UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CYNTHIA BROWN, et al.,

Plaintiffs,

v. CASE NO. ___

DAVID YOST,
in his official capacity.

Defendant.
_____/

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND ATTACHED MEMORANDUM OF LAW IN SUPPORT

Plaintiffs respectfully move under Federal Rule of Civil Procedure 65 for a temporary restraining order and/or preliminary injunction directing Ohio Attorney General David Yost ("Defendant") to perform his duty under Ohio law, O.R.C. § 3519.01(A), and immediately certify to Ohio's Ballot Board Plaintiffs' summary of their proposed constitutional amendment that was submitted to Defendant on March 5, 2024. *See* Plaintiffs' Verified Complaint, Exhibit 3. Defendant rejected the summary – for the sixth time – on March 14, 2024. *See* Plaintiffs' Verified Complaint, Exhibit 4. Because the verified facts establish that there are virtually no circumstances under which Defendant will certify Plaintiffs' summary of their proposed constitutional amendment, and because timely de novo judicial review is not available under Ohio law, Defendant's rejection of the summary is unconstitutional under the First Amendment.

Plaintiffs certify that counsel for Defendant has been contacted and provided copies by email of the Complaint (together will all Exhibits), this Motion, its accompanying Memorandum,

and Plaintiffs' Proposed Order. Plaintiffs have also requested of counsel for Defendant a waiver of service of process under Federal Rule of Civil Procedure 4.

Respectfully submitted,

s/*Mark R. Brown*

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** Pro hac vice application forthcoming

MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY RELIEF

Introduction

This is an original action brought under 42 U.S.C. § 1983, *Ex parte Young*, 209 U.S. 123 (1908), and the First Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, against Ohio Attorney General David Yost in his official capacity ("Defendant"). Plaintiffs seek declaratory and injunctive relief ordering Defendant to certify their proposed citizen-initiated constitutional amendment, "Protecting Ohioans' Constitutional Rights," along with its summary, *see* Verified Complaint, Exhibit 3, "Initiative Petition" (hereinafter "Exhibit 3, March 5 Submission"), to Ohio's Ballot Board under O.R.C. § 3519.01(A).

Plaintiffs are three Ohio voters who constitute the committee that is required under Ohio law, O.R.C. § 3519.02, to propose statewide citizen-initiated constitutional amendments. As such, they have proposed an amendment to Ohio's Constitution entitled "Protecting Ohioans' Constitutional Rights." *See* Exhibit 3, March 5 Submission, at 1.

Under O.R.C. § 3519.01(A), Defendant is charged with determining whether an otherwise properly proposed[1] constitutional amendment's summary represents a "fair and truthful statement of the proposed law or constitutional amendment" submitted by the committee. If it does, then he is required to "so certify and then forward the submitted petition to the Ohio ballot board for its approval …." *Id.*

[1] That is, one that comes from a committee organized under O.R.C. § 3519.02 and that is supported by at least one thousand voters' signatures.

Plaintiffs have duly submitted their proposed constitutional amendment to Defendant pursuant to O.R.C. § 3519.01(A) – along with a summary and one thousand supporting signatures – no fewer than six times. Defendant has rejected each submission.

Most recently, Plaintiffs submitted their proposed constitutional amendment (after gathering another one thousand signatures) to Defendant on March 5, 2024. On March 14, 2024 Defendant again rejected it as not being "fair and truthful." *See* Verified Complaint, Exhibit 4, "Yost Rejection Letter, March 14, 2024 (hereinafter "Exhibit 4, March 14 Rejection"). As set forth below, the various grounds Defendant has asserted for repeatedly rejecting Plaintiffs' proposed constitutional amendment are facially implausible and in some cases self-contradictory.

Defendant's unlawful rejection of Plaintiffs' proposed constitutional amendment has prevented Plaintiffs from undertaking the additional steps that are statutorily required to qualify it for Ohio's November 5, 2024 general election ballot. Most significant, following Defendant's certification, Plaintiffs must submit petitions signed by more than 400,000 Ohio voters from at least 44 of Ohio's 88 counties to Ohio's Secretary of State by July 23, 2024. *See* Ohio Constitution, Article II, Section 1a; *id.* Section 1g; O.R.C. §§ 3505.062(A) and 3519.01(A). But Plaintiffs cannot begin that time-consuming and arduous process until Defendant certifies their proposed amendment pursuant to O.R.C. § 3519.01(A).

