

No. 19-3196

**In the United States Court of Appeals
For the Sixth Circuit**

**WILLIAM T. SCHMITT, CHAD THOMPSON,
DEBBIE BLEWITT,**

Plaintiffs-Appellees,

V.

FRANK LAROSE,
Ohio Secretary of State,

Defendant-Appellant.

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

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 19-3196

Case Name: Schmitt v. LaRose

Name of counsel: Mark R. Brown

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

makes the following disclosure:

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

No.

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

No.

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

TABLE OF CONTENTS

Table of Authorities	iii
Statement in Support of Oral Argument	viii
Statement of the Issue	1
Statement of the Case	1
A. Ohio's Gatekeeper Law -- O.R.C. § 3501.11(K).	3
B. Additions to Discretion -- House Bill 463.	8
C. The Proceedings Below.	15
Summary of Argument	20
Argument	22
I. The First Amendment Protects Initiatives and Applies to the Initiative Process.	25
II. Ohio's Delegation of Discretion to Elections Boards Fails First Amendment Scrutiny Because it Constitutes An Impermissible Prior Restraint.	27
A. Ohio's Gatekeeper Law Vests Discretion Over Subject Matter and Content in Local Elections Officials.	30
B. Ohio Courts Do Not Review Executive Gatekeeping Decisions De Novo.	35
C. Ohio's Gatekeeper Law Does Not Maintain the Status Quo While Judicial Review is Being Sought.	40
D. Ohio's Gatekeeper Mechanism Does Not Place the Burden on Local Elections Officials to Seek Judicial Review.	41
E. Content-Neutral Time, Place and Manner Restrictions Can Also Constitute Improper Prior Restraints.	41

F. Ohio's Gatekeeper Law Is An Impermissible Prior Restraint Even if Initiatives Are Treated as a Non-Public Forum.	43
III. Ohio's Gatekeeper Mechanism Cannot Pass Strict First Amendment Scrutiny.....	44
IV. Invalidation of Ohio's Gatekeeper Law Is Not Confusing.....	52
V. Section 1983 Plaintiffs Can Not Be Compelled to Use the Procedures They Challenge Under the First Amendment.	54
Conclusion	54
Certificate of Word-Count and Type-size	55
Certificate of Service	55
Addendum: Designation of Relevant District Court Documents	56

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>A Quantity of Books v. Kansas</i> , 378 U.S. 205 (1964)	28
<i>Amandola v. Town of Babylon</i> , 251 F.3d 339 (2d Cir. 2001)	44
<i>Aye v. Mahoning County Board of Elections</i> , 2008 WL 554700 (N.D. Ohio 2008)	49
<i>Bantum Books v. Sullivan</i> , 372 U.S. 58 (1961)	28
<i>Barrett v. Walker County School District</i> , 872 F.3d 1209 (11th Cir. 2017)	44
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	29
<i>Bose v. Consumers Union, Inc.</i> , 466 U.S. 485 (1984)	36
<i>Buckley v. American Constitutional Law Foundation</i> , 525 U.S. 182 (1999) ..	20, 25
<i>Carroll v. President and Commissioners of Princess Anne</i> , 393 U.S. 175 (1969)	28
<i>Citizens for Legislative Choice v. Miller</i> , 144 F.3d 916 (6th Cir. 1998)	21, 24
<i>City of Cincinnati v. Hillenbrand</i> , 133 N.E. 556 (Ohio 1921)	38
<i>City of Cuyahoga Falls v. Buckeye Community Hope Foundation</i> , 538 U.S. 188 (2003)	20, 23, 25, 27
<i>City of Lakewood v. Plain Dealer</i> , 486 U.S. 750 (1988)	31, 38, 41, 42, 43
<i>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</i> , 885 F. 3d 443 (6th Cir. 2018)	25, 32
<i>Déjà vu of Nashville v. Metropolitan Government of Nashville and Davidson County</i> , 274 F.3d 372 (6th Cir. 2001)	passim
<i>Federal Communications Commission v. Fox Television Stations</i> , 567 U.S. 239 (2012)	29

