Case No. 19-3196

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

WILLIAM T. SCHMITT, et al.,	:	
	:	On Appeal from the
Plaintiffs-Appellees,	:	United States District Court
	:	Southern District of Ohio
v.	:	
	:	District Case No.
FRANK LAROSE, OHIO	:	2:18cv00966
SECRETARY OF STATE	:	
	:	
Defendant-Appellant.	:	

**REPLY BRIEF OF DEFENDANT-APPELLANT
OHIO SECRETARY OF STATE FRANK LAROSE**

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INTRODUCTION

This appeal is still about a remedy in search of a wrong.

In the Ohio Constitution, the People reserved for themselves the power to take "legislative action" through municipal initiatives. Ohio Const., Art. II, § 1f. But they may not take "administrative action" in municipal initiatives. *State ex rel. Ebersole v. Del. Cty. Bd. of Elections*, 20 N.E.3d 678, 684 (Ohio 2014) (per curiam). Ohio enforces this legislative-administrative distinction through its Legislative Authority Statutes. Those statutes permit county election boards to include municipal-level initiatives on the ballot *only if* the proposed measures take "legislative" as opposed to "administrative" action. When the board determines that an initiative is administrative, aggrieved supporters may challenge the board's determination in mandamus proceedings, where review of the legislative-administrative issue is effectively *de novo*. But Ohio law provides no avenue for pursuing a direct, *de novo* appeal.

Schmitt agrees with the District Court that the Legislative Authority Statutes ought to be enjoined, but he refuses to defend the court's reasoning. Recall that the District Court enjoined the Legislative Authority Statutes in different ways at different times. First, in its preliminary-injunction opinion, the court held that the Legislative Authority Statutes' failure to provide for a direct, *de novo* appeal unduly burdened "First Amendment rights related to voting upon valid initiative-generated legislation." *Schmitt v. Husted*, 341 F. Supp. 3d 784, 791 (S.D. Ohio 2018). The court reached this conclusion by applying the *Anderson-Burdick* balancing test, which it understood to require a comparative weighing of the burdens the statutes impose and the legitimate state interests they promote. *Id.* But the court dropped its First Amendment rationale when it issued a *permanent* injunction. At that point, it pivoted to the Fourteenth Amendment, reasoning that the Legislative Authority Statutes' failure to provide for a direct, *de novo* appeal violated "procedural due process." *Schmitt v. Husted*, 363 F. Supp. 3d 842, 847–48 (S.D. Ohio 2019).

Schmitt defends neither approach. In fact, he expressly disavows the District Court's due-process analysis, denying that the court invoked this "unjustifiabl[e]" basis for resolving this case. Resp.Br.22. Schmitt nevertheless asks this Court to affirm the decision below using the prior-restraint doctrine. According to him, the Legislative Authority Statutes, by failing to provide for a direct, *de novo* appeal, impose an unconstitutional prior restraint on protected speech. Of all the arguments that Schmitt might have chosen to defend the District Court's judgment, this is the weakest—which is likely why the District Court did not invoke the prior-restraint doctrine in any of its opinions below. Schmitt's arguments misunderstand the prior-restraint doctrine, misrepresent the State's arguments, and mischaracterize the relevant case law.

In sum, the only basis that Schmitt gives for affirming the District Court fails. This Court should reverse.

ARGUMENT

This case now turns entirely on whether the Legislative Authority Statutes violate the prior-restraint doctrine. They do not. Before getting to that, however, it is worth addressing Schmitt's claim that the District Court's due-process opinion is in fact all about the First Amendment.

I. The District Court's opinion and judgment below rest on the Due Process Clause only.

The District Court permanently enjoined the Legislative Authority Statutes because it believed those statutes, by failing to allow for a direct, *de novo* appeal, deprive aggrieved initiative proponents of procedural due process, thus violating the Fourteenth Amendment. The opinion begins by explaining the elements of a "procedural due process claim." *Schmitt*, 363 F. Supp. 3d at 848. It then walks through those elements in subsections entitled: "Liberty Interest Protected by the Due Process Clause," and "Deprivation of the Liberty Interest Without Adequate Procedural Rights." *Id.* It cites numerous "procedural due process cases," and assesses the Legislative Authority Statutes' compatibility with the Due Process Clause. *Id.*

at 848–49. The decision never cites the First Amendment or any other constitutional provision aside from the Due Process Clause.