Given Defendant's obvious refusal to certify virtually any summary Plaintiffs submit, on March 20, 2024 Plaintiffs filed an original action in the Ohio Supreme Court seeking mandamus relief against Defendant. *See State ex rel Brown v. Yost*, No. 2024-0409. Plaintiffs requested that the Ohio Supreme Court, exercising its jurisdiction under O.R.C. § 3519.01(C), expedite its review and immediately direct Defendant to certify their proposed amendment to the Ballot Board pursuant to O.R.C. § 3519.01(A).

Defendant vehemently and successfully opposed expedited review in the Ohio Supreme Court, knowing that the lack of expedited review would spell the death-knell of Plaintiffs' initiative. On March 26, 2024, the Ohio Supreme Court summarily denied Plaintiffs' motion to expedite. *See State ex rel. Brown v. Yost*, No. 2024-0409, Order (Ohio S. Ct., March 26, 2024) (https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-ohio-1131.pdf).

The Ohio Supreme Court's refusal to expedite Plaintiffs' case makes it impossible for Plaintiffs "to seek timely redress" under Ohio law. *See Schmitt v. LaRose*, 933 F.3d 628, 640 (6th Cir. 2019). Time is of the essence in this case. Even if Defendant certified their proposed amendment immediately, as things stand Plaintiffs would have less than four months to collect the 400,000-plus signatures they must submit by July 23, 2024. Each day that passes makes it that much more difficult for Plaintiffs to succeed.

Plaintiffs make two First Amendment arguments here. First, Ohio's failure to provide timely review and judicial resolution, by itself, violates the First Amendment.

Second, Defendant's inexplicable rejection of Plaintiffs' proposed constitutional amendment, coupled with the lack of expedited review, effectively confers on Defendant the unilateral power to prevent properly proposed initiatives from reaching Ohio's ballot. As applied here, Sections 3519.01(A) (which grants Defendant power) and (C) (which grants the Supreme Court review) combine to become an effective executive barrier to Plaintiffs' First Amendment rights.

Ohio Law

For Plaintiffs to place their proposed citizen-initiative on Ohio's November 5, 2024 ballot they must first provide a summary of their proposed amendment, together with 1000 supporting signatures, to Defendant for review. *See* O.R.C. § 3519.01(A). Defendant then has ten days to

certify that the summary is a "fair and truthful" description of the proposed amendment and send both it and the proposed amendment to Ohio's Ballot Board. Should the Defendant refuse to certify this summary, as he has done repeatedly in this case, the proposed amendment is stopped dead in its tracks. They must start all over again and lose each day of signature-collection that otherwise could be taking place or seek judicial review.

The Ohio Supreme Court recently summarized this process in *State ex rel. DeBlase v. Ohio Ballot Board*, 2023-Ohio-1823, ¶¶ 4 & 5 (June 1, 2023):

> Under R.C. 3519.01(A), proponents of a constitutional amendment must submit a preliminary initiative petition and summary thereof to the attorney general. The petition must contain the signatures of at least 1,000 qualified electors of the state. *Id.* If the attorney general determines that the summary is "a fair and truthful statement" of the proposed amendment, the attorney general "shall so certify" and forward the petition to the ballot board for its approval. *Id.*
>
> After receiving a certified preliminary initiative petition from the attorney general, the ballot board must examine it within ten days "to determine whether it contains only one proposed * * * constitutional amendment so as to enable the voters to vote on a proposal separately." R.C. 3505.062(A). If the board determines that the petition contains only one proposed amendment, "it shall certify its approval to the attorney general." *Id.* The attorney general shall then file with the secretary of state a verified copy of the proposed amendment and the summary of it certified by the attorney general. *Id.* and R.C. 3519.01(A).[2]

The capstone of this long and arduous process is the collection of more than 400,000 signatures from at least 44 of Ohio's 88 counties. The crux, meanwhile, is the Attorney General's certification. Nothing can happen until the proposed amendment's summary is certified, and Defendant's repeated failure to do so here is what is preventing Plaintiffs from moving forward with their proposed amendment.

[2] Once all of this is done, the Secretary of State selects a formal title for the initiative that will appear on the ballot. *See id.; id.* Sec. 1g; R.C. 3505.062(A) and 3519.01(A).

Section 3519.01(C) of the Ohio Revised Code vests in the Ohio Supreme Court original jurisdiction to review the Attorney General's decision. It fails, however, to require that the Ohio Supreme Court expedite or promptly consider the case. Nothing in the Ohio Supreme Court's rules of practice require expedited proceedings, either. Instead, the Ohio Supreme Court's rules only require that election proceedings be expedited when they are filed within 90 days of elections. *See* Ohio S. Ct. R. Prac. 12.08. Outside this limited 90-day-before-the-election-time-frame, whether and how to expedite are left to the discretion of the Ohio Supreme Court.