<i>Forsyth County v. Nationalist Movement</i> , 505 U.S. 123 (1990)	31
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	passim
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006)	26
<i>Garcia v. Texas</i> , 564 U.S. 940 (2011)	39
<i>Herrington v. Cuevas</i> , 1997 WL 703392 (S.D.N.Y. 1997)	48
<i>Hyman v. City of Salem</i> , No. 19-75 (N.D. W.Va., April 19, 2019)	48
<i>Initiative & Referendum Institute v. Walker</i> , 450 F.3d 1082 (10th Cir. 2006)	49
<i>Jones v. Markiewicz-Qualkinbush</i> , 892 F.3d 935 (7th Cir. 2018)	49
<i>Kunz v. New York</i> , 340 U.S. 290 (1951)	33
<i>Las Vegas Taxpayer Accountability Committee v. City Council of City of Las Vegas</i> , 125 Nev. 165, 208 P.3d 429 (2009)	46
<i>Libertarian Party of Ohio v. Husted</i> , 831 F.3d 382 (6th Cir. 2016)	27
<i>Marijuana Policy Project v. United States</i> , 304 F.3d 82 (D.C. Cir. 2002)	49, 50
<i>Mazzone v. Attorney General</i> , 432 Mass. 515, 736 N.E.2d 358 (2000)	52
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988)	20, 25
<i>Miller v. City of Cincinnati</i> , 622 F.3d 524 (6th Cir. 2010)	34, 43
<i>Minnesota Voters Alliance v. Mansky</i> , 138 S. Ct. 1876 (2018)	27, 33, 34, 52, 53
<i>Myers v. Schiering</i> , 271 N.E.2d 864 (Ohio 1971)	38
<i>New York Magazine v. Metropolitan Transportation Authority</i> , 136 F.3d 123 (2d Cir. 1998)	43
<i>Nwanguma v. Trump</i> , 903 F.3d 604 (6th Cir. 2018)	26
<i>Nevada Commission on Ethics v. Carrigan</i> , 564 U.S. 117 (2011)	26, 27
<i>Ohio Citizen Action v. City of Englewood</i> , 671 F.3d 564 (6th Cir. 2012)	42

<i>Ohio Council 8 American Federation of State, County and Municipal Employees v. Husted</i> , 814 F.3d 329 (6th Cir. 2016)	27
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	24
<i>Patsy v. Board of Regents</i> , 457 U.S. 496 (1982)	54
<i>Port of Tacoma v. Save Tacoma Water</i> , 422 P.3d 917 (Wash. App. 2018)	50, 51
<i>Rebel Motor Freight v. Interstate Commerce Commission</i> , 971 F.2d 1288 (6th Cir. 1992)	24
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015)	34, 35, 52
<i>Rosen v. Brown</i> , 970 F.2d 169 (6th Cir. 1992)	16
<i>Scottsdale Ins. Co. v. Flowers</i> , 514 F.3d 546 (6th Cir. 2008)	38
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	30, 31, 53, 54
<i>Six Star Holdings v. City of Milwaukee</i> , 821 F.3d 795 (7th Cir. 2016)	42
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	28
<i>State ex rel. Bolzenius v. Preisse</i> , 155 Ohio St. 3d 45, 119 N.E.3d 358 (2018)	8, 11, 12
<i>State ex rel. Espen v. Wood County Board of Elections</i> , 154 Ohio St.3d 1, 110 N.E.3d 1222 (2017)	9, 10
<i>State ex rel. Flak v. Betras</i> , 152 Ohio St.3d 244, 95 N.E.3d 329 (2016) .	5, 6, 11, 35
<i>State ex rel. Horne v. Adams</i> , 154 W.Va. 269, 175 S.E.2d 193 (1970)	48
<i>State ex rel. Khumprakob v. Mahoning Board of Elections</i> , 153 Ohio St.3d 581, 109 N.E.3d 1184 (2018)	10, 11, 12, 13, 14
<i>State ex rel. Maxcy v. Saferin</i> , __ N.E.3d __, 2018 WL 4846266 (Ohio 2018)	14, 22, 23, 52
<i>State ex rel. Ray v. Skaff</i> , 190 W.Va. 504, 438 S.E.2d 847 (1993)	48
<i>State ex rel. Sensible Norwood v. Hamilton County Board of Elections</i> , 148 Ohio St.3d 176, 69 N.E.3d 696 (2016)	3, 6, 7, 37, 40

<i>State ex rel. Sensible Norwood v. Hamilton County Board of Elections</i> , 2016-Ohio-5919	2
<i>State ex rel. Walker v. Husted</i> , 144 Ohio St.3d 361, 43 N.E.3d 419 (2015)	3, 4, 5, 32
<i>State ex rel. Youngstown v. Mahoning County Board of Elections</i> , 144 Ohio St.3d 239, 41 N.E.3d 1229 (2015)	6
<i>Thomas v. Chicago Park District</i> , 534 U.S. 316 (2002)	32, 42
<i>Taxpayers United for Assessment Cuts v. Austin</i> , 994 F.2d 291 (6th Cir. 1993)	20, 24
<i>Universal Film Exchange, Inc. v. City of Chicago</i> , 288 F. Supp. 286 (N.D. Ill. 1968)	36
<i>Waste Management of Ohio v. City of Dayton</i> , 169 Fed. Appx. 976 (6th Cir. 2006)	24
<i>Wirzburger v. Galvin</i> , 412 F.3d 271 (1st Cir. 2005)	51
<i>Wyman v. Secretary of State</i> , 625 A.2d 307 (Me. 1993)	44, 45, 47

