole point of a petition is for the public to seek recompense from the government.

Before the Founding, "the primary responsibility of colonial assemblies was the settlement of private disputes raised by petitions," resulting in a "dialogue of petition and response between inhabitants and colonial assemblies." Note, Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 145 (1986). Indeed, "[t]his process originated more bills in pre-constitutional America than any other source of legislation." *Id.* at 144. Recognizing the power of petitions, the Framers enshrined the right "to petition the Government for a redress of grievances" in the First Amendment, alongside the freedom of speech. U.S. Const. amend. I. Ohio's ballot initiative process relies on petitions in this traditional sense. In the Ohio Constitution, "the people reserve to themselves ... the power to adopt or reject any law" and "to propose amendments to the constitution and to adopt or reject the same at the polls." Ohio Const. art. II, § 1. And that "power reserved by the people" is exercised through "a petition to propose an amendment to the constitution." Ohio Const. art. II, § 1a. Based on that history, it is a contradiction in terms to say that a citizen petition is the government's speech.

Nor are people who observe citizen petition summaries likely to "interpret them as conveying some message" on the government's behalf. *Summum*, 555 U.S. at 471. In the certification that appears alongside the summary on an initiative petition, Yost states: "I hereby certify that the summary is a fair and truthful statement of the proposed constitutional amendment." Letter from Dave Yost, Ohio Attorney General, to Mark Brown, Esq. (Nov. 25, 2024 Approval), https://www.ohioattorneygeneral.gov/getattachment/86455195-2145-42c5-97e4-4520a47cf483/Untitled-Petition-for-Constitutional-Amendment.aspx; *see* App. 31. Contrary to Yost's suggestion, Appl. 20, that phrasing plainly conveys that he has reviewed the summary, not that he is the summary's author. What's more, Yost "ma[kes] it clear" that his certification "does not constitute approval" of the petition. *Tam*, 582 U.S. at 237. His statement certifying a summary

specifies that he does so "[w]ithout passing on the advisability of the approval or rejection of the measure to be referred." App. 31 (alteration in original). He even acknowledges having certified summaries for amendments "that he personally disagrees with." Appl. 6. There would be no reason for a member of the public to think that the petition summary speaks "on the government's behalf." *Shurtleff*, 596 U.S. at 255 (internal quotation marks omitted) (quoting *Walker*, 576 U.S. at 212).

Finally, the government does not maintain the kind of control over the summary that this Court has associated with government speech. To be sure, in this case, Yost "has played the role of an antagonistic copyeditor," App. 15, blocking Plaintiffs from circulating their petition "on grounds increasingly dubious," *Brown II*, 122 F.4th at 622 (Kethledge, J., dissenting). But even Yost's pretextual nitpicking of Plaintiffs' summaries does not "set[] the overall message to be communicated." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005). Yost himself claims to remain "entirely agnostic as to the content and subject matter of any given amendment." Appl. 24 (internal quotation marks and alteration omitted) (quoting *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022)). And he describes his powers of review as "binary"—accept or reject—with no option to "redline a submitted summary." Appl. 21.

The bottom line is that the government, through its fair-and-truthful review, "regulate[s] private expression," without "speak[ing] for itself." *Shurtleff*, 596 U.S. at 252. By definition, a petition is "a formal written request made to an authority" or "a written request or call for change signed by many people in support of a shared cause or concern." *Petition*, Merriam-Webster's Online Dictionary, www.merriam-webster.com/dictionary/petition. It defies common sense that Yost's imprimatur could transform a petition summary written by private citizens into the government's speech.