If the Court chooses not to expedite, as here, then an indeterminate time-frame that extends at least over the course of several weeks applies. Under Supreme Court Rule of Practice 12.04(A)(1) answers need not be filed for 21 days. But Respondents (like Defendant has done before) can delay this deadline by filing motions to dismiss. *See* Ohio S. Ct. R. Prac. 12.04(A)(1). At some unspecified time after an answer is filed, the Ohio Supreme Court will prescribe a "schedule for the presentation of evidence and the filing and service of briefs or other pleadings." Ohio S. Ct. R. Prac. 12.05. This scheduling indeterminacy risks – and perhaps ensures – that Defendant's executive decision to reject a proposed constitutional amendment will survive without review until it is too late for meaningful relief.

Further, Ohio's mandamus process of review once commenced is not de novo. Instead, executive ballot decisions that are challenged by mandamus can only be reviewed for an abuse of discretion. This means that so long as the decisions are not arbitrary, capricious or clearly violative of law they will not be set aside. *See, e.g., State ex rel. Hawkins v. Pickaway County Board of Elections,* 75 Ohio St.3d 275, 277, 662 N.E.2d 17, 19 (1996). This is consistent with Ohio's treatment of mandamus generally, whereby an abuse of discretion can be found only when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Worrell v. Ohio*

Police & Fire Pension Fund, 112 Ohio St.3d 116, 2006-Ohio-6513, 858 N.E.2d 380, ¶ 10; *see also State ex rel. Walker v. Husted*, 144 Ohio St.3d 361, 43 N.E.3d 419, 423 (2015).

The Ohio Supreme Court has never suggested that its abuse of discretion standard does not apply to Defendant's rejections of summaries under § 3519.01(A). Unlike the Ohio Supreme Court's decisions reviewing rejections of local initiatives, there is no track record that would lead one to believe that the Court's decisions are effectively de novo. Indeed, in *State ex rel. DeBlase v. Ohio Ballot Board*, 2023-Ohio-1823, ¶ 28 (June 1, 2023), the Ohio Supreme Court recently applied this abuse of discretion standard to a decision about the propriety of a statewide citizen-initiative by the Ohio Ballot Board. Nothing suggests that the standard is different for Defendant.

Application of Ohio Law to Plaintiffs

Plaintiffs here finally sought review in the Ohio Supreme Court. Following Defendant's rejection of their March 5, 2024 submission on March 14, 2020, Plaintiffs on March 20, 2024 challenged Defendant's decision in the Ohio Supreme Court. The Ohio Supreme Court denied expedited review on March 26, 2024.

This denial of expedited review effectively left Plaintiffs with no judicial review whatsoever. The Ohio Supreme Court's rules specify no definitive time for resolution of original mandamus actions; indeed, the procedures mirror those found under Ohio's Rules of Civil Procedure. Answers are not due for 21 days, and motions to dismiss can be filed (and have been filed under similar circumstances, *see, e.g.*, *State ex rel. Dudley v. Yost*, No. 2024-0161 (Ohio S.Ct.) (https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2024/0161), to delay the filing of answers. Each day that passes makes it more unlikely that Plaintiffs can exercise their First Amendment rights. Whether a decision will be handed down by July 3, 2024, meanwhile, is anyone's guess.

Argument

I. The First Amendment Applies to Citizen-Initiatives and Prohibits States from Placing "Severe" Burdens on Ballot Access.

The Supreme Court of the United States has ruled that the circulation of ballot initiatives involves core political speech. Ballot initiatives implicate "core political speech." *Meyer v. Grant*, 486 U.S. 419, 422 (1988). "First Amendment protections" covering the initiative process are accordingly "at [their] zenith" and "exacting scrutiny" is required. *Id*. at 425, 420. For citizens in nearly half the states in the Union, including Ohio, ballot initiatives are "basic instruments of democratic government." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found*., 538 U.S. 188, 196 (2003).

For these reasons, the Sixth Circuit has long recognized that "although the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution …." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). Numerous cases from both the Supreme Court and the Sixth Circuit have applied First Amendment limitations to direct democracy and the initiative process. *See, e.g., Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (applying First Amendment to invalidate restrictions on circulation of initiatives); *Committee to Impose Term Limits on the Ohio Supreme Court and to Preclude Special Legal Status for Members of and Employees of the Ohio General Assembly v. Ohio Ballot Board*, 885 F. 3d 443, 446 (6th Cir. 2018) (applying First Amendment to Ohio's single-subject requirement for initiatives); *Schmitt v. LaRose*, 933 F.3d 628 (6th Cir. 2019) (applying First Amendment to local citizen-initiatives in Ohio and stating that timely judicial redress is necessary to avoid placing "severe" burdens on ballot access).