Federal Statutes

42 U.S.C. § 1983	16, 54
------------------------	--------

State Statutes

H.B. 463	8, 9, 10, 13, 14
O.R.C. § 3501.05	16
O.R.C. § 3501.11(K)	passim
O.R.C. § 3501.11(K)(1)	8, 11, 13

O.R.C. § 3501.11(K)(2)	8, 11
O.R.C. § 3501.38(M)	8
O.R.C. § 3501.38(M)(1)(a)	9
O.R.C. § 3501.39(A)	9

Miscellaneous

James D. Gordon, III, <i>et al.</i> , <i>Pre-Election Judicial Review of Initiatives and Referendums</i> , 64 NOTRE DAME L. REV. 298 (1989)	47
Matt Harvey, <i>Fed. judge: Salem, WV, officials must put marijuana measure on June 4 ballot</i> , WVNEWS, April 19, 2019	48
56 OHIO JUR.3d, <i>Initiative and Referendum</i> § 12 (2019)	52
Scott L. Kafker & David A. Rusccol, <i>The Eye of the Storm: Pre-election Review By The State Judiciary of Initiative Amendments to State Constitutions</i> , 2012 MICH. ST. L. REV. 1279	46, 47
Henry P. Monaghan, <i>First Amendment "Due Process,"</i> 83 HARV. L. REV. 518 (1970)	36
Note, Allan Tanambaum, <i>"New and Improved": Procedural Safeguards for Distinguishing Commercial From Non-Commercial Speech</i> , 88 COLUM. L. REV. 1821 (1988)	36
Portage County General Election, Nov. 6, 2018, Summary Report	17

STATEMENT IN SUPPORT OF ORAL ARGUMENT

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

STATEMENT OF THE ISSUE

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

STATEMENT OF THE CASE

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

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

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

number of signatures, were timely, addressed single subjects, used the correct forms, and were certified by the two Villages. *Id.*

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

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

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

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

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

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

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

what falls outside local authority, as explained by Ohio's Supreme Court, present "difficult" legal questions.

Elections officials' authority to consider constitutional questions, meanwhile, is murkier still. According to the Ohio Supreme Court, election boards have authority to decide whether initiatives fall under a municipality's constitutional authority, but they cannot decide whether initiatives are constitutional. Because review is limited, moreover, executive decisions have generated a large measure of indeterminacy. Not only are the required distinctions "difficult" to make, according to the Ohio Supreme Court, they can according to one Justice (Fischer) be "unnecessarily confusing" and "without meaning." Justice Fischer has offered that all in all, § 3501.11(K) "defie[s] workability."

* * *

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

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

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

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

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

Id. at 247, 95 N.E.3d at 332.³

State ex rel. Sensible Norwood v. Hamilton County Board of Elections, 148 Ohio St.3d 176, 69 N.E.3d 696 (2016), which was relied upon by the Portage

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

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

Per Ohio's accepted process, the sponsors of the initiative sought a writ of mandamus in the Ohio Supreme Court directing the elections officials to place the initiative on the ballot. The Ohio Supreme Court refused; it sustained the local elections board's discretion on both points, emphasizing its limited power of review under mandamus:

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

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

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

B. Additions to Discretion -- House Bill 463.

On April 6, 2017, H.B. 463 took effect in Ohio. While keeping the language in O.R.C. § 3501.11(K) (quoted above),⁴ it added new language, codified as O.R.C. § 3501.11(K)(2). This language states that local elections boards shall:

[e]xamine each initiative petition, ... received by the board to determine whether the petition falls within the scope of authority to enact via initiative and whether the petition satisfies the statutory prerequisites to place the issue on the ballot, as described in division (M) of section 3501.38

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

of the Revised Code. The petition shall be invalid if any portion of the petition is not within the initiative power.

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

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

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

House Bill 463 not only reaffirmed local elections boards' roles as gatekeepers in deciding whether the subjects of initiatives are proper under O.R.C. § 3501.11(K), it added to their executive discretion. They are now afforded discretion to decide whether a subject (1) generally falls "within the initiative power," (2) exceeds a local political body's constitutional home-rule powers, or (3) otherwise conflicts with general laws. Although O.R.C. § 3501.11(K) had achieved much the same thing before H.B. 463 was passed, these changes arguably augmented executive control of the initiative process.

Whether H.B. 463's enlargement of executive discretion at the expense of Ohio's courts is valid under Ohio's Constitution's separation-of-powers provision

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

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

Because the fourth vote (that of Justice O'Donnell) supporting the Court's result in *Espen* did not join the per curiam opinion, whether H.B. 463 enlarged local elections officials' gatekeeper duties, and whether it could under Ohio's

Constitution, were not answered. *See State ex rel. Khumprakob v. Mahoning Board of Elections*, 153 Ohio St.3d 581, 585, 109 N.E.3d 1184, 1187 (2018) (Fischer, J., concurring) ("*Espen* does not resolve this case because the lead opinion in that case, joined by only three justices, did not articulate a holding of this court.").

