No. 24A970

In the Supreme Court of the United States

DAVID YOST, OHIO ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY,
Applicant,

v.

CYNTHIA BROWN, ET AL.,
Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO AND FOR AN ADMINISTRATIVE STAY

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REPLY

To ensure Ohioans understand the proposed ballot initiatives that circulators ask them to support, Ohio law requires that official petitions contain a summary starting on the very first page, where any potential signor can easily review it. *See* Burnett Decl. Ex. 1-A, R.59-1, PageID#712–66; Lynaugh Decl. Ex. 4-C, R.59-4, PageID#1155–67 (example petitions); *see also* https://citizensnotpoliticians.org/wp-content/uploads/2023/10/CNP-Amendment-for-Web.pdf. For nearly 100 years, Ohio's citizen lawmaking process has required the Attorney General to certify that the proposed summary is a "fair and truthful" representation of the ballot initiative. Ohio Rev. Code §3519.01(A). Because the legally required summary on the first page of a legal document is not private speech, it does not implicate the First Amendment's Free Speech Clause.

Plaintiffs say otherwise. Ohio's initiative review process, they say, must satisfy strict scrutiny to pass constitutional muster. That should give this Court considerable pause. If the review process in Ohio's ballot-initiative process must meet such a high bar, then so must "almost any content- or viewpoint-based limitation on the exercise of legislative power at the state and federal level." App'x 47 n.8 (Bush, J., dissenting); *see below* 8–10. That approach contradicts the "considerable leeway" this Court has afforded States to order their ballot-initiative processes. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999).

Plaintiffs assume the conclusion that fair-and-truthful review restricts "core political speech." Opp. 1, 19, 20, 29, 33, 34. They conflate the promise of "interactive communication," *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988), with the "nonsymbolic

conduct" of obtaining a government certified initiative petition, *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). The official petition proponents circulate, including its summary, conveys government speech on a government document, one that circulators are free to supplement with leaflets or spoken messages. Indeed, plaintiffs concede that the proposed amendment is "akin to" a legislative "bill." Opp. 21.

Contrary to plaintiffs' opposition, the challenged state law is likely to survive constitutional review. As a law regulating the mechanics of Ohio's initiative process—and the government's own speech to voters—the challenged law does not implicate the First Amendment. Still, the challenged law survives any review (such as *Anderson-Burdick* balancing) that leaves the States with leeway to structure their own initiative processes. In addition, *amici* ably explain why this case warrants certiorari and provides this Court with an ideal opportunity, in the face of three circuit splits, to clarify the limits the First Amendment places on States' ballot-initiative laws.

ARGUMENT

Plaintiffs oppose a stay, but their arguments lack merit. The Attorney General stresses five points in reply.

I. Plaintiffs facially attack Ohio's longstanding initiative procedures.

Initially, it is important to emphasize what is at issue in this federal case. Plaintiffs at times allude to their challenge being "as applied." Opp. 19, 27. And plaintiffs spend much of their response criticizing the Attorney General's specific review of their summaries under state law. *E.g.*, Opp. 1, 2, 5–9, 24, 28; *see* App'x 47

(Bush, J., dissenting) (recognizing that plaintiffs' argument largely "boils down to … an argument that the Attorney General is incorrectly interpreting and applying state law"). But plaintiffs' challenges are far broader than that framing. Because plaintiffs skipped state-law options for disputing the Attorney General's review, their challenges amount to a facial attack on Ohio's near-centenarian review process.

To understand why, recall a few features of Ohio's system. Ohio's summary-review process does not consider whether the underlying proposal is wise policy, but only whether the summary fairly represents the proposal. *See Ohio ex rel. Barren v. Brown*, 51 Ohio St. 2d 169, 171 (1977). And while Ohio law deputizes its chief law officer to conduct this review, initiative proponents have recourse if they believe the Attorney General misapplied state law. Initiative proponents "may challenge the … failure to certify … in the [Ohio] supreme court, which [has] exclusive, original jurisdiction in all challenges of those certification decisions." Ohio Rev. Code §3519.01(C). That is no rubber stamp: The Supreme Court of Ohio has been more than willing to disagree with the Attorney General as to his review. *See Ohio ex rel. Dudley v. Yost*, 177 Ohio St. 3d 50 (2024).