A. The First Amendment Requires Timely Judicial Review of Executive Decisions Rejecting Ballot Access in Order to Avoid the Reality and Risk of "Severe" Restrictions.

The Sixth Circuit in *Schmitt v. LaRose*, 933 F.3d 628, ruled that timely "judicial redress" is necessary for States (like Ohio) to avoid placing "severe" burdens on citizen-initiatives' ballot access and being subjected to the strictest of scrutiny under the First Amendment. *See Schmitt*, 933 F.3d at 640. Specifically, the Sixth Circuit in *Schmitt* ruled that under the *Anderson-Burdick* analysis (which routinely applied to ballot access restrictions of all sorts, *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)), Ohio must provide both "timely [judicial] redress" and de novo judicial review to proponents of propriety of citizen-initiatives that are rejected by executive officials. The failure to provide either presents a "severe" burden that is subject to strict scrutiny.

The challenge in *Schmitt* was to Ohio's local initiative process, which delegated to local election boards the authority to decide whether otherwise properly completed initiatives addressed local matters that could be placed on ballots. Because the local election boards' decisions necessarily had to be rendered within 90 days of elections under Ohio law, prompt, expedited review was (and remains) always available by way of mandamus in the Ohio Supreme Court. *See* Ohio Sup. Ct. R. Prac. 12.08(A)(1). The Ohio Supreme Court's rules, which automatically expedite challenges to local election board's decisions, are prompt and timely. *See Schmitt*, 933 F.3d at 639-40.[3]

[3] This was true even though the process that was challenged, including the local boards of elections' decisions, was assumed by the Court to be content-neutral. *Schmitt*, 933 F.3d at 640 n.3 ("This aspect of the ballot-initiative statutes is plainly content-neutral.") Under *Anderson-Burdick* and the First Amendment, the Sixth Circuit ruled, timely judicial resolution is still required even though the initial executive rejection and the process that follows are unrelated to the suppression of subject or content. The same must be true here. Even assuming the

Had Ohio not provided this "timely redress," and very likely had it not been de novo, the Sixth Circuit stated that Ohio's certification-process would have placed a "severe" burden on First Amendment rights using the *Anderson-Burdick* analysis, thus requiring strict scrutiny. The Sixth Circuit explained:

> But even accepting Plaintiffs' argument that the First Amendment requires de novo review of a board's decision, the Ohio case law suggests that petitioners receive essentially that. The Ohio Supreme Court's evaluation of the decisions of boards of elections shows no particular deference to the boards' decisions. And, although the standard for showing entitlement to mandamus is recited as "fraud or corruption, abuse of discretion, or clear disregard of the law," Plaintiffs have identified no case in which the Ohio Supreme Court questioned the legal determination of a board of elections but nevertheless deferred to its discretion. Rather, the cases show that notwithstanding the stated standard of review, the court considers the proposed initiative and makes an independent reasoned determination whether it is within the Ohio Constitution's grant of legislative authority.

Id. (emphasis added).

The Court in *Schmitt*, 933 F.3d at 640, importantly observed "that because Ohio Supreme Court rules provide for expedited briefing and decision in election cases, aggrieved citizens who challenge an adverse decision are able to seek timely redress. The ballot-initiative statutes are thus not subject to strict scrutiny based on a severe burden." (Emphasis added).

Had the Ohio Supreme Court's review been less than de novo,[4] or more importantly had it not been automatically expedited under the Ohio Supreme Court's ninety-days-before-an-

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Defendant's decision was unrelated to subject or content, timely judicial resolution is still required under *Anderson-Burdick* and *Schmitt*.

[4] Lower courts have concluded that in the context of licensing speech, like with movies, parades, protests and adult businesses, de novo review is needed to satisfy the "prompt" judicial review requirement of the First Amendment. *See, e.g., Universal Film Exchange, Inc. v. City of Chicago*, 288 F. Supp. 286, 293 (N.D. Ill. 1968) ("it has been clear that only a de novo judicial determination that a motion picture is unprotected by the First Amendment can justify a valid final restraint of a motion picture in advance of exhibition.")

election rule (providing "timely redress"), the Sixth Circuit's result would have obviously differed – as made plain by the Sixth Circuit's language. A failure to provide "timely redress" would certainly have been "severe," requiring strict scrutiny under *Anderson-Burdick*. *See id.* at 640.