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

In *Sensible Norwood*, we concluded that under former R.C. 3501.11(K), an elections board was authorized to exclude an initiative petition from the ballot if the initiative petition sought to enact municipal legislation that would be beyond a municipality's legislative power. H.B. 463, effective April 6, 2017, introduced new provisions related to the authority and duty of elections boards to review the substantive terms of proposed ballot measures. For example, the act added R.C. 3501.11(K)(2), which requires elections boards to examine an initiative petition “to determine whether the petition falls within the scope of authority to enact via initiative.” ... Importantly, H.B. 463 retained the language of former R.C. 3501.11(K), recodifying it as R.C. 3501.11(K)(1).

In *State ex rel. Flak v. Betras*, we held that R.C. 3501.11(K)(1) authorizes elections boards ‘to determine whether a ballot measure falls within the scope of the constitutional power of referendum or initiative.’ Thus, without

relying on the changes introduced by H.B. 463, we again held that an elections board has the authority to determine whether a municipal initiative falls within the municipality's legislative power. Guided by *Flak*, we apply our pre-H.B. 463 case law in this case. Accordingly, we must determine whether the board members abused their discretion in determining that the proposed ordinance exceeds Columbus's legislative power.

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

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

This indeterminacy led Justice Fischer in *Khumprakob*, 153 Ohio St.3d at 584, 109 N.E.3d at 1187, to write a lengthy concurring plea for changes in the system.⁵ He complained that local elections boards are called upon to make

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

decisions that even courts cannot make. They are delegated discretionary authority to "make a substantive, pre-enactment legal determination that a proposed measure exceeds a municipality's legislative power." *Id.* The Court's deferential standard of review, Justice Fischer pointed out, complicated this result by "relinquishing some authority in favor of boards of elections and facilitating inconsistent results among various boards of elections." *Id.*

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

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

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

result, but explained he did not join the opinion because he felt the approach was unworkable.

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

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

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

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

Id. at *11 (citation omitted).⁶

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

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

C. The Proceedings Below.

On August 20, 2018, Schmitt's de-criminalization initiatives for Windham and Garrettsville were rejected by the Portage County Board of Elections. *See* Verified Complaint, R.1, at PAGEID # 7. On August 28, 2018, Schmitt filed this official-capacity action in the District Court against the Board and Appellant⁷

⁷ Ohio's Secretary of State is Ohio's chief election officer charged with enforcing Ohio's election laws and insuring that local elections officials comply with it. *See*

seeking relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments. *See id.* at PAGEID # 1. Schmitt argued that the executive license afforded local elections boards by Ohio' gatekeeper mechanism constitutes an impermissible prior restraint. Schmitt sought to have the two initiatives restored to the two Villages' ballots and a permanent injunction issued barring enforcement of the gatekeeper law.

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

In his September 19, 2018 Order directing that Schmitt's initiatives be restored to the Windham and Garrettsville ballots, Judge Sargus explained that Ohio's fault lied in its failure to provide an immediate, de novo legal remedy to one whose initiative is rejected by a local election board. Ohio, he explained, only allows a mandamus action, which requires that the aggrieved party prove "(1) a clear right to the requested relief, (2) a clear legal duty on the part of the board to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." Opinion and Order, R. 22, at PAGEID # 164 (citations omitted). "When the Ohio Supreme Court ... reviews a decision by a county board of elections, such

O.R.C. § 3501.05; *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992) (stating that Ohio's Secretary of State "compel[s] compliance with election law requirements by election officials").

court may only issue the writ if the board 'engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions.'" *Id.* (citations omitted and emphasis added).

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

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

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

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

Id. at PAGEID # 169 (emphasis added). Following their restoration to the ballot, Schmitt's initiative in Windham passed by a vote of 237 to 206 and the Garrettsville's initiative narrowly failed by a vote of 515 to 471.⁸

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

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

Judge Sargus succinctly explained in that Order:

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

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

Two weeks later, on February 25, 2019, the Secretary moved for a "clarification" of the Court's February 11, 2019 Opinion. See Defendants' Motion for Reconsideration, R. 39. On March 12, 2019, the Secretary lodged its Notice of

Appeal,⁹ *see* R. 41, and sought a stay of the District Court's permanent injunction. *See* Defendants' Motion for Stay, R. 42.

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

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

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

Id. (citation omitted).