Here, plaintiffs chose to attack the entire state law procedure rather than working within that procedure. They filed but then voluntarily dismissed an original action in the Supreme Court of Ohio regarding the summary language they submitted in March 2024. Notice of Voluntary Dismissal, *Ohio ex rel. Brown v. Yost*, No. 2024-0409 (Ohio May 20, 2024). They turned to federal court instead, alleging a constitutional violation *regardless* of whether the Attorney General correctly applied state

law. In their amended complaint, plaintiffs also allege that they are working on a new initiative regarding wrongful convictions. But plaintiffs have never submitted a summary to the Attorney General on that topic. So, the Attorney General has never reviewed, much less denied, such a summary. Plaintiffs have not obtained state-court review of either initiative summary.

Nonetheless, in justifying an injunction, the district court seemed to criticize the Attorney General's application of state law. *See* App'x 12, 15; *see also* 31–32, 34. That is just another reason that the Attorney General is likely to prevail on the merits. Federal courts generally cannot award relief against a state official for violating state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). And *Pullman* abstention prevents litigating unsettled constitutional questions in federal court when state law offers a viable resolution. *See Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 500 (1941); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976). It follows that plaintiffs cannot use this federal case as a substitute for state-law proceedings they bypassed. *See* App'x 47 (Bush, J., dissenting).

The takeaway: This Court should assume, for present purposes, that the Attorney General correctly applied state law to their earlier summaries and correctly deemed those summaries unfair. *See Ohio ex rel. Barren*, 51 Ohio St. 2d at 171 (describing the Attorney General's state-law role). Plaintiffs cannot hide behind atmospheric statements about how the Attorney General conducted review for their proposed summaries. Hence, plaintiffs' challenges are not "as applied" to any particular decision of the Attorney General. Their challenges instead present the broader

question of whether Ohio's entire review process (including the Supreme Court of Ohio's part in the process) violates the First Amendment. Plaintiffs must be likely to succeed on *those grounds* for purposes of injunctive relief.

II. The official petition is government speech in Ohio's legislative process.

Plaintiffs also misunderstand the role of the summary within the official petition. Like the stay panel decision below, *see* App'x 38–39, plaintiffs mistakenly assume that the summary is "private" political speech designed to facilitate private communication between the initiative proponent and the potential signer, *e.g.*, Opp. 19. They likewise use a linguistic sleight of hand to conflate Ohio's official petitions in a Progressive-era form of citizen-legislation with the venerable founding-era petition letters citizens sent legislative bodies. Opp. 23. True, both use the word "petition." But that comparison is like conflating a change.org "petition" with a legal document, complete with a felony warning. That misdirection, more than anything, reveals their weak position on history. *See Shurtleff v. Boston*, 596 U.S. 243, 252 (2022).

Here is the relevant history. To reach Ohio's ballot, proposed initiatives have always needed to garner sufficient support via a certain number of signatures. *See* Ohio Const. art. II, §1a. From the inception of Ohio's initiative process, Ohioans understood that the process risked trading "rascals in the legislature" for "rascals outside of the legislature," who might abuse citizen lawmaking. *See* 1 Proceedings and Debates of the Constitutional Convention of the State of Ohio, 740 (1912). Thus, for nearly a century, Ohio has involved the Attorney General in certifying the accuracy of the summary that goes within an official petition. *Ohio ex rel. Hubbell v. Bettman*,

124 Ohio St. 24, 25 (1931). The summary serves as the government's way of ensuring that a potential supporter receives an accurate, "concise, summing up" that "properly advise[s]" of what an initiative proposes. *Id.* at 27–28. And potential signers would perceive the petition as a government document, correctly, because it contains not just the Attorney General's official certification but also warnings of criminality for fraudulent signatures. *See* Ohio Rev. Code §3519.05(A) ("Immediately following the text of the proposed amendment must appear the following form: … WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.").