Although the Sixth Circuit in *Schmitt* did not fully explain "timely redress," it at a minimum meant that something like the Ohio Supreme Court's automatic expedited consideration process was required. That process requires prompt answers -- within three days, *see* Ohio S. Ct. R. Prac. 12.08(A)(1) -- and prioritizes proceedings to ensure timely resolutions before elections. That prompt process is what saved Ohio's law from strict scrutiny in *Schmitt*.

Because Ohio law does not apply that same review process to Defendant's decisions rejecting state-wide initiative filings under O.R.C. § 3519.01(A) -- which cannot qualify for the Supreme Court's automatic-expedite track because they must be rendered 125 days before elections -- and because the Ohio Supreme Court here at Defendant's urging refused to otherwise expedite Plaintiffs' case, the burden on Plaintiffs' rights is "severe" under *Schmitt*. The First Amendment requires strict scrutiny.

Further explanation of what "timely redress" requires, if needed, might be found in the Supreme Court's interpretation of "prompt" and "timely" in the context of licensing and permitting parades, protests, newspaper racks and even adult businesses.[5] "Prompt" judicial

[5] Although the Sixth Circuit ruled in *Schmitt* that Ohio's citizen-initiative process is not a prior restraint, its analysis under *Anderson-Burdick* achieves almost the same result as found in the prior restraint cases in terms of prompt, timely resolution. The analogy, Plaintiffs believe, is apt, and thus the prior restraint cases cited here can be properly used to inform what is permitted in the ballot access context. Otherwise, adult businesses would have more First Amendment protections than voters and those seeking to promote citizen-initiatives. In the event, an analogy to the prior restraint problem is not necessary to Plaintiffs' success. The Court in *Schmitt*, after all, stated that "timely redress" is needed to avoid strict scrutiny under *Anderson-Burdick*.

review, according to the Supreme Court, means prompt judicial resolution within a matter of days.

The Supreme Court in *City of Littleton v. Z.J. Gifts D-4*, 541 U.S. 774, 781 (2004), explained that the First Amendment's safeguard covers both "*judicial,* as well as *administrative,* delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being 'issued within a reasonable period of time.'" (Emphasis original and citations omitted). The First Amendment's "prompt judicial review" requirement thus means "a prompt judicial decision." *Id*. The Court added that its First Amendment precedents "set forth a 'model' that involved a 'hearing one day after joinder of issue' and a 'decision within two days after termination of the hearing.'" *Id*. (citation omitted).

The Sixth Circuit, for its part, has employed the Supreme Court's "promptness" requirement in a variety of settings, ranging again from parades and protests to licensing adult businesses. The Sixth Circuit in *Déjà vu of Nashville v. Metropolitan Government of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001), which involved the licensing of adult businesses, concluded that Tennessee's common-law judicial review process by itself did not satisfy the promptness requirement embedded in the First Amendment: "Whether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." (Citation omitted). "Thus, the Ordinance, in requiring that aggrieved applicants proceed to court via a discretionary route, fails to guarantee a 'final judicial adjudication on the merits,' as required under *Freedman*'s first safeguard." *Id*.

Just as important, the Sixth Circuit also ruled in *Déjà vu* that Tennessee's requirement that a court after granting review must issue its "decision within forty (40) days of the court granting the writ of certiorari" also failed First Amendment standards. *Id*. Forty days is simply

not prompt in terms of judicial resolution or redress, the Sixth Circuit ruled. First Amendment rights deserve timely action.

To be sure, *Littleton* and *Déjà vu* were traditional "prior restraint" cases. But their logic should apply equally here. Indeed, if it does not, then strip clubs would have more First Amendment protection than voters! That simply cannot be true under the First Amendment.

That mandamus may simply be filed in the Ohio Supreme Court cannot under *Schmitt*, *Littleton* or *Déjà vu* render Ohio's process constitutionally timely. *Schmitt* plainly stated that "redress" must also be timely provided. Its assumption was that redress would be because of the Ohio Supreme Court's automatic expedited process for challenges filed within 90 days of election days. *Littleton* holds that "prompt" means resolution. The Court in *Déjà vu*, meanwhile, said that in the context of adult-business licensing 40 days for resolution was unconstitutional.