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

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

SUMMARY OF THE ARGUMENT

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

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

3. The Supreme Court has long warned of the dangers presented by prior restraints. In order to guard against these dangers, in *Freedman v. Maryland*, 380

U.S. 51, 58 (1965), it ruled that in those rare instances where government may insert executive license between speech and the public marketplace of ideas, government must include and abide by "procedural safeguards." These procedural safeguards, as explained by this Court in *Déjà vu of Nashville*, 274 F.3d at 400, require that the executive's decision must be made within a specified, brief period of time, and the status quo must be maintained pending prompt, de novo judicial review that is initiated by the executive seeking to restrain speech.

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

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

ARGUMENT

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

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

Appellant's surmise is, to put it gently, incorrect. It finds no support in the Record. Contrary to Appellant's claim, Schmitt has never altered his legal theory, a fact that is corroborated by the Record below. The District Court never "dropped"

its First Amendment conclusion in favor of Procedural Due Process, another fact that is corroborated by the Record. The District Court's opinions and orders make clear that it found Ohio's gatekeeper mechanism unconstitutional under the First Amendment. It explained that in order for Ohio to satisfy the First Amendment, it needed to implement the required procedural safeguards. It went out of its way to make clear to Appellant, the only confused party to these proceeding, that it had permanently enjoined Ohio's gatekeeper law under the First Amendment. Justices on Ohio's Supreme Court understand Judge Sargus's rationale, *see State ex rel. Maxcy v. Saferin*, __ N.E.3d __, 2018 WL 4846266 (Ohio 2018) (Fischer, J., dissenting); discussed at page 14 & footnote 6, *supra*, as apparently does the Portage County Board of Elections (which chose not to appeal).

As Appellant well knows, this case is, and always has been, about the First Amendment. It is about a citizen's right to freely participate in the political process through state-authorized popular initiatives and referenda. The Supreme Court has noted that popular measures form a "basic instrument of democratic government." *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003) (citation omitted). First Amendment principles, it has found, "dovetail[]

with the notion that all citizens, regardless of the content of their ideas, have the right to petition their government." *Id.*¹⁰

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

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

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

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

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

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

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

Appellant makes much of the fact that there is no First Amendment right to utilize an initiative. *See* Brief for Defendant, Doc. 25, at PAGEID # 44. States may allow them, but need not. And because there is no right to initiative, the argument goes, the First Amendment is not implicated at all. The argument fails for a

number of reasons, most importantly because it flies in the face of a wealth of precedent to the contrary. In addition, it fails for the even more basic reason that if accepted it would unravel First Amendment protections across the board. Government, after all, is not required by the First Amendment to elect most of its government officials. It is not required to have sidewalks or parks. It is not required to allow phone service or cable television. But when it does, the First Amendment applies to each and every one of them.

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

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

Carrigan, of course, says no such thing. According to *Carrigan*, government officials have no First Amendment protection when they are legislating. This leaves candidates, *see, e.g., Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018) (holding that presidential candidate is protected by the First Amendment), political parties, *see, e.g., Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 396 (6th Cir. 2016) (holding that Republican Party was not engaged in state action), voters at polling places, *see, e.g., Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (holding that voters have First Amendment right to wear political apparel at polling place), candidates, *see, e.g., Ohio Council 8 American Federation of State, County and Municipal Employees v. Husted*, 814 F.3d 329 (6th Cir. 2016) (applying First Amendment to judicial candidates' identifiers on ballots), and common, everyday citizens who are petitioning government, *see Buckeye Community Hope Foundation*, 538 U.S. 188, with their full panoply of First Amendment protections.

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

Ohio's gatekeeper mechanism restricts speech based on its subject matter and content. As such, it is a prior restraint. A "'prior restraint' exists when the exercise of a First Amendment right depends on the prior approval of public officials." *Déjà vu of Nashville v. Metropolitan Government of Nashville and*

Davidson County, 274 F.3d 372, 400 (6th Cir. 2001). “Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity.” *Id.* (quoting *Freedman*, 380 U.S. at 57) (emphasis added).

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

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

(Citations omitted).

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

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

"Where the transcendent value of speech is involved, due process certainly requires * * * that the State bear the burden of persuasion

(Emphasis added).

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

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1969). Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Bantum Books v. Sullivan*, 372 U.S. 58 (1961). See *Freedman v. Maryland*, 380 U.S. 51 (1965).

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

Here, Ohio's gatekeeper law violates these First Amendment principles because it fails to incorporate the required procedural safeguards. Schmitt does not challenge Ohio's authority to vertically separate powers between local and State officials. He does not question Ohio's power to define what may be put to voters through initiatives. Schmitt's claim is that Ohio's gatekeeper law fails because it

violates the procedural protections required by the doctrine against prior restraints. Specifically, Ohio's gatekeeper approach to initiatives impermissibly (1) vests discretion in executive agents to restrain speech, (2) fails to authorize de novo review by Ohio's courts, (3) fails to maintain the status quo during the pendency of judicial review, and (4) fails to place the burden of seeking "prompt" judicial review on the gatekeeper.