The upshot is that the summary is the government's speech—the way the government communicates with Ohio voters at the circulation stage of the legislative process. *See* Stay Appl. 19–21. It is true, as plaintiffs emphasize, that those advocating for an initiative propose the language of the summary. Opp. 20. But government speech can be (and often is) the product of public input. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 204–05 (2015). The government ultimately adopts that speech as its own when the Attorney General files "a verified copy of the" proposal "together with its title and summary and the attorney general's certification." Ohio Rev. Code §3519.01(A).

Plaintiffs say "proposed amendments" are like a bill, and "the summary is more like a legislator's speech" outside the Statehouse. Opp. 21. That concedes most of the merits. The Attorney General agrees the circulation petition is a legislative document "akin to a bill." The certified summary, under Ohio law, is an indispensable

component of that document that must be "printed in ten-point type" along with "the certification of the attorney general." Ohio Rev. Code §3519.05(A). Ohio law requires the summary, so the summary is part of the bill. The summary is *not* a private leaflet or anything like a press conference "on the steps of the Statehouse." Opp. 21. Plaintiffs concede more by saying they "seek only the opportunity to communicate with potential signatories using their chosen message." *Id*. State law does not impede that communication, only "commandeer[ing] an official government document" as a vessel for it. App'x 45 n.5 (Bush, J., dissenting).

Plaintiffs' refrain about "editorial control" falls flat. Opp. 17, 19–21. Initiative petitioners cede control of their proposal when they submit it to the Attorney General for certification and advancement to the ballot board and Secretary of State. Ohio law gives the Attorney General the binary choice to certify the summary or not. Ohio Rev. Code §3519.01(A). But if he had true editorial control, say, power to rewrite the summary (as other states allow or require), plaintiffs' claim would flounder. The amount of editorial control over the summary is irrelevant because plaintiffs have no cognizable private speech interest in the text of the initiative petition document (as opposed to the ideas it espouses). *See* Ohio Const. art. II, §1a (citizen lawmaking). This Court recently explained that "legislators, acting as legislators," cannot claim ownership of their work product, including official "annotations … prepared in the first instance by a private company." *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 266–67 (2020). It naturally follows that citizens, "acting as legislators," are not

proprietors of the official summary—akin to an annotation—that the Attorney General must certify "in the course of [his] legislative duties." *Id.* at 259, 266.

To be sure, initiative proponents remain free to supply potential signers with their own private description of an initiative, such as through written pamphlets or verbal advocacy. But initiative proponents do not have the "right to use governmental mechanics to convey" their message. *Carrigan*, 564 U.S. at 127. Said another way, submitting an accurate summary is a prerequisite to citizen lawmaking; it is an official legislative act, not a "prerogative of personal power." *Raines v. Byrd*, 521 U.S. 811, 821 (1997); *see Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–100 (10th Cir. 2006) (en banc).

III. Plaintiffs' strict-scrutiny approach has no limiting principle.

Plaintiffs' call for strict scrutiny is also troubling because of the havoc it would wreak on other state initiative laws. Many of plaintiffs' grievances stem from their inability to advance through Ohio's initiative process. They say, for example, that the speech restriction is "more severe" compared to *Meyer* because they cannot circulate a petition for signature "until Yost approves the speech they will use in" the petition. Opp. 25. But that logic is limitless. After all, "every structural feature of government that makes some political outcomes less likely" will inevitably affect people's ability to advocate for change. *See Walker*, 450 F.3d at 1100. Hence, this Court has cabined the political process doctrine. *See Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).