Still, Schmitt says that the court "went out of its way to make clear . . . that it had permanently enjoined Ohio's gatekeeper law under the First Amendment." Resp.Br.23; *accord* Resp.Br.14 & n.6. For proof, he cites Justice Fischer's dissent in *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, ¶ 52 (Ohio 2018). It is true that Justice Fischer described *Schmitt* as holding that the Legislative Authority Statutes "unreasonably infring[e] on the First Amendment rights of parties aggrieved by the rejection of an initiative ballot." *Id.* at ¶ 52 (Fischer, J., dissenting). Schmitt fails to note, however, that the quoted passage refers to the District Court's *preliminary*-injunction ruling—a ruling that, unlike the permanent-injunction ruling, rested on the First Amendment. *Id.* (citing *Schmitt*, 341 F. Supp. 3d 748).

Schmitt also claims that he "never made" a due process argument "in the District Court." Resp.Br.22. That is not how the District Court viewed the matter. In its words: "Plaintiffs contend that Ohio's ballot initiative framework fails to provide procedural due process." *Schmitt*, 363 F. Supp. 3d at 848.

Even though the District Court relied exclusively on procedural due process, Schmitt has waived any reliance on that doctrine. Indeed, he dismisses the procedural-due-process argument as "unjustifi[ed]." Resp.Br.22. Because Schmitt has waived the due-process argument, the Court ought not consider it—though if it does, it should reject the argument for the reasons the State gave in its opening brief.

II. The Legislative Authority Statutes do not create unconstitutional prior restraints.

Schmitt gives just one basis for affirmance: he says the Legislative Authority Statutes are invalid under the prior-restraint doctrine because they fail to provide for a direct, *de novo* appeal. Schmitt's reliance on the prior-restraint doctrine fails for two overarching reasons. *First,* the Free Speech Clause does not regulate "laws that determine the process by which legislation is enacted." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (en banc). Because that is all the Legislative Authority Statutes do—they dictate the manner in which initiatives may be put to a vote—they are not subject to the First Amendment at all. *Second*, and even assuming the First Amendment's applicability, the prior-restraint doctrine has nothing to do with this case because the Legislative Authority Statutes are not prior restraints. Schmitt does not make much of an argument to the contrary. Instead, he more or less *assumes* that the Legislative Authority Statutes are prior restraints, before showing that they do not contain the "procedural safeguards" that prior-restraint case law requires. Because his assumption is wrong, his argument fails.

A. The First Amendment does not limit the State's ability to regulate the process by which initiatives become law.

The prior-restraint doctrine is a First Amendment doctrine. So if the First Amendment does not bear on the Legislative Authority Statutes' failure to provide for a direct, *de novo* appeal, then the failure to provide for that appeal cannot give rise to a prior restraint. Schmitt's claim fails at this initial step, because the Free Speech Clause does not apply to laws that set out the process by which law is made, and the challenged portion of the Legislative Authority Statutes—the channeling of ballot-eligibility questions to county boards and then mandamus proceedings—is nothing more than a regulation of the way in which initiatives become law.

1. The First Amendment does not protect "the right to make law, by initiative or otherwise." *Initiative & Referendum Inst.*, 450 F.3d at 1099. The First Amendment prohibits the government from abridging "the freedom of speech." That "freedom" includes the freedom to support or oppose a law, to advocate for or against its passage, and so on. Thus, its protects "political speech incident to an initiative campaign." *Id.* But the freedom of speech is the not the freedom to *make* law. Nor does it confer any "right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). That is why States can refuse to permit legislation by initiative, or withdraw "subject matters from the initiative process," without violating the First Amendment. *Marijuana*

Policy Project v. United States, 304 F.3d 82, 86 (D.C. Cir. 2002); *Initiative & Referendum Inst.*, 450 F.3d at 1099.