2. Because the summary is private political speech, Plaintiffs' challenge to the fair-and-truthful certification requirement is governed by this Court's decision in *Meyer v. Grant*, 486 U.S. 414. In *Grant*, this Court reviewed a Colorado law that made it a felony to pay petition circulators. *Id*. at 416. It concluded that the case "involve[d] a limitation on political expression subject to exacting scrutiny." *Id.* at 420. Because "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change," the Court explained, the "interactive communication concerning political change" associated with collecting signatures for a proposed ballot initiative constituted "core political speech." *Id.* at 421-22. The Court found that the ban on paid petition circulators restricted political expression by "limit[ing] the number of voices who will convey" the proponents' message and therefore "the size of the audience they can reach," as well as by "limiting [proponents'] ability to make the matter the focus of statewide discussion." *Id.* at 422-23. Since the State's law infringed protected political expression, it was subject to "exacting scrutiny," which the State's purported interest in safeguarding the "integrity" of the initiative process failed to satisfy. *Id.* at 420, 425. The Court reached that conclusion even though "other avenues of expression remain[ed] open" to the organizers of the petition and even though "the power of the initiative is a state-created right." *Id.* at 424.

The restriction in this case is, if anything, more severe. Plaintiffs cannot circulate their petition until Yost approves the speech they will use in attempting to persuade potential signatories to support their cause. This has required them to reshape their preferred political messaging time and again in an attempt to satisfy the State's editorial control. And it has denied them the opportunity to engage in the sort of "interactive communication concerning political change" that "the circulation of a petition involves." *Id.* at 421-22. As in *Grant*, this restriction on speech is not

permissible just because "other avenues of expression remain open" to the initiative's proponents. *Id*. at 424. This Court has explained that a provision that "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse" and prevents the proponents from "select[ing] what they believe to be the most effective means for" advocating for their cause violates the First Amendment. *Id.*

The First Amendment's broad protections "reflect[] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *FEC v. Cruz*, 596 U.S. 289, 302 (2022) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Governmental restrictions on "the discussion of political policy generally or advocacy of the passage or defeat of legislation" are "wholly at odds with the guarantees of the First Amendment." *Grant*, 486 U.S. at 428 (internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 48, 50). Because restrictions that burden this First Amendment right are "always subject to exacting judicial review," *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981), the fair-and-truthful certification provision triggers strict scrutiny. *See Grant*, 486 U.S. at 420.

3. The content-based nature of Yost's fair-and-truthful review independently triggers strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A provision is a "direct regulation of the content of speech" if "the category of covered [speech] is defined by [its] content" or if the provision requires the speech to contain certain information. *McIntyre*, 514 U.S. at 345-46. The fair-and-truthful provision is content based because Yost decides whether to approve the summary based on his opinion of its contents. *See* Ohio Rev. Code § 3519.01. Yost himself admits that he "cannot conduct fair-and-truthful review without reviewing the summary's content." Appl. 21. And in practice, Yost *has* prevented Plaintiffs from using their chosen summaries based on their content. For instance, he objected to the title of Plaintiffs' proposed amendment—"Protecting

Ohioans' Constitutional Rights"—"because he did not agree that removing qualified immunity would protect citizens' constitutional rights." App. 28. Indeed, Yost's objection to the title likely constituted viewpoint discrimination, "an egregious form of content discrimination" that punishes speech based on "the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

4. Under strict scrutiny, the government bears the burden of demonstrating that the law is narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 163; *see also ACLF*, 525 U.S. at 207 (Thomas, J., concurring) (laws that "directly regulate[] core political speech" have always been subject to "strict scrutiny" and must be "narrowly tailored to serve a compelling governmental interest"). A law restricting speech that "does not 'avoid unnecessary abridgment'" of the First Amendment "cannot survive 'rigorous' review." *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (quoting *Buckley*, 424 U.S. at 25).