Plaintiffs fall back on the notion that Ohio's review process is content based. *See, e.g.*, Opp. 11, 26, 33. But that assessment jumps the analytical gun. Whether a

law is content based does not answer the threshold question of whether a law even implicates the First Amendment. *See Walker*, 450 F.3d at 1104.

In any event, plaintiffs' theory would affect a host of content- and viewpoint-based initiative laws. For example, Ohio and fourteen other States enforce a single-subject rule for ballot measures. *See* NCSL, *Initiative and Referendum Processes*, *Allowable Subject Matter* tab (last accessed April 17, 2025), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes. And many other States also have government officials review initiative summaries or titles. *See, e.g.*, Ark. Code Ann. §7-9-107(d)–(e); Md. Code Ann. Election Law §§6-201(b)(1), (c)(2), 6-208(a)(2); Me. Stat. tit. 21-A, §901 3-A; Mont. Code Ann. §§13-27-212, 13-27-226(3); N.M. Stat. Ann. §§1-17-8, 1-17-12; Utah Code Ann. §20A-7-202(5). Indeed, if the Attorney General cannot review a proposed summary for fairness, there is no reason the Ohio Supreme Court—a different state actor—could. *See* Ohio Rev. Code §3519.01(C).

Many more States place onerous barriers on specific subjects. NCSL, *Initiative and Referendum Processes*, *Allowable Subject Matter* tab (last accessed April 17, 2025), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes. Utah, for instance, subjects ballot initiatives related to wildlife to a heightened standard. Utah Const. art. VI, §1(2)(a)(ii); *see Walker*, 450 F.3d at 1085. The District of Columbia prevents ballot initiatives that affect marijuana policy. *Marijuana Pol'y Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002). Massachusetts closes off its ballot-initiative process to matters of "religion"; judicial "appointment,"

"removal," and "compensation"; and "appropriation[s] of money." Mass. Const. amend. art. XLVIII, pt. 2, §2. An initiative on any such topic cannot advance through Massachusetts' lawmaking process. *Wirzburger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005). And in addition to subject-matter restrictions, Wyomingites cannot initiate a ballot measure that is "substantially the same as" a ballot initiative that electors defeated within five years. Wyoming Statutes §22-24-301. These content- and viewpoint-based laws have never survived strict scrutiny's gauntlet. Yet, under plaintiffs' logic, that must be the applicable test.

Plaintiffs' broad First Amendment theory would also implicate federal lawmaking. The U.S. Senate Rules severely moderate the content of legislative speech. For example: "No Senator in debate shall refer offensively to any State of the Union." Senate Rule XIX-3. The House Rules devote an entire rule to "restrictions on certain bills." House Rule XXI (capitalization omitted). One such rule makes it improper "to consider a bill … that provides for the designation or redesignation of a public work in honor of an individual then serving" in Congress. House Rule XXI-6. Comparable restrictions are ubiquitous in state legislatures. The Ohio House, for example, requires its Reference Committee to reject any bill that "conflict[s] with" an "existing statute without making proper provision for the repeal or amendment of such existing statute." Ohio G.A. House R. 64. The Committee obviously must evaluate the bill's content. The First Amendment permits these restrictions because they regulate the public act of legislating, not private speech. *Cf. Raines*, 521 U. S. at 821; *Carrigan*, 564 U.S. at 127.

IV. Ohio's position is consistent with this Court's caselaw.

As the Attorney General outlined in his application, judicial review in this area must distinguish between different types of initiative laws. Laws "that regulate or restrict the communicative conduct of persons advocating a position" implicate the First Amendment. *Walker*, 450 F.3d at 1100. Laws that "that determine the process by which legislation is enacted" do not. *Id.* The challenged law here—about the content of Ohio's official initiative petitions—falls in the second category. Plaintiffs nonetheless suggest that this Court's precedent disapproves Ohio's summary-review process. Opp. 20–25. They are wrong: the cases plaintiffs rely on fit within the just-discussed distinction.