Following the Ohio Supreme Court's non-expedited rules, however, carries the risk (and likely reality) that timely resolution will not be forthcoming. Defendant's answer under the non-expedited rules is not due for 21 days following service of process. *See* Ohio S. Ct. R. Prac. 12.04(A)(1). Motions to dismiss are allowed (and have been employed by Defendant, *see, e.g.*, *State ex rel. Dudley v. Yost*, No. 2024-0161 (Ohio S.Ct.)), *id.*, thus delaying the time for filing answers, and the Ohio Rules of Civil Procedure are borrowed[6] to fill in gaps, thus adding even more delays. No one can say exactly how long an election challenge that is not expedited will take in the Ohio Supreme Court. Weeks at bare minimum, and perhaps months.

Plaintiffs have until only July 3, 2024 to collect hundreds of thousands of signatures. Whether they lose weeks or months while their mandamus motion is pending before the Ohio

[6] The Ohio Supreme Court's rules provide that "[t]he Ohio Rules of Civil Procedure shall supplement these rules unless clearly inapplicable." Ohio S. Ct. Rules of Practice 12.01(A)(2)(b).

Supreme Court, their First Amendment rights are being violated by the unnecessary delay. This is a far cry from the "timely redress" required by the Sixth Circuit in *Schmitt* and the "prompt" resolution envisioned by *Littleton* and *Deja vu*.

* * *

If Defendant were to have his way, strip clubs would have greater First Amendment protection than voters. Adult businesses, after all, are entitled under the First Amendment to expedited review of decisions that reject their licenses. Judicial decisions are constitutionally expected within days. But for voters and supporters of citizen-initiatives, Defendant has made plain, delay is acceptable. It is preferred. Run out the clock. He perhaps enjoys having a complete executive license over who can and cannot place citizen-initiatives on Ohio's ballot. Aggrandizement like this is why the First Amendment exists. Executive decisions restricting First Amendment rights must be judicially tested, and those tests must be timely.

B. Defendant's Actions Establish An Intent to Exclude Plaintiffs' Initiative From the Ballot.

Even if Defendant's rejections of Plaintiffs' summaries were perfectly reasonable, the absence of timely judicial review would still render them unconstitutional. But here, Defendant's rejections are far from perfectly reasonable. Instead, the verified facts establish that there are virtually no circumstances under which Defendant will certify Plaintiffs' summary and timely allow them to proceed with their effort to qualify their proposed constitutional amendment for Ohio's general election ballot. As applied by Defendant, O.R.C. § 3519.01(A) operates as a near-absolute barrier to Plaintiffs' ability to qualify its proposed constitutional amendment for Ohio's general election ballot. Such "exclusion or virtual exclusion from the ballot" is "the hallmark of a severe burden" on Plaintiffs' First Amendment rights. *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th

Cir. 2019) (citation omitted). The statute is therefore subject to "strict scrutiny," *id.*, meaning it must be "narrowly tailored [to] advance a compelling state interest." *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 546 (6th Cir. 2014) (citation omitted). O.R.C. § 3519.01(A) fails that test.

Defendant here has essentially thumbed his nose at both the Sixth Circuit's ruling in *Schmitt* and the First Amendment. He has argued vehemently against expedited review in the Ohio Supreme Court while at the same time imagining fanciful ambiguities and uncertainties in Plaintiffs' submitted summaries. Defendant's facial and as-applied First Amendment violations demand immediate declaratory and injunctive relief ordering Defendant to certify Plaintiffs' summary and proposed amendment to the Ballot Board. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Plaintiffs properly submitted their proposed constitutional amendment and summary to Defendant no fewer than six times between February 2023 and March 2024. Each time, Defendant rejected their submission. None of the grounds that Defendant cited for rejecting Plaintiffs' submissions had merit,[7] and the four reasons Defendant asserted on March 14, 2024 for rejecting Plaintiffs' most recent submission on March 5, 2024 are specious, facially implausible and in some cases, self-contradictory.

First, Defendant objected that Plaintiffs' summary included the phrase "or any subset thereof" with its description of the "immunities and defenses" that the amendment abrogates. *See* Exhibit 4, March 14 Rejection at 2. But when Defendant previously rejected Plaintiffs'

[7] On November 8, 2023, for example, Plaintiffs submitted their proposed amendment, summary and one thousand signatures, *see* Verified Complaint, Exhibit 1, November 8, 2023 Submission, only to have it rejected by Defendant for a dozen or so trivial reasons. *See* Verified Complaint, Exhibit 2, November 17, 2023 Rejection (hereinafter "Exhibit 2, November 17 Rejection").

submission on November 17, 2023, he did so in part because the summary *did not* include this very phrase. *See* Exhibit 2, November 17 Rejection at 5. Defendant's rejection of Plaintiffs' November 17, 2023 submission for omitting this phrase, and his rejection of Plaintiffs' March 5, 2024 submission for including the exact same phrase, is self-contradictory and inconsistent with Defendant's duty to apply O.R.C. § 3519.01(A) in good faith.