Yost's stay application does not even attempt to argue that the fair-and-truthful provision, as applied to Plaintiffs' summaries, satisfies strict scrutiny. And it is evident, based on the "petty and self-contradictory" reasons Yost has given for his rejections, *Brown II*, 122 F.4th at 619 (Moore, J., dissenting), that his review is not narrowly tailored to serving any compelling interest. *See supra* pp. 5-9 (providing examples of Yost's rejection rationales). As a general matter, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control*, 454 U.S. at 299. It is "the people in our democracy," not the government, who "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791. Although "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process," Yost's editorial control "significantly inhibit[s] communication with voters about proposed

political change, and [is] not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *ACLF*, 525 U.S. at 191-92.

Moreover, as both the district court and Sixth Circuit explained, while the government certainly has an interest in preventing fraud in the ballot-initiative process, Yost's review is not remotely, let alone narrowly, tailored to serve that interest. App. 14-16, 31, 33-34. Yost cannot seriously contend that his summary rejections in this case were intended to prevent fraud. For instance, as the district court carefully documented, Yost rejected one version of the summary because it referred to government entities without mentioning "subset[s]" of government entities, then rejected the next version because he thought the "subset" language added at his own behest was confusing based on the placement of a comma. App. 15. In another, he faulted the summary for removing a space.[20] Yost rejected Plaintiffs' summaries again and again without identifying anything even remotely approaching a material misstatement. *See supra* pp. 5-9.

Even if the certification requirement is evaluated on its face, it is substantially broader than necessary to serve the government's interests. Yost's review is not restricted to fraud but extends to whether in his view a summary is "fair," a term so capacious that it is ripe for misuse and abuse. *See Mansky*, 585 U.S. at 21-22. And nothing prevents Yost from raising new purported concerns each time he reviews a summary, even if he could have raised them previously. *See supra* p. 9. This unfettered discretion can—and did, in Plaintiffs' case—lead to repeated rejections that trap proponents in an infinite loop from which their speech cannot escape.

In addition, other existing tools are more than sufficient to prevent fraud, rendering the fair-and-truthful certification requirement superfluous for that purpose. As this Court has

[20] Letter from Dave Yost, Ohio Attorney General, to Kyle Pierce (Aug. 18, 2023 Rejection), https://www.ohioattorneygeneral.gov/getattachment/34e73670-3a03-477e-96d0-1f0c166df239/Protecting-Ohioans-Constitutional-Rights-(Sixth-Submission).aspx.

previously explained, Ohio's "Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns." *McIntyre*, 514 U.S. at 349; *see* Ohio Rev. Code § 3517.22. Yost could also use his own public platform to correct any disinformation. And any risk of deception is substantially reduced given that the summary is used only to assist in collecting signatures, when political speech interests are at their "zenith," rather than at the time of balloting. *ACLF*, 525 U.S. at 186-87, 203. Voters receive a different title and summary, prepared by the ballot board, when ultimately deciding whether to vote for the initiative. The certification requirement thus fails to satisfy strict scrutiny.

B. Even if Evaluated under the *Anderson-Burdick* Framework, the Summary Provision Is Unconstitutional.

As the Sixth Circuit explained, because the fair-and-truthful certification requirement interferes with core political speech under *Grant*, it violates the First Amendment without regard to the *Anderson-Burdick* framework. App. 27-32. But it also fails scrutiny under the *Anderson-Burdick* balancing test, which "weigh[s] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). "When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest," whereas "lesser burdens trigger less exacting review." *ACLF*, 525 U.S. at 206-07 (Thomas, J., concurring). Even if the fair-and-truthful certification requirement were not a direct restriction on core political speech, it would still fail *Anderson-Burdick* review because it places a severe and unjustifiable burden on Plaintiffs'

ability to engage in speech during the circulation process. Indeed, the provision gives Yost the power to block access to the circulation process entirely.

1. The summary provision imposes substantial burdens on Plaintiffs' speech. Yost's highly discretionary review gives him the power to unilaterally block initiative sponsors from engaging in petition circulation, which this Court has recognized as a unique avenue for political discourse. *See Grant*, 486 U.S. at 421-22.