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

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

The Court stated:

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

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

In *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1990), the Court reiterated this principle: "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" (Citations omitted). "To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* (quoting *Shuttlesworth*). And in *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 757 (1988), the Court invalidated as an impermissible prior restraint a city's permitting scheme for news racks placed on public property: "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." (Citations omitted).

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

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

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

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

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

Far from setting clear, concrete, explicit limits, Ohio asks its elections officials to draw complicated legal conclusions. Complex legal conclusions are the antitheses of clear, concrete and neutral guidelines. The Supreme Court's recent

decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), makes this clear -- even in the context of subsequent punishment imposed on speech in a non-public forum.¹² There, Minnesota forbade any person from wearing a “political badge, political button, or other political insignia ... at or about the polling place.” *Id.* at 1883. “Minnesota election judges—temporary government employees working the polls on Election Day—have the authority,” the Supreme Court explained, “to decide whether a particular item falls within the ban.” *Id.* While the election judges could not restrain the offensive attire, they were empowered to initiate punitive proceedings after-the-fact.

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

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

Id. Of particular note, the Supreme Court pointed to the legal nature of the distinctions Minnesota asked its election judges to draw; they “pose[d] riddles that

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

even the State's top lawyers struggle to solve.” *Id.* at 1891. This kind of content-based power could not pass even the reduced level of scrutiny applied to a non-public forum.

Ohio’s gatekeeper mechanism fails First Amendment scrutiny for this same reason. What is administrative and what is legal present questions that even Ohio's Supreme Court Justices find difficult to assess. Like Minnesota election officials, Ohio's elections officials are required to answer legal "riddles that even the State's top lawyers struggle to solve." Ohio's distinction is even more objectionable than Minnesota's because Ohio's distinction is administered through a prior restraint (which was not the case in Minnesota).¹³ In either situation, whether by prior restraint (as in Ohio) or through subsequent punishment (as in Minnesota), resolving difficult legal riddles requires inquiries into content. And in the absence of concrete, content-neutral criteria, delegating this power to executive officials violates the First Amendment.

This conclusion is reinforced by *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), which invalidated a content-based sign ordinance under the First

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

Amendment. The Court there succinctly explained the difference between content-based and content-neutral restrictions on speech:

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

(Emphasis added).

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

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

The Supreme Court has made clear that First Amendment matters -- including fact as well as law -- generally demand de novo review. *See Bose v.*

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

Ohio's Supreme Court has repeatedly stated that local elections officials' decisions to exclude initiatives from ballots based on improper subject matter can only be reviewed by writ of mandamus. This writ, meanwhile, offers only limited relief. It can only be granted to correct clear error or an abuse of discretion. Mandamus review is not de novo.

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

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

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

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

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

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

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

in Ohio suggests that sponsor of initiatives may appeal as of right executive gatekeeper decisions under O.R.C. § 3501.11(K).

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

A federal court's "task is to rule on what the law is, not what it might eventually be." *Garcia v. Texas*, 564 U.S. 940, 941 (2011). Ohio may eventually develop a mechanism whereby executive censors of initiatives are required to promptly seek de novo review. But that is now only conjecture. If Appellant's argument were even plausible, one would think that Ohio's Supreme Court would have mentioned it in one of its many mandamus opinions addressing just this kind of case. The Ohio Supreme Court would be happy to relieve itself of that burden.

But it has never "suggested" that its mandamus review, which assumes "the lack of an adequate remedy in the ordinary course of the law," *Sensible Norwood*, 148 Ohio St.3d at 180, 69 N.E.3d at 700-01, supplements an existing "injunction-relief action" in the Courts of Common Pleas. If such an action existed, after all, mandamus would not be needed nor even proper. The reality is that no such procedure exists under Ohio law. And even if it did, as hypothetically configured by Appellant, it still would not satisfy *Freedman*.¹⁵

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

Even if Ohio law were to authorize an original action in the Court of Common Pleas, it would still fail *Freedman*'s requirements. Ohio law nowhere states that the status quo will be maintained "pending a final judicial determination on the merits." *Déjà vu of Nashville*, 274 F.3d at 400. Instead, Ohio's framework for mandamus review -- and even that supporting a hypothetical original action in the Court of Common Pleas (assuming this were possible) -- allows the censor to change the status quo. This change to the status quo is accepted unless the speaker

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

can succeed through judicial review. Here, for example, both of Schmitt's initiatives had already been certified for the ballot. The status quo had the initiatives being submitted to voters. Nothing in O.R.C. § 3501.11(K) or Ohio law provides that certification remains in place after an elections official decides to remove a previously certified initiative. Certification, which reflects the status quo, is not maintained while judicial review is being sought. This change in the status quo violates *Freedman*.