Second, Defendant asserted that Plaintiffs' summary misleadingly omitted the phrase "or any subset thereof" immediately following the words "government actors." *See* Exhibit 4, March 14 Rejection at 2. That is incorrect. The text of Plaintiffs' proposed amendment (which Defendant has no authority to review) states that "[i]n any action pursuant to this Section, no government actor shall enjoy or may rely upon any immunities or defenses which are only available to government actors or any subset thereof." *See* Exhibit 3, March 5 Submission at 3. Plaintiffs' summary accurately describes this text by stating that "[i]n any action filed under this Amendment, no government actor shall enjoy or may rely upon any immunities or defenses, or any subset thereof, which are only available to government actors." *See* Exhibit 3, March 5 Submission at 1.

Notwithstanding this practically verbatim summary, Defendant objected that "the misstatement [i.e., omission of the phrase "or any subset thereof" following "government actors"] results in the summary's omission of this broader, undefined category of 'any subset' of 'government actors' created by the proposed amendment." *See* Exhibit 4, March 14 Rejection at 2. Defendant's objection is nonsensical and illogical. Not only is the summary practically a verbatim quotation of the amendment's text, but also, subsets, by definition, cannot be larger than the sets that encompass them. Contrary to Defendants' assertion, the set of government actors referenced in Plaintiffs' summary cannot contain a "broader" subset that has somehow

been omitted. *See* Christopher Clapham, THE CONCISE OXFORD DICTIONARY OF MATHEMATICS: PAPERBACK REFERENCE 269 (2d ed. 1996) ("The set A is a subset of the set B if every element of A is an element of B.").

Third, Defendant objected that Plaintiffs had misrepresented the proposed amendment's statute of limitations, even though the summary once again uses nearly identical language. The proposed amendment states that "[a] claim made under this Section shall be commenced no later than six years from the date that the deprivation of a constitutional right is alleged to have occurred." *See* Exhibit 3, March 5 Submission at 4. Plaintiffs' summary likewise states that "[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." *See id*. at 2.

Because the summary also reiterates that "[a]ll claims must be commenced no later than six years from the date the alleged constitutional violation is alleged to have occurred," *id*., however, Defendant objected that the summary might "lead the reader to believe that there is some distinction or difference in the proposed amendment between the statute of limitations applicable to '[a] claim made under this Amendment' as opposed to '[a]ll claims." *See* Exhibit 4, March 5 Rejection at 2. But no reasonable reader could infer from the summary that the proposed amendment's statute of limitations was meant to alter statutes of limitations for *all* claims. The summary expressly states that the proposed amendment's statute of limitations only applies to claims "under this Amendment."

Fourth, Defendant objected that the title of the proposed amendment, which is contained in its text, is itself misleading. But Defendant has no authority to make such an objection. Defendant's authority extends only to determining whether *the summary* accurately describes the

text of a proposed amendment, not to decide whether *the text* of a proposed amendment is "fair and truthful" or anything else. O.R.C. § 3519.01(A).

Further, Plaintiffs' summary accurately describes the proposed amendment's title – "Protecting Ohioans' Constitutional Rights" – by quoting it verbatim, stating that "[t]he Protecting Ohioans' Constitutional Rights Amendment creates a private cause of action …." *See* Exhibit 3, March 5 Submission at 1. Even if Defendant had authority to object to this title – and he does not – Defendant's objection that the title "offers a subjective hypothesis (that eliminating such defenses will 'protect' the constitutional rights of citizens) regarding the proposed amendment in lieu of an objective description of its character and purpose (that it creates a cause of action notwithstanding those defenses)" is baseless. *See* Exhibit 4, March 14 Rejection at 2. It ignores decades of precedent going back to the Forty-second Congress's passage of the Ku Klux Klan Act of 1871 (also known as 42 U.S.C. § 1983), which recognize that the prophylactic creation of a private constitutional cause of action, like that found in § 1983, deters constitutional violations and thereby protects constitutional rights. *See, e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980) (observing that "two of the principal policies embodied in § 1983 [have been recognized] as deterrence and compensation").[8]

The facial implausibility of Defendant's asserted grounds for rejecting Plaintiffs' most recent submission – their sixth, following Defendant's rejection of the previous five – demonstrates that Defendant simply will not allow Plaintiffs' proposed constitutional amendment to proceed beyond his review pursuant to O.R.C. § 3519.01(A). There appears to be no language

[8] *See also* Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 933 (2009) ("The general purposes underlying § 1983 litigation are deterring officials from using their positions to deprive individuals of their rights protected by the Constitution or federal statutes, and providing victims of such deprivations with a remedy in federal court.").

that can satisfy Defendant's shifting, illogical and even self-contradictory interpretation of the statute's "fair and truthful" standard. O.R.C. § 3519.01(A). The statute thus imposes an insurmountable barrier to Plaintiffs as applied here. It confers on Defendant the unilateral power to reject their proposed constitutional amendment on any grounds, no matter how specious.