Yost concedes that "laws addressing the ballot access of candidates will impose severe burdens if they have the effect of excluding, or virtually excluding, candidates from the ballot." Appl. 23. Yost's capacious review of summaries does exactly that for initiative petitions. As long as Yost is blocking a summary, petitioners may not circulate their petition at all. That means they cannot "access ... the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication" during petition circulation. *Grant*, 486 U.S. at 424. Nor can petitioners "garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.* at 423.

Yost's attempts to downplay the burdens are unpersuasive. First, Yost implies that because states need not permit ballot initiatives at all, burdens in the initiative context are categorically less severe than burdens on candidates for office. Appl. 23. But that proves too much. Most candidate elections are optional for states as well; the federal Constitution does not require states to hold popular elections for President, governor, or state legislature. And yet this Court has recognized that burdens on ballot access in those elections can trigger constitutional scrutiny. *E.g.*, *Anderson*, 460 U.S. at 806 (striking down an Ohio law restricting ballot access for independent presidential candidates).

Second, Yost notes that Plaintiffs are now permitted to circulate the July 2024 version of their summary. Appl. 23. But as the Sixth Circuit found, Yost's approval of that summary "hardly diminishes the burden." App. 34. Because that July 2024 summary lacks a title, if Plaintiffs were to proceed with circulating that version, it would "leave the initiative subject to challenge later in the process." *Id.* In any event, it took Plaintiffs several years and numerous tries to obtain that approval for their proposed amendment, and who knows how long it might take for them to obtain Yost's approval for the summary of their new proposed amendment concerning wrongful convictions.

Third, Yost falsely states that his summary review "does nothing to limit who may circulate initiative petitions or otherwise advocate in favor of a proposed amendment." Appl. 24. But as long as he is blocking a summary, no one may circulate an initiative petition. And no one may advocate for the proposed amendment in the context of petition circulation, which this Court's precedent recognizes as a uniquely powerful avenue for political speech. *See Grant*, 486 U.S. at 421.

Finally, Yost glosses over the lack of timely, de novo review in the Ohio Supreme Court, which might otherwise provide a check on his unfettered discretion to block petition circulation. Yost says that "to the extent initiative proponents disagree with the Attorney General's determination, they have a statutory right to challenge that determination directly in the Supreme Court of Ohio." Appl. 24 (citing Ohio Rev. Code § 3519.01(C)). But that right is illusory. He fails to note that the Ohio Supreme Court does not provide for expedited review in cases involving petition summaries, meaning that seeking judicial review of a summary rejection can cost initiative sponsors an entire election cycle or more. *See supra* p. 5. That is itself a heavy burden. Indeed, in

this case, Plaintiffs sought judicial review in both the Ohio Supreme Court and in federal court but did not receive a decision in time for the 2024 election. *See supra* pp. 10-11.

2. As discussed above, the fair-and-truthful certification requirement does little to advance Ohio's legitimate interests in avoiding voter confusion and preventing election fraud. The summary never appears on any ballot—the ballot board drafts the language that does, *see supra* p. 4—so it is unlikely that a voter at a polling place would consult the petition summary for information in deciding how to cast her ballot. At the petition stage, potential signatories have access to the text of the proposed amendment, making it unlikely that they will be led astray by the summary. Ohio Const. art. II, § 1g; Ohio Rev. Code §§ 3519.01(A), 3519.05(A). And more to the point, there was nothing misleading about the summaries that Yost rejected. Yost's representations about combatting fraud and promoting transparency, Appl. 25, ring hollow given the triviality of his rejections. He blocked Plaintiffs' summaries for "having duplicative language, placing a modifying phrase after a comma, not being 'concise' enough, not adequately describing which courts would have venue of the right of action the amendment would create, not sufficiently explaining the amendment's impact on an award of attorney's fees to a prevailing plaintiff, and using the word 'protect' in describing the amendment's purpose of protecting Ohioans' rights." App. 12; *see also supra* pp. 5-9. No compelling state interest supports those pretextual denials. "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 61 n.13 (1984) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

3. The substantial burden that the certification requirement imposes on Plaintiffs' speech outweighs the limited benefit. Yost's claim that his fair-and-truthful review represents "a

reasonable, generally applicable requirement," App. 25, is difficult to take seriously given his obvious abuse of the power, *see supra* pp. 5-9. Ultimately, it is for the people of Ohio to judge what speech is fair and true. In a free society, the government has no role to play in policing the fairness of ideas. *See Bellotti*, 435 U.S. at 791 & n.31.