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

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

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

Many of the Supreme Court's prior restraint cases involve content-neutral time, place and manner restrictions. In *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 757 (1988), for example, where the city restricted news racks on public property, there was no claim that the city restricted them based on content. Rather, the basic restriction was a content-neutral time, place and manner restriction. Still,

the Supreme Court applied its prior restraint jurisprudence to invalidate how the city implemented this neutral restriction: "even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion." *Id.* at 764.¹⁶ *See also Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 567 (6th Cir. 2012) (district court invalidated prohibition on door-to-door canvassing and solicitation after 6 PM that gave city manager authority to grant permit for good cause; following city's repeal of measure Sixth Circuit dismissed as moot).

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

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

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

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

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

Restrictions in a non-public forum¹⁷ -- whether content-neutral or content-based -- are subject to the same procedural protections applied to prior restraints in traditional public settings. For instance, in *Miller v. City of Cincinnati*, 622 F.3d 524, 528 (6th Cir. 2010), the Sixth Circuit invalidated under the First Amendment a city's rule that delegated discretion to "Department Heads" to decide who should be allowed to solicit in city buildings. Although the interior of a public building -- like city hall -- was "at most, a limited public forum," *id.* at 535, the Sixth Circuit applied established prior restraint doctrine:

This distinction is irrelevant, however, because in *City of Lakewood* the Court held that an arbitrary prior restraint on protected speech provides

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

standing regardless of the forum. Hence, when a plaintiff's protected-speech activities are subject to restriction at the government's unfettered discretion, the plaintiff has suffered an injury in fact.

Id. at 528.¹⁸

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

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

¹⁸ See also *Barrett v. Walker County School District*, 872 F.3d 1209, 1226 (11th Cir. 2017) ("the unbridled-discretion doctrine can serve the same purpose in a limited public forum that it serves in a nonpublic forum: combating the risk of unconstitutional viewpoint discrimination. Naturally, then, the unbridled-discretion doctrine applies in a limited public forum."); *Amandola v. Town of Babylon*, 251 F.3d 339, 344 (2d Cir. 2001).

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

Because the petition process is protected by the first amendment and the Secretary has advanced no compelling interest in executive oversight of the content of the petition prior to its circulation for signature, his refusal to furnish the petition form based on the content of the proposed legislation impermissibly violated Wyman's rights protected by the first amendment.

Id. at 312.

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

Far from offering a compelling justification for Ohio's law, Appellant complains only about inconvenience. Application of the First Amendment to Ohio's gatekeeper law, Appellant complains, "would obligate the State to 'initiate

litigation every time it' rejected a proposed ballot-initiative." Brief for Appellant, Doc. 25, at PAGEID # 55. Appellant adds to this a potential parade of horrors; "every single State that permits legislation by initiative is acting in violation of the Constitution." *Id.* at PAGEID # 55-56.

Neither of Appellant's laments is true, let alone compelling. The fact is that Ohio's gatekeeper approach -- vesting discretion in executive officials to pick and choose between initiatives based on their subjects before elections -- is an outlier in the world of popular democracy. In many States that permit popular measures, initiatives are automatically included on ballots once they are found to satisfy the objective procedural requirements, like supporting signatures, single topic, required descriptions, *etc.* Challenges proceed only after elections, if and when the initiatives have passed. Ohio need only follow this path; it does not have to litigate again and again before elections.

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

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

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

¹⁹ To be sure, some states "require a more searching review to ensure that the amendment meets subject-matter and other substantive and procedural requirements," Kafker, *supra*, at 1291, but these states often (unlike Ohio) do this "before time, energy, and money are spent on gathering signatures."

Maine's law, as explained above, was invalidated in *Wyman*, 625 A.2d at 309. West Virginia's approach, which is much like Ohio's in that it relies on mandamus review to check elections officials' discretion,²⁰ was recently preliminarily enjoined by the federal District Court for the Northern District of West Virginia as constituting an impermissible prior restraint. *See Hyman v. City of Salem*, No. 19-75 (N.D. W.Va., April 19, 2019) (written opinion forthcoming); Matt Harvey, *Fed. judge: Salem, WV, officials must put marijuana measure on June 4 ballot*, WVNEWS, April 19, 2019.²¹ Only New York's law survived challenge, *see Herrington v. Cuevas*, 1997 WL 703392 * 9 (S.D.N.Y. 1997) (Sotomayor, J.), and that was because the matter was dismissed as moot on March 6, 2002 after the election.