These principles yield a distinction between (1) laws "that regulate or restrict the communicative conduct of persons advocating a position" in an initiative, and (2) laws that "determine the process by which legislation," including legislation by initiative, "is enacted." *Initiative & Referendum Inst.*, 450 F.3d at 1099–1100. The Free Speech Clause bears on the first category of laws, but not the second.

The distinction is perhaps easier to understand with an example. Imagine a hypothetical state constitutional provision requiring legislators to submit proposed bills to a presiding official, who has full discretion to put the bill to a vote or bury it. Or consider an actual state law that empowers a "Commission on Ethics" to bar legislators from voting on legislation that implicates their financial interests. *Carrigan*, 564 U.S. at 119–20. These laws both have incidental effects on speech. The public is less likely to spend its time debating a bill that never makes it to the floor, and the public will spend less time persuading a legislator to vote "yes" on a particular measure if he is barred from voting. Still, neither law implicates the First Amendment. The reason is this: both laws control the process by which law is made, and the right to free speech does not speak to such processes.

That should end this case. The Legislative Authority Statutes, just like the recusal law in *Carrigan*, or the restrictions on initiatives in *Initiative & Referendum Institute* and *Marijuana Policy Project*, structure the process by which law is made. More specifically, they set out conditions that initiatives must meet to be eligible for inclusion on the ballot (for example, they must be legislative), and they set forth a process for putting initiatives on the ballot (approval by the county election boards). They "silence no one," however—the Legislative Authority Statutes do not prevent anyone from saying anything they have a right to say. *Marijuana Policy Project*, 304 F.3d at 86. As a result, they do "not implicate the First Amendment at all." *Initiative & Referendum Institute*, 450 F.3d at 1099.

The Sixth Circuit (arguably, at least) recognized the distinction between laws regulating speech and laws regulating the lawmaking process in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993) (cited at Resp.Br.20, 24). In that case, this Court rejected a First Amendment challenge to a Michigan law that required state officials to review whether initiatives had enough valid signatures to be eligible for inclusion on the ballot. *Id*. at 296–97. The same law, just like the law at issue here, allowed proponents to challenge the state officials' decision via a writ of mandamus. *Id*. at 293–94. The Court held that, because the law did "not restrict the means that the plaintiffs [could] use to advocate their proposal," or "limit speech on the basis of content," it did not "impinge[]" the proponents' "rights to free speech and political association." *Id.* at 297. In other words, the law did not implicate the First Amendment because it governed the procedure by which laws are made rather than speech relating to those laws.

2. Schmitt calls these arguments "remarkable." Resp.Br.25. But instead of responding to them, he responds to a straw man. Specifically, Schmitt responds to the argument that, because the State need not allow for initiatives at all, it can regulate initiative-related speech in any way it wishes, without regard to the First Amendment. Resp.Br.26–27.

That is the not the State's argument. Instead, its argument is that the First Amendment does not apply to an exceptionally narrow set of initiative-related laws: those "'that determine the process by which legislation is enacted.'" Op.Br.40 (quoting *Initiative & Referendum Inst.*, 450 F.3d at 1099–1100) (emphasis added). This leaves undisturbed the First Amendment's application to the much-broader class of laws relating to the "public debate on [a] referendum" or initiative. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003) (cited at Resp.Br.25). For example, "the First Amendment applies to laws 'that regulate or restrict the communicative conduct of persons advocating a position in a referendum'" or initiative. Op.Br.40 (quoting *Initiative & Referendum Inst.*, 450

F.3d at 1099–1100) (emphasis added). The Free Speech Clause likewise limits the degree to which "ballot-initiative" laws may dictate who can circulate initiative petitions or how those circulators must identify themselves. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999) (cited at Resp.Br.25). And it restricts the government's power to require initiative proponents to "report the names and addresses of all paid circulators and the amount paid," *id.*, or to forbid the use of paid circulators altogether, *see Meyer v. Grant*, 486 U.S. 414, 415–16 (1988) (cited at Resp.Br.25). Laws like these address not the lawmaking process, but rather speech relating to that process. They are in that regard more comparable to a law regulating what senators may say on the campaign trail (which would implicate the First Amendment), than to a law regarding what senators must do to get their bills to the floor (which would not).