III. Plaintiffs' Challenge Does Not Implicate Any Circuit Split.

Yost's stay application fails for yet a third reason: He argues that this Court is likely to grant certiorari based on a division among the courts of appeals regarding the scrutiny afforded to regulations "that may make the initiative process more challenging" but do not "restrict political discussion or petition circulation." Appl. 13 (quoting *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (Roberts, C.J., concurring in the grant of stay)). But any such split is not at issue in this case, which involves a "law[] that 'restrict[s] the communicative conduct of persons advocating a position on an initiative.'" Appl. 17 (quoting *Initiative & Referendum Inst.*, 450 F.3d at 1100). As Yost acknowledges and all circuits agree, such laws "implicate the Free Speech Clause." *Id.*

As explained above, *supra* pp. 20-25, and by the Sixth Circuit, the fair-and-truthful certification requirement is not a "neutral regulation of election mechanics" but instead "expressly directs the Attorney General to review the content of … a statement or expression of the political change for which plaintiffs advocate." App. 10-11. Yost's restriction of Plaintiffs' core political speech is thus governed by *Meyer v. Grant*, rendering the circuit split over the applicability of the *Anderson-Burdick* framework to First Amendment claims challenging initiative-petition restrictions irrelevant. *Grant* and its progeny illustrate that core political speech restrictions are distinguishable from other types of generic ballot initiative regulations. Many ballot initiative regulations aim only to "control the mechanics of the electoral process" and thus do not directly implicate core political speech. *McIntyre*, 514 U.S. at 345-46; *see also Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996) (distinguishing regulations that affect circulation of initiative

petitions and political discussion and therefore burden "core political speech" from general initiative regulations). These might be considered "typical" and "neutral regulations on ballot access." *Reclaim Idaho*, 140 S. Ct. at 2617 (Roberts, C.J., concurring in the grant of a stay).

In contrast, where, as here, a regulation "restrict[s] political discussion or petition circulation," it is not a "neutral, procedural regulation." *Id*. at 2616; *see also Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 142-43 (3d Cir. 2022) (explaining that laws burdening speech that is not on a ballot and that has "the potential to spark direct interaction and conversation" regulate core political speech, not the mechanics of the electoral process). Even circuits that decline to closely scrutinize neutral ballot initiative regulations 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." *Initiative & Referendum Inst.*, 450 F.3d at 1099-1100; *see also Schmitt v. LaRose*, 933 F.3d 628, 644 (6th Cir. 2019) (Bush, J., concurring in part and concurring in the judgment) (recognizing that regulations targeting the "ability to advocate for initiative petitions … amount[] to regulation of political speech" under *Grant*). Accordingly, even if this Court had an interest in considering the circuit split asserted by Yost, this case would be an exceptionally poor vehicle for doing so.

CONCLUSION

The application for an emergency stay should be denied.

Respectfully submitted,

/s/ Kelsi Brown Corkran

Mark R. Brown
CAPITAL UNIVERSITY
303 E. Broad Street
Columbus, OH 43215

Oliver Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 20910
Washington, DC 20009

Kelsi Brown Corkran
Counsel of Record
Elizabeth R. Cruikshank
Alexandra Lichtenstein
William Powell
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, GEORGETOWN LAW
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 661-6728
kbc74@georgetown.edu

Counsel for Respondents

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