Appellant has failed to cite a single case rejecting a First Amendment challenge to a gatekeeper mechanism like the one found in Ohio. The cases

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

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

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

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

Marijuana Policy Project v. United States, 304 F.3d 82 (D.C. Cir. 2002), falls into the second category. It holds that government may vertically apportion

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

powers within its branches. Far from deciding whether an executive gatekeeper mechanism for initiatives constitutes an impermissible prior restraint,²³ the court addressed only whether "the First Amendment restrict[s] Congress's ability [under the Barr Amendment] to withdraw the District [of Columbia's] authority to reduce marijuana penalties?" *Id.* at 85. The challengers claimed that regardless of the procedures, Congress was precluded by the First Amendment from restricting the District's power to regulate marijuana.

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

²³ The plaintiffs in *Marijuana Policy Project* did not challenge any discretion vested in executive officers to pick and choose initiative topics; they instead argued that a well-defined subject could not be reserved to the Congress. Because the prohibited subject in *Marijuana Policy Project* was well-defined, it left no discretion at all in ballot officials.

Port of Tacoma v. Save Tacoma Water, 422 P.3d 917 (Wash. App. 2018), falls into the third category. Washington denies to executive officials the authority to decide what is and what is not a proper subject for initiatives. The question in *Save Tacoma Water* was whether a court could, consistent with the First Amendment, conclude before an election that an initiative is improper. *Id.* at 920.²⁴ There, a pre-election judicial challenge to an initiative was brought by groups who wanted to exclude an initiative from a ballot. *Id.* This group was properly saddled with the burden of going to court. More importantly, the court there did not defer to a pre-election executive decision; it acted de novo. Given this procedural posture, the court in *Save Tacoma Water* was perfectly justified in addressing whether the initiative at issue fell outside the scope of the state's initiative process.

Wirzbarger v. Galvin, 412 F.3d 271 (1st Cir. 2005), also falls into this third category. There, the First Circuit sustained Massachusetts' pre-election review process for initiatives that vested initial review authority in the state attorney general. Massachusetts' process was different from Ohio's in three important ways: (1) the attorney general was not given unbridled discretion; (2) the excluded subjects were specifically identified in a finite list, "including, *inter alia*, appointment or compensation of judges; the powers, creation or abolition of

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

the courts; and specific appropriation of state money," *id.* at 275; and (3) the executive's decision was subject to immediate, de novo judicial review before the election. *See Mazzone v. Attorney General*, 432 Mass. 515, 520, 736 N.E.2d 358, 364 (2000) ("Our review of that certification is de novo.").

After ruling that the law was subject to First Amendment scrutiny, the First Circuit concluded it survived as a content-neutral measure. *Id.* at 276. Regardless of whether this particular aspect of the First Circuit's reasoning remains correct,²⁵ because immediate de novo review was available under Massachusetts law, *Freedman* (which apparently was not argued) and the First Amendment would not necessarily have been violated.

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

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

The only thing confusing about the District Court's judgment is Appellant's confusion. Ohio's Supreme Court understands the judgment, *see State ex rel.*

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

Maxcy v. Saferin, as do Ohio's legal encyclopedias. See 56 OHIO JUR.3d, *Initiative and Referendum* § 12 (2019) (*Schmitt* holds that "availability of mandamus relief was no substitute for de novo review of denial of a First Amendment right"). The District Court made clear that Appellant and Ohio's local officials²⁶ cannot enforce Ohio's gatekeeper mechanism, the very kind of relief federal courts routinely order.

This particular injunction does not require that Ohio pass legislation creating a new process for judicial review -- though it could choose to do so -- nor does it demand that Ohio's courts accept "appeals even without the statutory authority to do so." Brief for Appellant, Doc. 25, at PAGEID # 22. It simply means that Ohio must join the mainstream and not allow local elections officials to exercise discretion under O.R.C. § 3501.11(K). The subjects of initiatives cannot, before elections, unilaterally be deemed unlawful by executive agents. Elections officials cannot, prior to elections, be allowed discretion to render determinative legal opinions on "riddles that even the State's top lawyers struggle to solve." *Mansky*, 138 S. Ct. at 1891.

Instead, as is true in most states, initiatives that have met the procedural requirements spelled out by law will be placed on ballots. If elections

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

officials (or anyone else) have substantive challenges, they can be made in appropriate courts after elections in due course.

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

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

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

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

s/Mark R. Brown
Mark R. Brown

CERTIFICATE OF SERVICE

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

s/Mark R. Brown
Mark R. Brown

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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

Verified Complaint, Exhibit 1, R.1-1

Verified Complaint, Exhibit 2, R.1-2

Verified Complaint, Exhibit 3, R.1-3

Verified Complaint, Exhibit 4, R.1-4

Verified Complaint, Exhibit 5, R.1-5

Verified Complaint, Exhibit 6, R.1-6

Verified Complaint, Exhibit 7, R.1-7

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

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

Defendants' Motion for Reconsideration, R. 39,

Notice of Appeal, R. 41

Defendants' Motion for Stay, R. 42

Order, R. 46, PAGEID # 358-59

Order, R. 50, , PAGEID # 369, 371