In *Meyer*, a Colorado law prevented initiative proponents from paying signature gatherers. 486 U.S. at 416. The law thus directly impeded communicative advocacy by blocking *who* (paid circulators) could advocate for an initiative. *See id.* at 422–23. Here, in contrast, the Ohio law does not address who may engage in signature gathering. Nor does it limit what signature gatherers may say (whether orally or through written materials) about an initiative. Thus, as three other circuits hold, *Meyer* "does not apply to content-based restrictions on the initiative process." App'x 44 n.3 (Bush, J., dissenting). Along similar lines, while there is no right to an initiative, the act of signing a petition "remains expressive"—so laws compelling signers to disclose information also fall on the communicative conduct side of the divide, thus triggering some First Amendment review. *See Doe v. Reed*, 561 U.S. 186, 195–96 (2010).

Plaintiffs' reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), is misplaced. That case involved a state law prohibiting the distribution of anonymous campaign literature. *Id.* at 336. Unlike that law, this one leaves initiative proponents "free to engage in any speech regarding initiatives that they wish," on leaflets or other media, anonymously or by name. App'x 45 n.4. (Bush, J., dissenting). Ohio's law is readily distinguished from this Court's direct speech line of cases because fair-and-truthful review does not impede private speech at all. *Accord Lichtenstein v. Hargett*, 83 F.4th 575, 583, 589 (6th Cir. 2023).

Plaintiffs' comparison to *Matal v. Tam*, 582 U.S. 218 (2017), fares no better. There, this Court held that trademarks involve private speech, not government speech. *Id.* at 239. But that is hardly an apples-to-apples comparison. Trademarks "have ancient origins" that long pre-dated their coverage in federal law. *Id.* at 224. Trademarks "have not traditionally been used to convey a Government message" and the Court found "no evidence that the public associates the contents of trademarks" with the government. *Id.* at 238. The same things cannot be said about official documents within a State's own citizen-lawmaking process. *Cf. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 793–95 (2015) (discussing the history of direct lawmaking in the States); *Advance Colorado v. Griswold*, 99 F.4th 1234, 1241–42 (10th Cir. 2024).

One final point on the caselaw. Despite plaintiffs' arguments, *see* Opp. 33–34, this case implicates several circuit splits. On the big picture, the circuits are split on the broader issue of whether the First Amendment applies at all to State regulations

of their ballot initiative processes. *Compare Walker*, 450 F.3d at 1099, *with Wirzburger*, 412 F.3d at 279. The Sixth Circuit implicated that split by applying strict scrutiny under *Meyer* to Ohio's law. App'x 27; App'x 44 n.3 (Bush, J., dissenting); *but see Lichtenstein*, 83 F.4th at 589. The circuits also depart on the narrower issue of whether *Anderson-Burdick* applies to a "procedural regulation" that "inhibits a person's ability to place an initiative on the ballot." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring in the grant of stay). The Sixth Circuit implicated this split by applying *Anderson-Burdick*. App'x 32. And contrary to plaintiffs' suggestions about other circuits' decisions being limited to "neutral" laws, *see* Opp.34, several circuits have upheld state initiative laws that unquestionably impose stricter requirements on certain subject matters. *See Walker*, 450 F.3d at 1085; *Marijuana Pol'y Project*, 304 F.3d at 83. Finally, the Sixth and Tenth Circuits now disagree over whether the initiative petition constitutes government speech. App'x 31; *Griswold*, 99 F.4th at 1241–42.