The closest Schmitt comes to addressing the State's actual argument is when he tries to distinguish *Marijuana Policy Project* and *Initiative & Reform Institute*. But his proposed distinctions fail.

In *Marijuana Policy Project*, the D.C. Circuit upheld a federal law that forbade D.C. from passing, by initiative or otherwise, laws reducing the penalties for drug-related crimes. 304 F.3d at 83. According to Schmitt, this case stands only for the proposition that Congress "may apportion powers vertically between different branches of government." Resp.Br.50. But *Marijuana Policy Project* stands for a good deal more than that. It holds that the First Amendment does not prohibit the government from imposing "limits on legislative authority." 304 F.3d at 85. That principle applies here, too, since the Legislative Authority Statutes simply govern the manner in which the People must exercise their power of direct legislative authority. They must (among other things) submit their proposed initiatives to county election boards, and then seek relief in a mandamus proceeding (or state-court injunctive action) if the board rejects the proposed initiative.

Schmitt's distinction of *Initiative & Referendum Institute* is even weaker. He claims the Tenth Circuit in that case "rejected a challenge to a content-neutral supermajority requirement for initiatives." Resp.Br.49. There are two problems with that proposed distinction. First, it is false. The case involved a content-*based* requirement. The challenged provision in Utah's constitution required supermajority support for legislation (including initiatives) "initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking of wildlife." *Id.* at 1086 (quoting Utah Const., art. VI, § 1(2)(a)(ii)). In addition to being content based, the provision was at least arguably *viewpoint* based, since its proponents supported the supermajority requirement as a means to protect Utah "from East Coast Special Interest [read: environmentalist] groups." *Id.* at 1086.

The second problem with Schmitt's proposed distinction is its legal irrelevance. Regardless of the Utah provision's content-neutrality, the Tenth Circuit upheld the law because it regulated "the process by which legislation is enacted," and because such laws do "not implicate the First Amendment at all." *Id.* at 1099–1100. Content-neutrality had nothing to do with the court's decision.

Finally, Schmitt claims support from *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993). But that case is consistent with the distinction between laws that regulate the lawmaking process and laws that regulate speech relating to the lawmaking process. In *Wyman*, Maine's secretary of state refused "to furnish petition forms to enable Wyman to collect the necessary signatures" to have a citizen initiative put before the legislature. *Id.* at 309. In other words, the secretary denied Wyman the forms he needed to petition the government for legislative change. In so doing, the secretary denied Wyman a full opportunity to engage in the "core political speech" that accompanies a signature-gathering campaign. *Id.* at 311 (quoting *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988)). To borrow again from the Tenth Circuit, Maine's secretary of state was "restrict[ing] the communicative conduct of persons advocating a position," not simply regulating the lawmaking process. *Initiative & Referendum Inst.*, 450 F.3d at 1099–1100. And so the Maine Supreme

Court's decision, regardless of whether it is correct, is consistent with the State's theory of this case.

B. Assuming the First Amendment applies, the prior-restraint doctrine has no bearing on this case.

The Court should reverse even if it holds that the First Amendment applies to laws that regulate the lawmaking process. In arguing for affirmance, Schmitt relies on the prior-restraint doctrine. (He notes the *Anderson-Burdick* framework in passing, but he never develops the argument—if indeed it is supposed to be a standalone argument—which fails in any event. *See below* 24–25.) Because the Legislative Authority Statutes do not give rise to a prior restraint, that argument fails.