In *Schmitt*, the Sixth Circuit recognized that a restriction is severely burdensome if it results in "exclusion or virtual exclusion from the ballot." *Schmitt*, 933 F.3d at 639 (citation omitted). O.R.C. § 3519.01(A), as enforced by Defendant here, does just that. It cannot withstand constitutional scrutiny, therefore, unless it is narrowly tailored to advance a compelling state interest. *See Green Party of Tenn.*, 767 F.3d at 546. The verified facts establish the statute fails that test. Far from being narrowly tailored, O.R.C. § 3519.01(A) enables Defendant to reject properly proposed constitutional amendments by asserting an endless number of groundless objections, the most recent of which are implausible on their face. O.R.C. § 3519.01(A) is unconstitutional as applied here.

II. Plaintiffs Are Entitled to Preliminary Relief.

"When a district court is asked to issue a preliminary injunction, it … balances four factors …: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995).[9]

[9] The substantive standard for issuing a temporary restraining order is essentially the same. *See Bryant v. Matvieshen*, 904 F. Supp.2d 1034, 1042 (E.D. Cal. 2012).

Plaintiffs are entitled to preliminary relief from Defendant. Defendant is responsible for enforcing Ohio law, and here has himself, on behalf of the State, violated the First Amendment. His violation is continuing. Injunctive relief ordering his immediate certification of Plaintiffs' summary to the Ballot Board will resolve his violation.

A. Likelihood of Success

As explained above, Plaintiffs' First Amendment challenge is likely to succeed. Ohio's failure to provide immediate judicial review and "timely redress" is plain. This failure violates the First Amendment.

B. Irreparable Harm

Plaintiffs have sustained and continue to incur irreparable injury as a result of Defendant's rejection of their citizen-initiative and his (and Ohio's) refusal to supply timely and immediate judicial review. Any impediment on First Amendment rights, even for brief periods, causes irreparable harm. *See Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The November 2024 election is closely approaching and injunctive relief is needed to ensure the initiative has a fair chance of being included on the ballot. Ohio's ballot clock is ticking. Each day that passes without the collection of signatures – which Defendant is prohibiting – interferes with Plaintiffs' First Amendment rights.

C. Defendants Will Suffer No Injury

Defendant will suffer no injury should the Court order Defendant to certify Plaintiffs' summary. Certification will simply send Plaintiffs' summary to the Ballot Board. The Ballot Board's approval will allow Plaintiffs to begin collecting signatures. Defendant will incur no expense and no harm.

D. The Public Will Benefit

Preliminary relief will benefit the public because it will facilitate voters' exercise of their rights under Ohio's Constitution and the First Amendment. Political participation will be enhanced. The Supreme Court of the United States has ruled that the circulation of ballot initiatives involves core political speech. Ballot initiatives implicate "core political speech." *Meyer*, 486 U.S. at 422. "First Amendment protections" covering the initiative process are accordingly "at [their] zenith" and "exacting scrutiny" is required. *Id*. at 425, 420. For citizens in nearly half the states in the Union, including Ohio, ballot initiatives are "basic instruments of democratic government." *City of Cuyahoga Falls*, 538 U.S. at 196. The public benefits from the exercise of this "basic instrument of democratic government." *Id.*

E. No Security Should Be Required

The Sixth Circuit has observed that security is not mandatory under Rule 65(c), and can be dispensed with in the discretion of the court. *See Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). No security is needed in this case, as it threatens no financial harm to Defendant or anyone else.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request preliminary relief ordering Defendant to certify Plaintiffs' summary to Ohio's Ballot Board.

Respectfully submitted,

s/ Mark R. Brown

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** Pro hac vice application forthcoming

CERTIFICATE OF SERVICE

I certify that copies of the Complaint, this Motion and accompanying Memorandum in Support, and the attached Proposed Order, were filed using the Court's electronic filing system; I further certify that e-mailed copies of each were sent to Defendant through his counsel at the same time they were filed with this Court.

s/*Mark R. Brown*
Mark R. Brown