V. A stay will prevent future confusion and irreparable harm to Ohio.

Cutting down an Ohio ballot initiative rule for amending Ohio's constitution—a rule almost as old Ohio's operative Progressive Era constitution itself—is an emergency. While the District Court recognized that the law's near-century pedigree justified a stay, App'x 18, plaintiffs and the Sixth Circuit were wrong to discount the five-alarm fire caused by the injunction's intrusion into state sovereignty. And plaintiffs seem to concede that the balance of harms in this case travel with the merits. *See* Opp. 17–18. If Ohio's law is constitutional, then plaintiffs' claims of irreparable injury dissipate. *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam)

(granting stay). And if Ohio's law is constitutional, then a preliminary injunction irreparably harms the State and its citizens. *See Abbott v. Perez*, 585 U.S. 579, 602–03 (2018); *Maryland v. King*, 567 U. S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

While the merits hang in the balance, a stay is prudent. In practical terms, a stay will greatly reduce the risks of future confusion while protecting this Court's capacity to review the circuit splits implicated in the case. Recall that, without a stay, the Attorney General will need to immediately certify plaintiffs' summary language from March 2024. App'x 17. The injunction will also prevent the Attorney General from reviewing a forthcoming initiative summary about wrongful convictions. *Id.* But it is unclear what would happen, as a matter of state law, if the Attorney General ultimately prevailed here. Ohio statutory law does not anticipate a situation in which the Attorney General must *decertify* an initiative summary that he previously certified. *See* Ohio Rev. Code §3519.01(A). Plaintiffs suggest that if the Attorney General prevails, they can simply toss voter signatures. Opp. 3. (Imagine those voters' confusion if that happens.) But plaintiffs do not disclaim a mootness attack on the Attorney General's appeal once he passes the baton to Ohio's ballot board. Moreover, once summary language is certified, there is no expiration date for the summary language. Stay Appl. 7. Thus, allowing injunctive relief to go forward here could set the stage for confusing state-law questions in the future. Absent a stay, Ohio faces the risk that an initiative petition will evolve to a ballot measure, even though it circumvented "a long-standing requirement of Ohio law" in a way the First Amendment never required. App'x 18 (stay order); *cf. Labrador v. Poe*, 144 S.

Ct. 921, 930 (2024) (Kavanaugh, J., concurring in the grant of stay) (discussing "difficulties" in "cases involving new laws").

Consider also how Ohioans perceive the State's ballot initiative process. The Attorney General has determined that plaintiffs' March 2024 summary language is unfair. (And plaintiffs have waived their chance to challenge that determination in the Supreme Court of Ohio. *See above* 2–5.) But if the injunction goes forward, Ohioans will likely confront clipboards bearing official petitions that indicate that the summary has the Attorney General's blessing. *See* Ohio Revised Code §3519.05(A). At the very least, such a scenario is likely to confuse potential signers. Only the rare citizen (tuned into the finer details of this lawsuit) will comprehend how things really stand. Overall, a preliminary injunction "has the potential to unleash … a 'chaotic and disruptive effect' on Ohio's legislative and electoral process," and that "is yet another reason to keep the stay in place." App'x 54 (Bush, J., dissenting) (quoting *Benisek v. Lamone*, 585 U.S. 155, 161 (2018) (per curiam)).

A stay, however, does not threaten reciprocal harms on plaintiffs. Should plaintiffs prevail in this case, they will be able to circulate their desired petition and summary. The only thing they stand lose by awaiting the end of litigation is time to gather signatures—time that the First Amendment does not guarantee any citizen or legislator. But again, the Attorney General's certification is not particular to a given election cycle—if plaintiffs miss the deadline for 2025, there is always 2026. And, given that plaintiffs face a time crunch for 2025 under any conceivable outcome (needing over 400,000 signatures by early July), the practical harm of any delay at this

point is marginal at worst. Of course, a stay would not hinder any form of advocacy or interest building.

All said, the equities favor Ohio's power to self-govern while the Attorney General presses his strong merits arguments, so this Court should stay the injunction while the pending appeal runs its course.

CONCLUSION

The Court should re-instate the District Court's stay of its injunction pending appeal through disposition of any petition for certiorari.

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