1. The Legislative Authority Statutes do not give rise to a prior restraint.

The prior-restraint doctrine comes into play when the government purports to license or preclear proposed speech. Generally speaking, the First Amendment prohibits prior restraints. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320–21 (2002). Thus, the government may impose content-based prior restraints *only if* the restraints are accompanied by three "procedural safeguards" that protect the would-be speaker. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). "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." *Deja Vu of Nashville, Inc. v. Metro. Govt. of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001). "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.'" *Id.* (quoting *Freedman*, 380 U.S. at 58–59). Finally, "the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor." *Id.* at 400–01 (quoting *Freedman*, 380 U.S. at 58).

No court has ever held that laws requiring the government to prescreen proposed initiatives for eligibility constitute prior restraints. That is telling, because these laws are quite common. *Contra* Resp.Br.47. Michigan, for example, requires officials to review the validity of signatures on initiative petitions. *See* Mich. Const. Art. XII, § 2. Many other states impose similar requirements. *See, e.g.*, Ark. Code Ann. § 7-9-109; Cal. Elec. Code § 9114; Md. Code Ann., Elec. Law § 6-203(b). The Massachusetts Constitution requires the Attorney General to review proposed initiatives to ensure, among other things, that the initiative "contains only subjects not excluded from the popular initiative." Mass. Const. Amend. Art. LXXIV. Excluded subjects include "religion, religious practices or religious institutions." Mass. Const. Amend. Art. XLVIII, c. II, § 2. Missouri law directs the secretary of state to review initiative petitions to ensure that they meet the requirements of Article

III, § 50 of Missouri's Constitution. *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. 2012); Mo. Rev. Stat. § 116.120. The list could continue indefinitely: Ohio is not aware of any jurisdiction that puts every proposed initiative or referendum on the ballot without some degree of pre-screening for eligibility.

This apparently uniform practice matters because it means that all of these States ought to be subject to prior-restraint doctrine if indeed the doctrine applies. After all, each of these States is imposing some sort of preclearance requirement on proponents. If these many state laws were subject to the prior-restraint doctrine, someone should have noticed by now.

The opposite has happened. Courts uphold these laws without regard to the prior-restraint doctrine. To illustrate, consider again this Court's decision in *Taxpayers United*, which rejected initiative proponents' First and Fourteenth Amendment challenges to a Michigan ballot-access law. 994 F.2d at 296–99. The law in question required state officials to review initiative proponents' compliance with the State's signature requirement. Aggrieved proponents could challenge the result of that review process with a writ of mandamus. *Id.* at 293–94. In upholding the law, this Court never even mentioned the prior-restraint doctrine. The Supreme Court apparently approved of this Court's decision, as it favorably cited this case as an example of the principle that "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley*, 525 U.S. at 191.

Taxpayers United is consistent with any number of other cases upholding ballot-eligibility requirements that States enforce with some form of pre-submission review. *See, e.g.*, *Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd.*, ("*CITL*"), 885 F.3d 443, 444–45 (6th Cir. 2018); *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 936-37 (7th Cir. 2018); *Kendall v. Balcerzak*, 650 F.3d 515, 520, 523 (4th Cir. 2011); *Wirzburger v. Galvin*, 412 F.3d 271, 275–76 (1st Cir. 2005); *Dobrovolny v. Moore*, 126 F.3d 1111, 1112–13 (8th Cir. 1997); *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996). None of these cases so much as mentions the prior-restraint doctrine. Even if the laws were *constitutional* prior restraints (even if, for example, they guaranteed the "procedural safeguards" that *Freedman* requires for content-based prior restraints), there ought to be at least one case saying so. The State has not found one. And, just like the plaintiff in *Aey v. Mahoning County Board of Elections*, Schmitt "fails to cite any authority in support of the proposition that prior restraint licensing analysis should be applied to a ballot access statute." No. 4:08 CV 405, 2008 U.S. Dist. LEXIS 19247, at *16 (N.D. Ohio Feb. 26, 2008).

The reason these cases do not rely on the prior-restraint doctrine is likely this: the freedom of speech does not entitle anyone to have an initiative put to a vote, and so a restriction on that right does not constitute a "restraint" of protected speech. To be sure, some courts have held that eligibility requirements "indirectly impact core political speech" by keeping initiatives that fail to qualify from becoming "the focus of statewide discussion." *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). But even those courts understand that "[t]here is no First Amendment right to place an initiative on the ballot." *Id.* And if there is no right to place an issue on the ballot, then regulating the ballot-access process cannot be a "prior restraint." Accordingly, these cases do not invoke the prior-restraint doctrine.

2. Schmitt does not establish, and barely even addresses, the relevance of the prior-restraint doctrine.

Schmitt's response brief is dedicated almost entirely to showing that Ohio's Legislative Authority Statutes do not comply with *Freedman*'s "procedural safeguards." That is certainly true. Ohio does not, for example, require that county boards "institut[e] judicial proceedings" before refusing to put a proposed initiative on the ballot. *Freedman*, 380 U.S. at 59-60. But it is also certainly irrelevant, unless *Freedman* (or the prior-restraint doctrine more generally) applies. As just discussed, it does not, and Schmitt's brief makes almost no effort to prove otherwise. He does not, in other words, show that Ohio's failure to provide for a direct, *de novo* appeal constitutes a "prior restraint."

***a. Freedman* procedural safeguards.** Because the prior-restraint doctrine has no bearing on this case, it is irrelevant that the Legislative Authority Statues do not comport with *Freedman*. But Schmitt's reliance on *Freedman* makes little sense in this case anyway. After all, even the very procedural protection that Schmitt says is lacking and that the District Court held to be necessary—a direct, *de novo* appeal of county boards' decisions—would not satisfy *Freedman*. To pass muster under *Freedman*, a "licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on" the State. *Déjà vu*, 274 F.3d at 400 (citing *Freedman*, 380 U.S. at 58). Giving the proponent the right to file a direct, *de novo* challenge, would not be enough; Ohio could satisfy *Freedman* only by obligating county election boards to immediately seek judicial review of their own determinations in court. *Id.* Not even the District Court would require that.

This mismatch between the prior-restraint doctrine and the alleged flaw in the Legislative Authority Statues led Ohio to suggest, in its opening brief, that Schmitt is relying on a novel theory that is similar to, but different from, the prior-restraint doctrine. He is, in other words, relying on the prior-restraint doctrine's "spirit." Op.Br.45. But the Legislative Authority Statutes comport with the doctrine's spirit. Specifically, the availability of mandamus relief in the Supreme Court of Ohio ensures proponents an opportunity to seek meaningful judicial review before being "deprived" of the chance to appear on the ballot. *See* Op.Br.46–47. The review in these proceedings is effectively *de novo*, and the Supreme Court's rules ensure that all disputes are resolved in time for the election. *See* Ohio Sup. Ct. R. 12.08.

Schmitt insists that Ohio's procedures are not good enough to satisfy his novel approach to the prior-restraint doctrine. But while it is impossible to quibble with Schmitt's application of a made-up doctrine, Ohio does take issue with the factual premises on which Schmitt's analysis rests. For example, Schmitt insists that "[m]andamus review is not de novo," Resp.Br.36, but instead exceptionally deferential. The problem for Schmitt is that the only case he invokes, *State ex rel. Sensible Norwood, v. Hamilton County Board of Elections*, 69 N.E.3d 696 (Ohio 2016), contradicts his argument. The court in *Sensible Norwood* considered whether to award mandamus relief requiring a county election board to place an issue on the ballot. It refused to grant the writ. But in so doing, *Sensible Norwood* paid no deference whatever to the county board's resolution of the legislative-administrative distinction. Instead, the Court determined on its own that the initiative proposed administrative action, and denied the writ on that basis. *Id.* at 179–80. This is consistent with other mandamus cases in the ballot-eligibility context that take the same non-deferential approach—cases that Ohio cited in its opening brief, but that Schmitt never addresses. *See State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 109 N.E.3d 1184, 1186 (2018) (per curiam); *State ex rel. City of Youngstown v. Mahoning Cty. Bd. of Elections*, 41 N.E.3d 1229, 1232 (Ohio 2015) (per curiam); *State ex rel. City of Brecksville v. Husted*, 978 N.E.2d 157, 160–61 (Ohio 2012) (per curiam); *State ex rel. Citizen Action v. Hamilton County Bd. of Elections*, 875 N.E.2d 902, 909 (Ohio 2007) (per curiam).

Schmitt also denies that the Legislative Authority Statutes guarantee pre-deprivation process. According to him, the mere act of rejecting a proposed initiative constitutes a deprivation of some already-vested right. Resp.Br.40–41. Even assuming that is true, however, it does not change the fact that the proponent can get meaningful judicial review (via a mandamus proceeding) *before* he is denied the chance to place an eligible initiative on the ballot. And because the Legislative Authority Statutes provide for that review, they are a far cry from the censorship regimes that prior-restraint cases condemn.

b. CITL. Schmitt's discussion of case law inadvertently highlights the irrelevance of the prior-restraint doctrine to this case. *CITL*—the barely year-old precedent rejecting a First Amendment challenge to an Ohio law prohibiting ballot initiatives from containing more than one subject, 885 F.3d at 445; *see also* Ohio Rev. Code § 3505.062(A)—is particularly relevant. According to Schmitt, *CITL* is a prior-restraint case; it stands for the proposition that, "[w]here a licensing scheme is neutral and otherwise follows objective criteria, it can pass First Amendment scrutiny." Resp.Br.32.

CITL has nothing to do with the prior-restraint doctrine. Indeed, it never even squarely held that the case implicated the First Amendment, since no party challenged the Free Speech Clause's relevance. *See* Op.Br.37. Instead, *CITL* implicitly assumed the First Amendment's relevance, determined that the single-subject requirement was content-neutral, and then upheld it under the *Anderson-Burdick* framework. 885 F.3d at 447–48. If the law were a prior restraint, whether content-based or content-neutral, the Court could not have applied *Anderson-Burdick*.

Schmitt's reliance on *CITL* is doubly bizarre because his description of that case would require upholding the Legislative Authority Statutes. Schmitt invokes *CITL* to support his claim that "[e]xecutive licensing that follows concrete, content-neutral requirements . . . does not run afoul of the First Amendment." Resp.Br.32. The problem with this argument is that the Legislative Authority Statutes are just as "concrete" and "content-neutral" as the single-subject provision in *CITL*.

Begin with concreteness. While it is "*sometimes* difficult to distinguish" a legislative provision from an administrative one, *State ex rel. Flak v. Betras*, 95 N.E.3d 329, 333 (Ohio 2016) (per curiam) (emphasis added), *overruled on other grounds by Maxcy*, 2018-Ohio-4035 at ¶ 13, it usually is not. The distinction is effectively the same one the federal constitution draws between executive and legislative action, and while there are difficult questions at the margins, most citizens with a passing knowledge of civics can sort action that makes law from action that enforces law.

If nothing else, the distinction is no less concrete than the idea of a single subject. The single-subject requirement applicable to initiatives, *see* Ohio Rev. Code § 3505.062(A), is similar to the Ohio Constitution's provision forbidding the General Assembly from passing legislation with "more than one subject," *see* Ohio Const., art. II, § 15(D). Case law pertaining to the latter shows just how slippery this concept can be. According to those cases, the "mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics." *State ex rel. Ohio Civil Serv. Emples. Ass'n, Local 11 v. Ohio Civil Serv. Emps.*, 818 N.E.2d 688, 697 (Ohio 2003) (internal quotation marks omitted).

As one might expect, it is often hard to know whether a bill contains multiple subjects (which is not allowed), or two topics relating to one subject (which is allowed).

Consider, for example, the outcomes in *Comtech Sys. v. Limbach*, 570 N.E.2d 1089 (Ohio 1991) and *Ohio Civil Service Employees*, 818 N.E.2d 688. The first of these cases rejected a single-subject challenge to a tax passed with an appropriations bill. It reasoned that, since the tax would fund "government operations described elsewhere in the act," it was merely a separate topic that shared a common purpose with the rest of the bill. *Comtech*, 570 N.E.2d at 1093. But in the second case, the Court struck down a provision, included in a budget-corrections bill, exempting some public employees from collective-bargaining laws. *Ohio Civil Serv.*, 818 N.E.2d at 691. One could certainly argue that provisions relating to the pay of public employees are just as related to a budget-corrections bill as a tax is related to an appropriations bill. But the Court concluded otherwise. This shows that, however concrete the legislative-administrative distinction might be, it is no less concrete than the distinction between a law with two subjects and a law with one subject and many topics.

In addition to being just as concrete as the law at issue in *CITL*, the Legislative Authority Statutes are just as content-neutral. In *CITL*, this Court deemed the single-subject rule content-neutral because it applied "to all initiative positions no matter the topic discussed or idea or message expressed," and could be justified "without reference to the content of any initiative petitions." 885 F.3d at 447. The same is true of the Legislative Authority Statutes. First, they apply "to all initiative petitions, no matter the topic discussed or idea or message expressed." Second, they can be justified independent of any particular provision. The challenged portion of the Legislative Authority Statutes channel ballot-access decisions to county boards and then mandamus proceedings. That ensures that the State can quickly and efficiently promote its legitimate interests in screening out ineligible administrative actions and simplifying the ballot. *See* Op.Br.49–50.

In sum, if Schmitt is right about *CITL*, and if he is right about the prior-restraint doctrine's application to content-neutral laws like the one in *CITL*, then the Legislative Authority Statutes are constitutional.

c. Strict Scrutiny. Finally, Schmitt argues that the Legislative Authority Statutes are "content-based," and that they are therefore subject to strict scrutiny. Resp.Br.44–52. According to Schmitt, the Statutes ought to be struck down under this demanding standard of review.

It is unclear whether Schmitt intends this as an alternative or a complement to his prior-restraint argument. At times, he discusses the argument in prior-restraint terms. *See, e.g.*, Resp.Br.46, 51–52. At other times, he speaks of this point as though it were a standalone, alternative argument, such as when he mentions the *Anderson-Burdick* framework. *See* Resp.Br.44.

The argument fails either way. If it is a standalone argument, then Schmitt's "fail[ure] to fully develop this argument" constitutes waiver. *Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063 (6th Cir. 2014) (citing *Gen. Star Nat'l Ins. Co. v. Aministratia Asiqurarilor de Stat*, 289 F.3d 434, 441 (6th Cir. 2002)). And if the standalone argument is supposed to rest on *Anderson-Burdick*, then in addition to failing on waiver grounds, it fails for all the reasons Ohio laid out in its opening brief, Op.Br.47–51—reasons that Schmitt never addresses or attempts to rebut.

Regardless of whether the strict-scrutiny argument is a standalone argument, it rests on the false premise that the Legislative Authority Statutes are content based. In this suit, Schmitt purports to challenge the *procedural* aspects of the Legislative Authority Statutes. Specifically, he challenges the fact that the Legislative Authority Statutes do not allow for direct, *de novo* appeals. There is no plausible argument that this procedural requirement, which applies to *all* municipal-ballot initiatives, is content-based. Perhaps for that reason, Schmitt does not argue otherwise. Instead, he (apparently) argues that the legislative-administrative distinction is content-based. But there are two problems with that. First, he does not challenge the legality of this distinction, and in fact goes out of his way to acknowledge its legality. *See* Resp.Br.29 ("Schmitt does not question Ohio's power to define what may be put to voters through initiatives."). Second, even that distinction is not content-based. As already explained, it is just as content-neutral as the singe-subject provision that *CITL* upheld. *See above* 23–24.

CONCLUSION

The Court should reverse the District Court's decision enjoining the enforcement of Ohio's Legislative Authority Statutes.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume for a reply brief and contains 5,727 words. See Fed. R. App. P. 32(a)(7)(B)(ii).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2019, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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